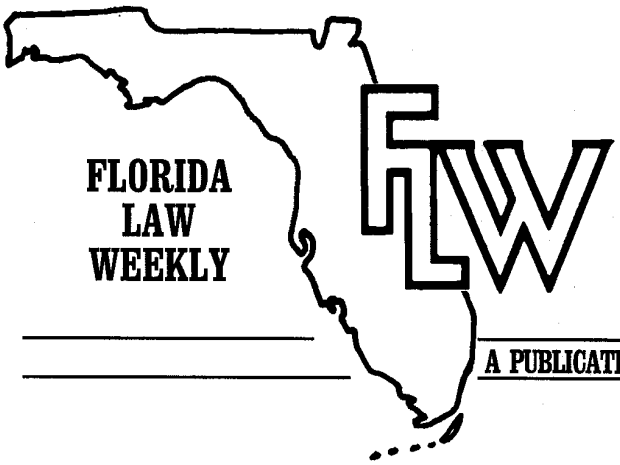
Volume 28, Number 6, October 30, 2020



SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 433-563

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.

- **COUNTIES—MASK ORDINANCE—CONSTITUTIONALITY. The circuit court denied an emergency motion for a temporary injunction enjoining the enforcement of county's mask ordinance, concluding that the plaintiffs failed to show by competent substantial evidence that they had a substantial likelihood of success on merits of their constitutional challenge to the ordinance or that the public interest would be served by enjoining the enforcement of ordinance. The court determined that the ordinance's mandate to wear a face covering in public unless a medical condition makes wearing a mask unsafe did not infringe the constitutional right to privacy, the right to refuse medical treatment, or the right to individual autonomy over medical health. Further, the ordinance was not unconstitutionally vague and had a clear rational relationship to the legitimate government objective of protecting public health. The fact that masks are unable to completely prevent the spread of COVID-19 does not establish that the ordinance was arbitrary or irrational. Finally, the court found that the public interest was not served by enjoining enforcement of the ordinance because the potential injury to the public outweighed any individual right to relief.** *MACHOVEC v. PALM BEACH COUNTY. Circuit Court, Fifteenth Judicial Circuit in and for Palm Beach County. Filed July 27, 2020. Full Text at Circuit Courts-Original Section, page 498b.*
- **CRIMINAL LAW—SEARCH AND SEIZURE—VEHICLE. A circuit court judge held that the odor of cannabis coming from a defendant's parked vehicle, with no other reasonable suspicion of criminal activity, did not provide a valid basis to detain the defendant and perform a warrantless search of the vehicle or the defendant because the odor of cannabis is indistinguishable from the odor of now-legal hemp.** *STATE v. NORD. Circuit Court, Twentieth Judicial Circuit in and for Collier County. Filed August 8, 2020. Full Text at Circuit Courts-Original Section, page 511a.*

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Bold denotes decision by circuit court in its appellate capacity.

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Sea Spine Orthopedic Institute LLC (Charriez) v. Liberty Mutual Insurance Company. Circuit Court, Seventeenth Judicial Circuit, Broward County, Case No. CONO 16-006781 (70). Circuit Court Order at 25 Fla. L. Weekly Supp. 489a (September 29, 2017). Reversed **17CIR 477a**

* * *

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Cite as 28 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearings—Failure of subpoenaed witness to appear—Hearing officer did not depart from essential requirements of law by refusing to invalidate suspension of license based on breath technician's failure to appear pursuant to a lawful subpoena where breath test was not administered or analyzed because licensee refused to take breath test—Failure of subpoenaed officer who signed refusal affidavit to appear at formal hearing not basis for invalidation of suspension under section 322.6215(11) where officer was not arresting officer and did not perform duties of a breath technician

RISHI SARAIYA MUCHHALA, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2020-AP-4, Division AP-A. July 15, 2020. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: Wm. J. Sheppard; Elizabeth L. White; Matthew R. Kachergus; Bryan E. DeMaggio; Jesse B. Wilkison; and Camille E. Sheppard, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, for Respondent.

(PER CURIAM) Petitioner seeks certiorari review of the Department's ruling and raises one argument for review: Whether or not the Department departed from the essential requirements of the law when the hearing officer refused to invalidate the suspension of Petitioner's license based on the breath technician's failure to appear pursuant to a lawful subpoena.

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 served Officer M. McDonald with a subpoena requiring him to attend the formal review hearing. Officer McDonald signed the Affidavit of Refusal to Submit to Breath, Urine, or Blood Test, which stated that Petitioner refused a breath test after Officer McDonald read an implied consent warning to him. Officer McDonald did not attend the hearing. Petitioner filed a Motion to Invalidate Driver's License Suspension, requesting that the hearing officer invalidate Petitioner's license suspension because the breath technician, Officer McDonald, did not attend the hearing. The hearing officer denied Petitioner's Motion in her Findings of Fact, Conclusion of Law, and Decision, finding that invalidation was not appropriate in the instant case because Officer McDonald did not act as a breath technician where Petitioner refused a breath test.

Section 322.6215(11), provides in part:

> The formal review hearing may be conducted upon a review of the reports of a law enforcement officer or a correctional officer, including documents relating to the administration of a breath test or blood test or the refusal to take either test or the refusal to take a urine test. However, as provided in subsection (6), the driver may subpoena the officer or any person who administered or analyzed a breath or blood test. If the arresting officer or the breath technician fails to appear pursuant to a subpoena as provided in subsection (6), the department shall invalidate the suspension.

§ 322.6215(11), Fla. Stat. (2019).

Here, the hearing officer observed the essential requirements of the law when she denied Petitioner's Motion to Invalidate. A breath test was not administered or analyzed because Petitioner refused to take a breath test. Officer McDonald, therefore, did not perform the duties of a breath technician, defined as a "person who administered or analyzed a breath or blood test," Therefore, section 322.2615(11) does not apply to the subpoena of Officer McDonald.

Petitioner's argument regarding the application of section 322.2615(11) has been rejected by the Fourth Circuit, as well as other circuit courts. *See Sanchez v. Dep't of Highway Safety and Motor Vehicles,* 26 Fla. L. Weekly Supp. 73a (Fla. 4th Cir. Ct. Mar. 19, 2018); *Hampton v. Dep't of Highway Safety and Motor Vehicles,* 25 Fla. L. Weekly Supp. 687a (Fla. 2d Cir. Ct. Aug. 9, 2017); *Garcia v. Dep't of Highway Safety and Motor Vehicles,* 26 Fla. L. Weekly Supp. 457a (Fla. 11th Cir. Ct. July 18, 2018). While not binding authority, this Court finds the reasoning of those opinions to be persuasive.

Although Petitioner cites to *Objio v. Dep't of Highway Safety & Motor Vehicles,* 179 So. 3d 494 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2608a], in support of his argument that section 322.6215(11) applies to subpoenas of "breath technicians" in refusal cases, the *Objio* court only determined the application of the statutory sub-section to an arresting officer's failure to appear pursuant to a lawful subpoena. Certiorari should be granted "only when there has been a violation of [a] *clearly established* principle of law resulting in a miscarriage of justice." *Combs v. State,* 436 So. 2d 93, 96 (Fla. 1983) (emphasis added). This Court finds that the hearing officer's denial of Petitioner's Motion to Invalidate was not a departure from the essential requirements of the law which would require granting certiorari review.

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

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Statutory fee schedules—Clear and unambiguous election by insurer—Policy clearly and unambiguously elected to limit reimbursement payments to the schedule of maximum payments by stating that "we will limit reimbursement to, and pay no more than, 80 percent of ... schedule of maximum charges"—No merit to medical provider's contention that insurer must elect either the reasonable charge method of calculation or the schedule of maximum charges method of calculation and that, because its policy includes both, insurer relied on an unlawful hybrid method of reimbursement calculation—Trial court erred in entering summary judgment in favor of provider

PROGRESSIVE AMERICAN INSURANCE COMPANY, Appellant, v. NEUROLOGY PARTNERS, P.A., d/b/a EMAS SPINE & BRAIN SPECIALISTS, a/a/o Arkeelia Evans, Appellee. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 2017-AP-0060. L.T. Case No. 16-2015-SC-5526. April 30, 2019. Counsel: Michael C. Clarke, Kubicki Draper, P.A., Tampa, for Appellant. Adam Saben and Melissa R. Winer, Shuster & Saben, LLC., Jacksonville, for Appellee.

ORDER ON APPEAL

(JAMES H. DANIEL, J.) Progressive American Insurance Company ("Progressive") appeals the entry of summary judgment in favor of Neurology Partners, P.A., d/b/a Emas Spine & Brain Specialists ("Neurology Partners") requiring Progressive to pay additional personal injury protection benefits ("PIP") on behalf of its insured related to a January 2015 automobile accident. Progressive's insured sought medical treatment from Neurology Partners and Progressive paid all but $126.35 of the total amount of the bill. Progressive based its decision to limit the PIP benefits on the maximum fee schedule outlined in its policy that tracked the language in the PIP statute found at section 627.736(5), Florida Statutes (2015). Neurology Partners took an assignment of benefits from Progressive's insured and filed suit arguing that the policy language limiting payments to the

statutory fee schedule was ambiguous and that Progressive owed the full amount of the bill. The trial court agreed with Neurology Partners, found the policy language ambiguous, and granted summary judgment in its favor. The trial court, however, did not have the benefit of the decision in *State Farm Mutual Automobile Insurance Co. v. MRI Associates of Tampa, Inc.*, 252 So. 3d 773 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1149a], when it entered its order and, on the authority of this decision, the final judgment granting summary judgment in favor of Neurology Partners must be reversed.

Progressive's PIP policy required the company to pay medical benefits for its insured arising out of a motor vehicle accident. The policy states "**[m]edical benefits** means 80 percent of all reasonable medical expenses incurred for medically necessary medical, surgical, x-ray, . . . services. . . ." The policy goes on to limit reimbursement for "medical benefits" in the following manner:

> **UNREASONABLE OR UNNECESSARY MEDICAL BENEFITS.** If an **insured person** incurs **medical benefits** that **we** deem to be unreasonable or unnecessary, **we** may refuse to pay for those **medical benefits** and contest them.
>
> **We** will determine to be unreasonable any charges incurred that exceed the maximum charges set forth in 627.736(5)(a)1(a through f) of the Florida Motor Vehicle No Fault law, as amended. Pursuant to Florida law, **we** will limit reimbursement to, and pay no more than, 80 percent of the following schedule of maximum charges:
>
> a. For emergency transport and treatment by providers listed under Chapter 401, Florida Statutes, 200 percent of Medicare;
>
> . . .

Progressive relied upon this language to deny paying Neurology Partners the full amount of the bill for its radiological services.

The Progressive policy language in question tracks the method of reimbursement outlined in section 627.736(5)(a), Florida Statutes (2015):

> **(5) Charges for treatment of injured persons**.—
>
> (a) A physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person for a bodily injury covered by personal injury protection insurance may charge the insurer and injured party only a reasonable amount pursuant to this section for the services and supplies rendered . . . . In determining whether a charge for a particular service, treatment, or otherwise is reasonable, consideration may be given to evidence of usual and customary charges and payments accepted by the provider involved in the dispute, reimbursement levels in the community and various federal and state medical fee schedules applicable to motor vehicle and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.

In the very next section of the PIP statute, the legislature provided an alternative method of reimbursement:

> (1) The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:
>
> a. For emergency transport and treatment by providers licensed under chapter 401, 200 percent of Medicare.

§627.736(5)(a)1, Fla. Stat. (2015).

Neurology Partners maintains that the language in the PIP statute found at section 627.736(5)(a) mandates a choice by PIP insurers such as Progressive to either reimburse their insureds for reasonable medical expenses using the "fact-dependent" method to determine what charges are "usual and customary" in the relevant community or the method that relies solely on the "maximum fee schedule." In using the term "reasonable medical expenses" to describe Progressive's obligation under its policy, but capping its obligation to pay "reasonable medical expenses" based on a "schedule of maximum charges," Neurology Partners argues that the language in Progressive's PIP policy is ambiguous and at odds with the requirement under section 627.736(5)(a) that insurers elect one of the two alternative methods for reimbursement of PIP benefits. According to Neurology Partners, Progressive can choose one method or the other, but not an "unlawful hybrid method" of payment that allows Progressive to pay the usual and customary medical charges that are below, but not in excess of, the maximum fee schedule.

The question under consideration in this case is purely legal and this court will apply *de novo* review to the lower court's decision. *See Allstate Ins. Co. v. Orthopedic Specialists*, 212 So. 3d 973, 975 (Fla. 2017) [42 Fla. L. Weekly S38a] ("Because the question presented requires this Court to interpret provisions of the Florida Motor Vehicle No-Fault Law—specifically, the PIP statute—as well as to interpret the insurance policy, our standard of review is de novo.") The court in *State Farm Mutual Automobile Insurance Co. v. MRI Associates of Tampa, Inc.*, supra, addressed almost identical arguments by the provider of medical services in its attempt to obtain full reimbursement of the provider's charges above the statutory maximum fee schedule contained in a State Farm PIP policy. Similar to the language in the Progressive policy at issue in this case, State Farm's PIP policy limited what was "reasonable" to no more than the maximum fee schedule provided in section 627.736(5)(a)1. *MRI Associates of Tampa, Inc.*, 252 So. 3d at 775-76. In rejecting the provider's arguments, the court held that a 2012 amendment to section 627.736(5)(a) should be interpreted to mean that "there are no longer two mutually exclusive methodologies for calculating the reimbursement payment owed by the insurer." *Id*. at 778. The court further observed:

> The 2013 PIP statute includes the fact-dependent calculation of reasonable charges as a part of the definition of "[c]harges for treatment of injured persons" under section 627.736(5)(a). And an insurer may not disclaim the fact-dependent calculation; however, it may elect to limit its payment in accordance with the schedule of maximum charges under subsection (5)(a)(1)(a)-(f).

Id. at 778. In other words, PIP insurers are obligated to pay "reasonable medical expenses," but they can limit what is reasonable to no more than what is specified in the maximum fee schedule contained in section 627.736(5)(a)1.

Both sides have spent considerable time arguing the applicability, or lack thereof, of the decisions in *Geico Gen. Ins. Co. v. Virtual Imaging Services, Inc.,* 141 So. 3d 147, 150 (Fla. 2013) [38 Fla. L. Weekly S517a] (Holding that the PIP statute at section 627.736 requires the insurer to make an election between paying benefits under the fact-dependent method of what is "reasonable" or the maximum fee schedules, but not both); *Allstate Ins. Co. v. Orthopedic Specialists*, 212 So. 3d at 975 (Holding PIP policy language stating that "[a]ny amounts payable for medical expense reimbursements shall be subject to any and all limitations, authorized by section 627.736, . . . including . . . all fee schedules" was unambiguous, consistent with the holding in *Virtual Services, Inc.*, and adequately placed the insured and service providers on notice of the insurer's election of the schedule of maximum charges limitation). Neither of these cases is applicable to the PIP policy in the instant case because they each interpreted a version of the PIP statute that predated the 2012 amendment to section 627.736(5)(a). *MRI Associates of Tampa, Inc.*, 252 So. 3d at 777-778. The court in *MRI Associates of Tampa, Inc.* was very clear. The 2012 amendment changes the way the statute should be interpreted and PIP insurers are no longer required to choose one method of reimbursement to the exclusion of the other.

Curiously, neither Appellee nor Appellant pointed out during oral argument the longstanding requirement that "a circuit court (even in its appellate capacity) is bound to apply existing precedent from

another district if its district has not yet spoken on the issue. In this regard, a party is unable to argue that the circuit court should rule differently on the same issue of law." *Nader v. Florida Dept. of Highway Safety and Motor Vehicles*, 87 So.3d 712, 724 (Fla. 2012) [37 Fla. L. Weekly S130a]; *See also Pardo v. State*, 596 So. 2d 665, 667 (Fla. 1992). When the initial and answer briefs were filed in this case, *MRI Associates of Tampa, Inc.,* had not yet been decided. By the time Appellant filed its reply brief, that was not the situation, and it was certainly not the situation when the parties scheduled and conducted oral argument. It is understandable that the parties would want to preserve all arguments for a possible petition for writ of certiorari to the district court, but this court has no choice except to reverse the county court's decision to grant summary judgment in favor of Neurology Partners, and has had no choice since *MRI Associates of Tampa, Inc.* became final upon issuance of the mandate in that case.

As a result, the final summary judgment in this case is reversed and the case is remanded to the county court with directions to enter final summary judgment in favor of Progressive.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Statutory fee schedules—"Clear and unambiguous election" standard set by *Virtual Imaging* was superceded by 2012 amendment to PIP statute—In order to utilize statutory fee schedules, insurer was required only to give notice that it may limit reimbursement based on fee schedules—Policy at issue gave legally sufficient notice that it may limit reimbursements based on applicable Medicare fee schedules

NEUROLOGY PARTNERS, P.A. d/b/a EMAS SPINE AND BRAIN SPECIALIST, a/a/o Almern L. Vos, Appellant, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Appellee. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 2017-AP-39. L.T. Case No. 2016-SC-000095. April 20, 2018. Counsel: Adam Saben and Melissa R. Winer, Shuster & Saben, LLC, Jacksonville, for Appellant. Michael C. Clarke, Kubicki Draper, P.A., Tampa, for Appellee.

OPINION

(ERIC C. ROBERSON, J.) In this Personal Injury Protection ("PIP") appeal, the Appellant seeks review of the trial court's Final Judgment and preceding Order Granting Defendant's Motion for Summary Judgment. For the reasons set forth below, the trial court's Order is AFFIRMED under the "tipsy coachman" rule. *See Dade County Sch. Bd. v. Radio Station WQBA,* 731 So. 2d 638, (Fla. 1999) [24 Fla. L. Weekly S216a] ("[I]f a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record.").

Factual and Procedural Background

Mr. Vos was injured in a vehicle accident on June 11, 2013. At that time, Mr. Vos was insured through a policy issued by Appellee Progressive American Insurance Company ("Progressive"). Thus, this case involves a policy in effect after July 1, 2012.

Mr. Vos sought treatment for his injuries with Neurology Partners, P.A. d/b/a Emas Spine and Brain Specialist ("Neurology Partners"). As part of his treatment, Mr. Vos assigned his benefits under the subject policy to Neurology Partners.

The relevant language of Progressive's policy includes:

> **UNREASONABLE OR UNNECCESSARY MEDICAL BENEFITS**
>
> If an **insured person** incurs medical benefits that we deem to be unreasonable or unnecessary, we may refuse to pay for those medical benefits and contest them.
>
> We will determine to be unreasonable any charges incurred that exceed the maximum charges set forth in Section 627.736(5)(a)(1)(a through f) of the Florida Motor Vehicle No Fault Law, as amended. Pursuant to the Florida law, we will limit reimbursement to, and pay no more than, 80 percent of the following schedule of maximum charges:
>
> ***
>
> f. For all other medical services, supplies and care, 200 percent of the allowable amount under the participating physicians' fee schedule for Medicare Part B. . . .

Neurology Partners filed the underlying small claims lawsuit seeking recovery of sums allegedly due and owing for Mr. Vos's medical treatment. The parties both moved for summary judgment on the dispositive issue of whether the subject insurance policy gave legally sufficient notice that the insurer was limiting reimbursement for medical services based on various Medicare fee schedules. *See* Fla. Stat. § 627.736(5)(a) 2-5. If there was not sufficient notice, payment determinations would revert to the "default" methodology utilizing a fact-intensive analysis of the "reasonable" amount of the charges. *See* Fla. Stat. § 627.736(5)(a)1. After hearing, the trial court granted Progressive's Motion for Summary Judgment and denied Neurology Partners' motion.

The trial court ultimately found Progressive's policy to be "unambiguous" and "expressly state[d] that [Progressive] will limit reimbursement to pay no more than the fee schedules. . . ." Progressive had, according to the court's ruling, satisfied its statutory obligations to Neurology Partners. As the issues on summary judgment were dispositive, a Final Judgment in favor of Progressive was entered shortly thereafter. This timely appeal ensued.

Legal Analysis

One of the most frequently litigated issues in County Court is the exact issue before this Court: Whether a PIP insurance policy provided legally sufficient notice that it would limit reimbursement of medical expenses pursuant to certain Medicare fee schedules. This issue has divided the Duval County Court and now divides the Fourth Judicial Circuit Court, sitting in its appellate capacity. We are not alone; this issue has divided courts throughout the state.

Section 627.736, Florida Statutes (the "PIP Statute") provides insurers with two separate and distinct methods of reimbursing charges for the treatment of injured persons. These are commonly referred to as the default method and the permissive method. The default method is found in Section 627.736(5)(a) and utilizes a fact-intensive 'reasonableness' analysis. To determine whether a particular charge is reasonable "consideration may be given to evidence of usual and customary charges and payments accepted by the provider involved in the dispute, reimbursement levels in the community and various federal and state medical fee schedules applicable to motor vehicle and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply." Fla. Stat. § 627.736(5)(a). The default methodology apparently results in higher reimbursements. *See Allstate Fire & Cas. Ins. v. Stand-Up MRI of Tallahassee, P.A.,* 188 So. 3d 1, 3 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D693b] ("*Stand-Up MRI*").

On the other hand, the permissive method found in Section 627.736(5)(a)2-5 is closer to a mathematical equation, setting reimbursements based on various Medicare fee schedules.

Virtual Uncertainty

There is a threshold issue that is both fundamental and potentially dispositive. Does the standard established in *Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc.,* 141 So. 3d 147 (Fla. 2013) [38 Fla. L. Weekly S517a] ("*Virtual*") remain applicable to policies in effect after July 1, 2012? If it does, then the courts must engage in a linguistic analysis of specific policy language. Having to engage in a fresh analysis of each insurer's policy—with all the variations in language—will ensure that there is no predictability to potential litigants.

This will result in great uncertainty (not to mention multiplying exponentially the cost of litigation) until the inevitable conflicts between the Districts are resolved by our Supreme Court.

If, however, the 2012 amendment language supersedes *Virtual,* then the highly deferential standard requires only that insurers give notice that the Medicare fee schedules *could apply.* Such a standard will provide certainty to potential litigants and greatly reduce either the volume of PIP cases or the amount of attorney's fees incurred in litigation.

In *Virtual,* the Supreme Court addressed whether Geico's policy provided legally sufficient notice of electing the permissive payment method and gave what appears to be a definitive answer. PIP insurers must "clearly and unambiguously elect the permissive payment methodology in order to rely on it." *Virtual,* 141 So. 3d at 158. But the devil lies in the details.

Although decided in 2013, *Virtual,* by its clear and unambiguous terms, stated that its "holding applies only to policies that were in effect from the effective date of the 2008 amendments to the PIP statute that first provided for the Medicare fee schedule methodology, which was January 1, 2008, through the effective date of the 2012 amendment, which was July 1, 2012." *Virtual,* 141 So. 3d at 150.

The Supreme Court's standard of requiring insurers to "clearly and unambiguously elect the permissive payment methodology" filled in the absence of a legal standard in the 2008 version of the PIP Statute. Before the 2012 amendment, Section 627.763(5)(a)5 read:

> *If an insurer limits payment as authorized by subparagraph 2.* [setting forth the fee schedules], the person providing such services, supplies, or care may not bill or attempt to collect from the insured any amount in excess of such limits, except for amounts that are not covered by the insured's personal injury protection coverage due to the coinsurance amount or maximum policy limits.

Virtual, 141 So. 3d at 159 (quoting, with emphasis added, Fla. Stat. 627.763(5)(a)5 (2008)). Thus, there was no standard to determine "if" an insurer properly elected the permissive method.

That changed in 2012 when the statute was amended to read:

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

Fla. Stat. § 627.763(5)(a)5 (2012).

The Supreme Court recognized that the 2012 amendment provided a standard to determine if an insurer could rely on the permissive method. Specifically, the court said "the Legislature has now specifically incorporated a notice requirement into the PIP statute, effective July 1, 2012. . . ." *Virtual,* 141 So. 3d at 150.

Far from *Virtual*'s exacting standard of 'clearly and unambiguously electing' the permissive method, the 2012 amendment merely requires "notice at the time of issuance or renewal that the insurer *may* limit payment pursuant to" the Medicare fee schedules. Fla. Stat. § 627.763(5)(a)5 (emphasis added).

Here, the Legislature's choice of the word 'may' at two points shows that it intended to give insurers broad leeway in choosing the Medicare fee schedule methodology. From day one, aspiring lawyers are taught the difference between the mandatory 'shall' and the permissive 'may.' *See e.g. Blair Nurseries, Inc. v. Baker Cnty,,* 199 So. 3d 534, 539 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D2121a] ("There is ample case law holding that the use of the term "may" ordinarily denotes discretionary or permissive authority.") (Bilbrey, J., dissenting). In other contexts, courts have found the word 'may' to provide breadth and flexibility. *See Dept. of Children and Families v. J.D.,* 198 So. 3d 960, 961 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D1822b] ("The use of the word 'may' rather than 'shall' in this section recognizes the courts must be free to exercise broad discretion when choosing the appropriate remedy. . . ."); *Andrews v. State,* 181 So. 3d 526, 528 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2456a] ("The emphasis on the word 'may' reflects *Daubert's* description of the Rule 702 inquiry as a 'flexible' one.); *Doe v. City of Palm Bay,* 169 So. 3d 1211, 1219 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1671a] (Ordinance banning sexual offender from performing work in any "other place where children or vulnerable adults *may* reside or regularly congregate . . . is broad enough to apply to virtually every residence in the City, as well as a vast number of businesses. . . .").

The definitions of the word 'may' in Black's Law Dictionary demonstrate how open-ended the word can be, especially in the context of this specific statute. The first definition is "to be permitted to" while the second definition is "to be a possibility." *Black's Law Dictionary* (10th ed. 2014), *available at* Westlaw BLACKS. These two definitions coincide with the two uses of the word "may" in Section 627.763(5)(a)5, Florida Statutes.

Thus, if the 2012 amendment is applied, all that is required is notice that an insurer *could possibly* limit reimbursements to the Medicare fee schedule—not that the insurer will do so or can only utilize the fee schedules.

Post-*Virtual* Decisions

The decisions following *Virtual* have failed to delineate whether the "clear and unambiguous election" standard applies to insurance policies in effect after July 1, 2012.

The First District, in *Stand-Up MRI,* analyzed an Allstate policy containing the following relevant policy language:

> In accordance with the Florida Motor Vehicle No-Fault Law, [Allstate] will pay to or on behalf of the injured person the following benefits. . .
>
> 1. Medical Expenses
>
> Eighty percent of reasonable expenses for medically necessary . . . services . . .
>
> Any amounts payable under this coverage shall be subject to any and all limitations, authorized by section 627.736, or any other provisions of the Florida Motor Vehicle No-Fault Law, as enacted, amended or otherwise continued in the law, including but not limited to, all fee schedules.

The First District held "that the policy gives sufficient notice of its election to limit reimbursements by use of the fee schedules." *Stand-Up MRI,* 188 So. 3d at 3. The court's reasoning stemmed from "the policy's plain statement that reimbursements 'shall' be subject to the limitations in § 627.736, including 'all fee schedules'." *Id.* The First District then quoted *Virtual* to say that "plain and unambiguous" policy language must be interpreted with the "plain meaning of the language" to give effect to the policy. *Id.* (citations omitted).

The Supreme Court approved *Stand-Up MRI*'s reasoning and quashed a conflicting Fourth District opinion in *Allstate Ins. Co. v. Orthopedic Specialists,* 212 So. 3d 973 (Fla. 2017) [42 Fla. L. Weekly S38a] ("*Orthopedic Specialists*"). To highlight the division and confusion in applying *Virtual*'s standard, *Stand-Up MRI* was a consolidation of 14 cases and *Orthopedic Specialists* involved 32 consolidated cases.

Confusion remains, however, for multiple reasons. First, the post-*Virtual* decisions do not include in their analysis whether the subject policies were in effect before or after July 1, 2012 and what, if any, difference that would have on the outcome. For example, the lead case in *Stand-Up MRI,* assigned Case No. 2012-SC-2640 in Leon County, Florida, involved injuries allegedly sustained on May 20, 2012. Similarly, the lead case in *Orthopedic Specialists* was filed on

February 22, 2012 and assigned Case No. 2012-SC-3692 in Palm Beach County, Florida. Accordingly, neither case involved a policy in effect after July 1, 2012.

Second, there is uncertainty because the distinctly different concepts of (i) actually electing the permissive payment method and (ii) merely providing notice that an insurer may utilize the permissive payment method seem to be used interchangeably. The pre-2012 version of Section 627.763(5)(a)5, Florida Statutes applied "if an insurer limit[ed] payment" to the fee schedules. Thus, the insurer was required to actually choose or "elect" to utilize the fee schedules. This is consistent with *Virtual*'s holding that:

> [W]e conclude that the insurer was required to give notice to its insured by *electing* the permissive Medicare fee schedules in its policy before taking advantage of the Medicare fee schedule methodology to limit reimbursements.

Virtual, 141 So. 3d at 150 (emphasis added). Stated differently, "the insurer must clearly and unambiguously elect the permissive payment methodology in order to rely on it." *Id.* at 158.

The 2012 amendment, however, only requires notice and not an actual election of the permissive payment methodology. Specifically, the amendment allows an insurer to utilize the Medicare fee schedules "only if the insurance policy includes a *notice* at the time of issuance or renewal that the insurer *may* limit payment pursuant to the schedule of charges. . . ." Fla. Stat. 627.763(5)(a)5 (emphasis added). But *Virtual* appears to conflate election and notice by stating:

> [T]he Legislature amended the PIP statute to include a specific requirement that insurers notify their policyholders at the time of issuance or renewal of the insurer's election to limit payment pursuant to the fee schedules set forth in the PIP statute.

Virtual, 141 So. 3d at 154.

This was repeated in *Orthopedic Specialists*' holding that "Allstate's PIP policy provides legally sufficient notice of Allstate's *election* to use the permissive Medicare fee schedules". *Orthopedic Specialists,* 212 So. 3d at 979 (emphasis added). The question remains: does the 2012 amendment to Section 627.763(5)(a)5 providing a *notice* requirement supersede *Virtual*'s requirement that an insurer "clearly and unambiguously elect" the permissive method?

Fourth Circuit Appellate Decisions

This Court's opinion conflicts with two prior Fourth Circuit appellate opinions addressing the legal sufficiency of an insurer's notice of relying on the permissive payment method. Because this opinion is decided by holding that *Virtual*'s "clear and unambiguous election" standard was superseded by the 2012 amendment to Section 627.736(5)(a)5, the analysis below will be confined to that narrow issue.

Most recently, *Neurology Partners, P.A., d/b/a Emas Spine and Brain Specialists a/a/o Roderick A. Williams v. Progressive Express Ins. Co.,* 2017-AP-34 (Fla. 4th Cir. Jan. 25, 2018) ("*Williams*") dealt with 10 separate appeals involving insurance policies that were in effect after July 1, 2012. That opinion held that the standard in *Virtual* still applied. The entirety of *Williams'* analysis on that point was set forth in the following footnote:

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

Williams, D.E. 39, p. 7, N. 1. The footnote contradicts itself and lacks any reasoning or citation to authority to conclude that *Virtual* still applies. Accepting this reasoning, the 2012 amendment to Section 627.736(5)(a)5 is judicially scrubbed from the Florida Statutes.

In addition to the explicit limitation in *Virtual,* the Court disagrees with *Williams* because of established rules of statutory construction and the binding precedent of the Supreme Court that the Circuit Court must follow.

In construing the 2012 amendment, this Court must give the effect to the statutory language and not read it in a way that renders it ineffective or surplusage. *See Gracie v. Deming,* 213 So. 2d 294, 296 (Fla. 2d DCA 1968) ("courts should not construe a statute in such a manner as to reach an illogical or ineffective conclusion when another construction is possible"). As the Fifth District succinctly stated:

> We are required to give effect to every word, phrase, sentence, and part of the statute, if possible, and words in a statute should not be construed as mere surplusage. Moreover, a basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.

Quarantello v. Leroy, 977 So. 2d 648, 652 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D517a] (cleaned up).

Here, the reasoning in *Williams* would not only render the 2012 amendment meaningless, it would also render the Supreme Court's explicit limitation of *Virtual* application a nullity. The Court does not have to speculate whether the 2012 amendment was added to provide a notice provision—the Supreme Court explicitly said as much. *Virtual,* 141 So. 3d at 150 (2012 amendment "incorporated a notice requirement into the PIP statute"). The Court also does not have to speculate whether the Supreme Court meant to limit its holding in *Virtual* to policies in effect prior to the 2012 amendment—even the *Williams* opinion recognized that it did. This Court cannot, and will not, ignore the clear instructions of the Supreme Court in limiting the application of *Virtual*.

Before *Williams,* another Circuit Court appellate opinion engaged in significant analysis of whether *Virtual* applied after July 1, 2012. *See Progressive Select Ins. Co. v. Neurology Partners, P.A. d/b/a Emas Spine and Brain Specialist a/a/o Phyllis Easley,* 2016-AP-61 (Fla. 4th Cir. Ct. September 7, 2017) ("*Easley*").

Easley reasoned that the 2012 amendment "codif[ied] the judicially-created notice requirement when electing the permissive payment method." *Easley,* D.E. 53, p. 12. The "judicially created notice requirement" refers to two District Court opinions in *Kingsway Amigo Ins. Co. v. Ocean Health, Inc.,* 63 So. 3d 63 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1062a] and *Geico Indem. Co. v. Virtual Imaging Servs., Inc.,* 79 So. 3d 55 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D2597a]. The reasoning in those two cases was affirmed in *Virtual.*

But if the 2012 amendment was a mere codification of earlier district court opinions, it would make no sense for the Supreme Court to then explicitly limit its application based on the new "notice requirement" added to the PIP Statute. Instead, the Supreme Court made the limitation because the 2012 amendment "incorporated a notice requirement into the PIP Statute." *Virtual,* 141 So. 3d at 150. There is simply no basis to conclude that the 2012 amendments were made to adopt prior intermediate appellate decisions. Moreover, any alleged motivation underlying the amendment is irrelevant.

The Court does not attempt to find the "intent" of the 2012 amendment. Absent an express declaration of intent within the statute, it is a legal fiction to believe that a bicameral legislature and an executive signing the bill into law had a singular intent. Instead, the Court turns first, as always, to the text of the statute. The words are given their plain and ordinary meaning. If the statutory wording is unambiguous, then judicial inquiry is complete. *Klonis v. State Dept. of Revenue,* 766 So. 2d 1186, 1189 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D2230a]. The Court finds the 2012 amendment to be

unambiguous and it will be applied according to its terms.

More troubling is *Easley's* determination of which branch of government is tasked with creating the substantive rules and policies governing PIP—such as the notice requirements for utilizing the permissive payment method. According to *Easley,* the legislature cannot make substantive changes to the PIP Statute and is bound to a court's interpretation of a prior version of Section 627.736(5)(a)5. Specifically, *Easley* stated:

> Progressive's argument is also inconsistent with binding authority on legislative adoption of judicial construction of statutes. In 2011, the year immediately preceding the amendment to §627.736(5)(a)5, the Florida judiciary held in *Kingsway Amigo Ins. Co. v. Ocean Health, Inc.,* 63 So. 3d 63 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1062a] ("*Kingsway*"), and *Geico Indem. Co. v. Virtual Imaging Servs., Inc.,* 79 So. 3d 55 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D2597a] ("*Geico*") that insurers must "clearly and unambiguously" elect the permissive fee schedule in order to rely on it. The legislature is presumed to know the judicial construction of a law when enacting a new version of that law. Therefore, this Court takes the position, *as a matter of law,* that when the statute was amended in 2012, the legislature adopted the judicial construction of *Geico* and *Kingsway,* requiring notice of clear and unambiguous election to use the permissive payment method.

Easley, D.E. 53, p. 14-15 (certain citations and quotations omitted, emphasis in original). This reasoning would mean that the legislature is forever stripped of its power to enact substantive changes to the law once the judiciary has weighed in. Such an approach is fundamentally flawed and runs afoul of the most basic principles of the separation of powers.

In our constitutional scheme, the three branches are assigned separate powers that are not intended to overlap. The legislative power is reserved solely for our state's legislature. Art. III, §1, Fla. Const. No other branch may exercise legislative power unless the Constitution specifically permits it. Art. II, §3, Fla. Const.

The legislature has the power to enact substantive laws. *Johnson v. State,* 336 So. 2d 93, 95 (Fla. 1976); *see also Citizens for Strong Schools, Inc. v. Fla. State Bd. of Educ.,* 232 So. 3d 1163, 1171 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D2640c] ("the legislative branch has sole power to appropriate and enact substantive policy"). The legislature, frequently and directly accountable to the electorate, has the prerogative to enact policy choices into law. *See* The Federalist No. 78 ("The legislature . . . prescribes the rules by which the duties and rights of every citizen are to be regulated.").

The judiciary is limited to enforcing the substantive law where constitutional. *Johnson,* 336 So. 2d at 95. While it is "emphatically the province and duty of the judicial department to say what the law is", *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), it is not the judiciary's role to say what the law should be or what the law will be.

The series of events leading up to the 2012 amendment shows the different branches operating exactly as our constitution intends.[1] The 2008 amendment to Section 627.736(5)(a)5 allowed a PIP insurer to elect the permissive payment method but did not establish the substantive requirements for doing so. The judiciary, through *Kingsway* and *Virtual* (both in the Third District and Supreme Court), established a legal standard requiring a clear and unambiguous election in the absence of a statutory standard. The legislature later enacted its 2012 amendment, which the Supreme Court explicitly held established a notice requirement. Thus, the judicially-created standard became obsolete once the legislature established a notice requirement for PIP insurers to utilize the permissive method.

Conclusion

The Court holds that the "clear and unambiguous election" standard set by *Virtual* was superseded by the 2012 amendment to Section 672.736(5)(a)5. Applying that statutory standard, the insurance policy at issue gave legally sufficient notice that it may limit reimbursements based on applicable Medicare fee schedules. Accordingly, the order under review is **AFFIRMED.**

As set forth above, this is an issue causing significant confusion—and increased litigation—in the County Courts throughout the state. The County Court can certify questions to the District Court of Appeal if the question has statewide application and (i) is of great public importance or (ii) will affect the uniform administration of justice. Fla. Stat. § 34.017. The Court has no doubt that the issue here easily satisfies both of those requirements.

Unfortunately, the Circuit Court has no similar mechanism of certifying questions to the District Court of Appeal. If this Court had such an option, it would consider certifying the following question:

> FOR POLICIES IN EFFECT AFTER JULY 1, 2012, WHAT IS THE STANDARD FOR PIP INSURERS TO UTILIZE THE PERMISSIVE PAYMENT METHOD PURSUANT TO SECTION 627.736(5)(a)5?

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[1]The analysis would be different if *Virtual* found that the PIP Statute offended constitutional requirements. However, *Virtual,* as well as *Kingsway* and *Geico*, was limited to statutory and contractual interpretation.

* * *

Criminal law—Sentencing—Violation of probation—Where defendant's initial term of supervision ended when his probation was revoked upon finding of a violation and new term of supervision was imposed, defendant's current violation is first violation of his current term of supervision—Trial court erred in sentencing defendant to more than 90 days in jail for first violation of current term of supervision

FERNANDO RIOS, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 5th Judicial Circuit (Appellate) Marion County. Case No. 2019-AP-24. L.T. Case No. 2018-MM-4996. July 24, 2020. Appeal from the County Court in and for Marion County, The Honorable Sarah-Ritterhoff Williams. Counsel: Michael A. Hollander, Hollander Law, Ocala, for Appellant. Robert J. Underkofler, Assistant State Attorney, Ocala, for Appellee.

OPINION

(DAVIS, H., J.) Appellant appeals the trial court's denial of his Motion to Correct Illegal Sentence, filed pursuant to Fla. R. Crim. Pro. 3.800. Appellant argues that his maximum jail sentence for a technical violation of probation was 90 days, because it was the first violation in his current term of supervision, which he argues began after his probation was revoked. Appellee argues that the violation was not he first in the current term of supervision, because the probation both before and after the revocation was part of a continuous term of supervision for a single offense. We agree with Appellant, and therefore reverse.

Appellant was sentenced to a six-month term of probation on August 20, 2018. On January 11, 2019 the state filed an affidavit of violation was filed, alleging that Appellant had failed to report to the probation office following his sentencing. Appellant admitted to the violation, his probation was revoked, and he was again sentenced to a six-month term of probation on August 1, 2019. On October 15, 2019 another affidavit was filed alleging Appellant had failed to pay fees and had tested positive of opioids. Defendant again admitted to the violation and was sentenced to 160 days in the Marion County Jail on November 19, 2019.[1] Appellant subsequently filed his Motion to Correct Illegal Sentence, which the trial court denied, and Appellant now appeals.

The denial of a motion to correct illegal sentence is a question of law; therefore, we review it under a *de novo* standard. *See Wardlaw v. State,* 832 So. 2d 258 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2639a].

Under § 948.06(2)(f) Fla. Stat., a defendant's probation must be modified or continued with a maximum of 90 days in jail as a special condition, or revoked and a sentence imposed of up to 90 days in jail if there are less than 90 days of probation remaining. § 948.06(2)(f) applies when (1) the supervision is probation, (2), the probationer does not qualify as a violent felony offender, (3) the violation is a low-risk technical violation and (4) the court has not previously found the probationer in violation of his or her probation pursuant to an affidavit filed "during the current term of supervision". The parties do not contest that Appellant met the first three criteria. However, the state maintains that Appellant did not meet the final condition, arguing that the original violation for failing to report to probation was part of a continuous term of supervision for a single offense. Appellant instead argues that the previous term of supervision ended when the trial court revoked his probation and imposed a new term, and that this was therefore his first violation during the current term.

In support of its position the state cites § 921.187(1)(n) Fla. Stat., permitting a trial court to place a defendant on administrative probation "for the remainder of the term of supervision" after partially completing a term of probation, as drawing a distinction between a "term of probation" and a "term of supervision." The state argues that the "term of supervision" therefore does not necessarily terminate at the same time as the "term of probation." However, we read the distinction drawn in § 921.187(1)(n) as including the potential for multiple types of supervision, rather than multiple terms of probation, as both forms of probation are imposed as part of a single term. In contrast, § 948.06(3) Fla. Stat. characterizes a term of probation imposed after a revocation as a "subsequent term of supervision", with any previous probation being "the preceding terms of probation." This is also consistent with the distinction between "revocation", indicating that the previous term ends and a new sentence is imposed, and "modification" or "continuance", indicating that the previous term remains in force. Therefore, we find the Appellant's term of supervision ended when his probation was revoked on August 1, 2019, and the subsequent violation was therefore the first of his current term. Thus, we reverse the trial court's denial of Appellant's Motion to Correct Illegal Sentence, and remand for further proceedings in accordance with this opinion.

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

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[1]Because Appellant was granted a supersedeas bond and therefore still has time remaining on this appeal is not moot.

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Contracts—Discovery—Failure to comply—Sanctions—Abuse of discretion to grant motion to strike untimely amended responses to requests for admissions where trial court did not make specific finding of willful or deliberate refusal to comply—Trial court erred in granting summary judgment based on technical admissions that are contradicted by record evidence

GORMAN BARGER, ALICE BARGER d/b/a BARGER QUARTER HORSES, and LAURIE ISON, Appellants, v. TAMMY RICKS, Appellee. Circuit Court, 5th Judicial Circuit (Appellate) in and for Marion County. Case No. 2020-AP-03. L.T. Case No. 2019-CC-0049. July 8, 2020. Appeal from the Marion County Court. R. James McCune, Jr., Judge. Counsel: Laurie D. Hall, Ocala, for Appellants. Lisa M. Bowell, Wellington, for Appellee

OPINION

(FALVEY, Judge.) Appellants, Gorman Barger, Alice Barger d/b/a Barger Quarter Horses (collectively, the "Bargers"), and Laurie Ison ("Ison"), appeal an order granting the Appellee's motion for summary judgment, an order denying Appellants' motion for reconsideration of the lower court's order striking their amended responses to requests for admissions, and all other orders entered by the trial court. We reverse the trial court's order granting motion for summary judgment and order striking the amended responses to requests for admissions.

Appellee Tammy Ricks ("Ricks") filed a complaint seeking to rescind a contract for the purchase of a two-year-old Quarter Horse and recover damages caused by the alleged misrepresentation of material facts by the Bargers and Ison. Ricks filed requests to produce and requests for admissions directed at each of the Appellants. The Bargers and Ison timely filed their responses to the requests for admission. The Bargers responded to the request to produce untimely, after being granted an extension to file their responses. Ison filed no response. Ricks moved to compel better responses to the requests for admissions and moved to compel discovery. The trial court granted the motions, ordering the Bargers and Ison to file amended responses to the requests for admission within ten (10) days and Ison to file her responses to the production request within five (5) days or pay attorney fees.[1]

Thereafter, the Bargers and Ison filed their amended responses to the requests for admissions four (4) days late, and Ricks moved to strike the amended responses and deem the requests admitted. Ricks filed a second motion to compel and motion for sanctions after Ison failed to produce additional items mentioned at Ison's deposition. After a hearing, the trial court granted the motions, struck the amended responses filed by the Bargers and Ison and ordered Ison to pay for the extraction of information from her phone.[2] Ricks, relying on the technical admissions, moved for summary judgment. The Bargers and Ison filed their opposition and a list of supportive documents and exhibits. The Bargers and Ison also filed a motion for reconsideration directed at the trial court's order granting the motion to strike. The trial court heard both outstanding motions on the same day, denying the motion for reconsideration and granting the motion for summary judgment.

On appeal, the Appellants raised four (4) issues, but this Court finds error only with the trial court's ruling on the motion for summary judgment and motion to strike.[3] When addressing the scope of a trial court's discretionary power to grant discovery sanctions, the Florida Supreme Court has stated:

> In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness."

Mercer v. Raine, 443 So.2d 944, 946 (citing *Canakaris v. Canakaris,* 382 So.2d 1197, 1203 (Fla. 1980)). "[S]triking of pleadings or entering a default for noncompliance with an order compelling discovery is the most severe of all sanctions which should be employed only in extreme circumstances." *Id.*

This case involves a discovery sanction that ultimately became dispositive of the case. The trial court set forth no basis for granting the motion to strike in its initial order and the order on the motion for reconsideration included only one paragraph stating the Bargers and Ison engaged in bad faith conduct throughout the litigation.[4] "[B]ecause of the severity of the sanction, orders striking pleadings should contain specific findings of a willful failure or deliberate refusal to comply with discovery." *Surf Tech Intl. Inc. v. Rutter,* 785 So. 2d 1280, 1283 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1453a]. The trial court failed to make specific findings of a willful or deliberate refusal to comply, only that the untimely responses were not justified or excusable. "Absent evidence of a willful failure to comply or extensive prejudice to the opposition, the granting of such an order constitutes an abuse of discretion." *Id.*

Finding that the trial court erred in granting the motion to strike, this Court now considers the order granting summary judgment. A party is entitled to summary judgment "if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c). "If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issue, it should be submitted to the jury as a question of fact to be determined by it." *Kitchen v. Ebonite Recreation Centers, Inc.,* 856 So. 2d 1083, 1085 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D2401a].

Here, the record shows that genuine material facts are disputed and contradict the technical admissions. It is improper for a court to grant summary judgment based on technical admissions when the record contains evidence that contradicts the technical admissions. *Love v. Allis-Chalmers Corp.,* 362 So. 2d 1037 (Fla. 4th DCA 1978). Looking at the Motion in Opposition to Summary Judgment and the evidence in the record, genuine issues of material fact remain, and the trial court erred by granting summary judgment.

REVERSED and REMANDED. (ROGERS, S. and DAVIS, H., JJ., concur.)

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[1]Based on the record, it appears the Order was complied with and no attorney fees were issued as a sanction.

[2]The trial court found in its order that it would not impose attorney fees at that time because the cost of the extraction was the appropriate sanction.

[3]This Court notes it received the second supplemental record on June 30, 2020, but due to the tardy filing of the supplement and no notice to the Court of a delay in seeking the transcripts, the case proceeded forward with the appellate panel on June 26, 2020, as noticed. The second supplement was not considered because it was not part of the record at the time of the appellate panel review.

[4]The trial court found that the Bargers and Ison engaged in bad faith conduct throughout the course of litigation, but the record shows no prior sanctions issued by the court other than Ison paying the cost of extracting data from her cellular phone.

* * *

Criminal law—Resisting officer without violence—Dismissal—Trial court erred in sua sponte dismissing charge against defendant—Based on comments suggesting judge has formed opinion of cause, transfer to different judge is directed

STATE OF FLORIDA, Appellant, v. RICHARD WHITE, Appellee. Circuit Court, 5th Judicial Circuit in and for Citrus County. Case No. 2020-AP-03. L.T. Case No. 2019-MM-0994. August 6, 2020. Appeal from the County Court in and for Citrus County. The Honorable Mark J. Yerman, Judge. Counsel: Tara Hartman, Assistant State Attorney, Inverness, for Appellant. Steven A. Brown, Assistant Public Defender, Inverness, for Appellee.

OPINION

(ROGERS, J.) The State appeals the trial court's *sua sponte* dismissal of a resisting a law enforcement officer without violence charge against Appellee. The trial court's dismissal of the charge was subsequent to the Appellee's advising the trial court he would be pleading no contest to the charge pursuant to a negotiated plea agreement, and the trial court's finding a factual basis for the plea. We reverse and remand.

"[I]n the absence of statute or motion to dismiss, the decision whether to prosecute or to dismiss charges is a determination to be made by solely the State." *State v. Brosky,* 79 So. 3d 134, 135 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D296a]. A decision by the trial court to *sua sponte* dismiss a charge constitutes an abuse of discretion. *Id.* Accordingly, the trial court's *sua sponte* order of dismissal must be reversed and the cause remanded for reinstatement of the charge.

Because of concerns regarding the previous comments made by the trial judge, which suggest he has formed an opinion of this cause, we direct the case be transferred to a different judge upon remand. *See Thompson v. State,* 990 So. 2d 482,490 (Fla. 2008) [33 Fla. L. Weekly S596a] ("judicial comments revealing a determination to rule a particular way prior to hearing any evidence or argument have been found to be sufficient grounds for disqualification.").

REVERSED AND REMANDED. (FALVEY, C., and DAVIS, H. JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to urine test—Where licensee exhibited signs of impairment and vape pen in cupholder of vehicle tested positive for THC, request for urine test was lawful—Petition for writ of certiorari is denied

EMMANUEL G. MANIAS, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 19-000072AP-88B. UCN Case No. 522019AP000072XXXXCI. June 23, 2020. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER AND OPINION

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

Facts and Procedural History

The Hearing Officer found the following facts to be supported by a preponderance of the evidence:

> On September 11, 2019, Officer Gibson stopped the Petitioner for driving at night without headlights. The vehicle was slow to pull over. Officer Viars responded upon hearing the call on the department radio. Both Officers approached the vehicle with Officer Gibson on the driver side and Officer Viars on the passenger side. There were two occupants, the driver/Petitioner and a passenger. Officer Gibson saw the Petitioner attempting to conceal a bottle. Officer Gibson asked for the bottle and after checking, the bottle was wine and open and half full. Officer Viars saw a vape pen in the cup holder. Officer Gibson asked the Petitioner to exit the vehicle and he complied. When asked, Petitioner admitted to a "couple" of drinks earlier. Officer Viars observed that Petitioner had bloodshot/watery eyes, a distinct odor of an alcoholic beverage on his breath and would sway while standing. Officer Viars asked to look at Petitioners eyes and he agreed but was becoming agitated and asked if this was necessary. Officer Viars told Petitioner that this was a DUI investigation. Officer Viars conducted Horizontal Gaze Nystagmus and noted signs of possible impairment. Petitioner was asked to perform additional Standardized Field Sobriety Exercises (SFSE). He was hesitant but then agreed. During the walk and turn as well as the one leg stand, Petitioner complained of back/leg pain. The other SFSE were accomplished with Petitioner seated. Petitioner exhibited additional indicators of impairment. During the time, Petitioner admitted to drinking alcohol but denied any drug use. Petitioner was arrested for DUI, and was asked for submit a sample of his breath for testing the breath alcohol level. He stated that he would and was read his Miranda right and refused to answer any further questions. Officer Gibson then informed Officer Viars that the vape pen had tested positive for THC and that the passenger had claimed the pen belonged to Petitioner. Petitioner was transported to the jail facility and provided samples of his breath which yielded a breath alcohol level of 0.075 g/210L and 0.075g/210L. Petitioner was then asked to provide a urine sample. Petitioner became belligerent and eventually refused. The Implied Consent warning was read to Petitioner but he continued to refuse.

Based on Petitioner's refusal to provide a urine sample, his license was suspended. After a hearing, the license suspension was upheld. Petitioner then filed the instant Petition for Writ of Certiorari.

Standard of Review

"[U]pon first-tier certiorari review of an administrative decision, the circuit court is limited to determining (1) whether due process was

accorded, (2) whether the essential requirements of the law were observed, and (3) whether the administrative findings and judgment were supported by competent, substantial evidence." *Wiggins v. Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1174 (Fla. 2017) [42 Fla. L. Weekly S85a].

Discussion

Petitioner contends there was not competent, substantial evidence in the record demonstrating that the officers had reasonable cause to believe Petitioner was under the influence of a chemical or controlled substance, "as they did not make any such allegation, and specifically documented that the offense was not drug related, and that the .075 breath test result did not immediately establish reasonable cause to believe that Petitioner was under the influence of anything other than alcohol." Florida Statutes § 316.1932(1)(b) provides in pertinent part:

> Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to a urine test for the purpose of detecting the presence of chemical substances . . . or controlled substances if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of chemical substances or controlled substances. The urine test must be incidental to a lawful arrest and administered . . . **at the request of a law enforcement officer who has reasonable cause to believe such person was driving or was in actual physical control of a motor vehicle within this state while under the influence of chemical substances or controlled substances**.

(Emphasis added).

Reasonable cause is not defined in the statute. Black's Law Dictionary indicates it is synonymous with probable cause. "The existence of probable cause requires an examination of the totality of the circumstances." *Mathis v. Coats*, 24 So. 3d 1284, 1288 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D142b] (citation omitted). "The existence of probable cause is measured by an objective standard, not based on an officer's underlying intent or subjective motivation." *D.H. v. State*, 121 So. 3d 76, 81 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D1902b] (citations omitted). Here, the Complaint/Arrest Affidavit for Driving Under the Influence states in pertinent part:

> Officer Gibson conducted traffic stop on a vehicle that was driving without lights. Upon [Officer Viars'] arrival, Officer Gibson was walking up to the vehicle as [Officer Viars] approached the passenger side. [Officer Viars] observed a bottle of wine sitting behind the driver's seat and it was found to be open and half full. The driver was asked to step out and [Officer Viars] requested he step onto the sidewalk. [Petitioner] swayed while walking and [Officer Viars] could smell an odor of an alcoholic beverage on his breath. [Petitioner] consented to Field Sobriety Exercises and performed poorly. He provided a breath sample but refused a urine sample.

The Complaint/Arrest Affidavit for Refusal to Submit to Testing states in pertinent part:

> A traffic stop conducted on a vehicle that was driving without headlights. Field Sobriety tests were conducted which [Petitioner] performed poorly. [Petitioner] was asked to provide a urine sample after his breath results were a .075.

On both Arrest Affidavits, in regard to whether there was any indication of "Alcohol Influence" observed, the officer checked "yes," and as to whether there was any indication of "Drug Influence" observed, the officer checked "unknown." The Offense Report has "yes" marked under "Alcohol related" and "no" marked under "Drug related." It also states that Petitioner admitted to consuming alcohol but denied any drug use. The Offense Report narrative states:

> As [Officer Viars] looked into the vehicle, [he] could see a vape pen inside the cup holder with a liquid that [he] identified as possible THC oil. . . . [T]he oil inside the vape pen tested positive for THC oil. . . . [T]he passenger had stated the pen belonged to [Petitioner].

At the DHSMV hearing, Petitioner moved to invalidate the suspension asserting the request for a urine sample was unlawful. The Hearing Officer found that:

> Petitioner exhibited signs of impairment and had a vape pen which field tested positive for THC in his vehicle. Further, the passenger stated that the pen belongs to Petitioner. Despite Petitioner's denial of ownership of the pen or drug use, these facts create reasonable cause to believe Petitioner was under the influence of chemical substances or controlled substances.

Section 322.2615(7), Florida Statutes, requires the Hearing Officer to "determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension." This Court must determine if the Hearing Officer's decision is supported by competent, substantial evidence. In determining if competent, substantial evidence exists, this Court may only decide "whether the record contains the necessary quantum of evidence." *Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship*, 619 So. 2d 996, 1003 (Fla. 2d DCA 1993). A reviewing court "is not permitted to go farther and reweigh that evidence . . . or to substitute its judgment about what should be done." *Id.*; *Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Com'rs*, 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a] ("As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended."). Here, a review of the appendix indicates that competent, substantial evidence supports the Hearing Officer's decision.

Conclusion

Because the DHSMV's final order is supported by competent, substantial evidence, it is

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is **DENIED**. (PAMELA A.M. CAMPBELL, LINDA R. ALLAN, and THOMAS M. RAMSBERGER, JJ.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of arrest—Hearing officer's determination that probable cause existed for licensee's arrest is supported by deputy's observations that licensee was speeding, had strong odor of alcohol and glassy bloodshot eyes, and was lethargic and swaying—Because there was other competent substantial evidence supporting determination that deputy had probable cause for arrest, it is unnecessary to address admissibility of horizontal gaze nystagmus test—Petition for writ of certiorari is denied

RUSSELL RIVERA, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 19-000036AP-88B. UCN Case No. 522019AP000036XXXXCI. June 8, 2020. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER AND OPINION

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

Facts and Procedural History

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

On March 16, 2019, Deputy Mowatt observed the Petitioner's vehicle driving at a high rate of speed which he estimated to be 70 MPH in a 30 MPH zone. Deputy Mowatt activated his radar and confirmed the Petitioner's speed at 71 MPH in the 30 MPH zone. Deputy Mowatt initiated a traffic stop, made contact with the Petitioner and observed signs of impairment.

Deputy Mowatt observed the Petitioner's eyes to be bloodshot and glassy and he had a strong and distinct odor of an alcoholic beverage coming from his breath.

Deputy Mowatt requested the Petitioner perform Field Sobriety Tests. The Petitioner told Deputy Mowatt he had two plates in his knee and has three spinal surgeries; Deputy Mowatt also took into account information from the Petitioner that he is on his feet a lot for his job as he owns a motorcycle shop when determining the standardized Field Sobriety Tests were appropriate to administer to the Petitioner. Based on the Petitioner's performance on all three Field Sobriety Tests, Deputy Mowatt's observations, and the totality of the circumstances, the Petitioner was placed under arrest for DUI.

Deputy Mowatt requested the Petitioner submit to a breath test which the Petitioner refused after being read Implied Consent.

Based on Petitioner's refusal to provide a breath sample, his license was suspended. After the hearing, the license suspension was upheld. Petitioner then filed the instant Petition for Writ of Certiorari.

Standard of Review

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

Discussion

Petitioner contends the Hearing Officer departed from the essential requirements of law by admitting evidence regarding the HGN test, and, without the HGN test, the Hearing Officer's finding that Deputy Mowatt had probable cause to arrest Petitioner was not supported by competent, substantial evidence. Because competent, substantial evidence supports the determination that probable cause existed for the arrest without consideration of the HGN test, we decline to address the admissibility of the HGN test.

Probable cause for a DUI arrest exists if "the facts and circumstances allow a reasonable officer to conclude that an offense has been committed." *Mathis v. Coats*, 24 So. 3d 1284, 1288 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D142b] (internal citations omitted). "The facts are to be analyzed from the officer's knowledge, practical experience, special training, and other trustworthy information." *Id.* Probable cause for a DUI arrest is based on several factors including the odor of alcohol, the "reckless or dangerous operation of a vehicle, slurred speech, lack of balance or dexterity, flushed face, bloodshot eyes, admissions, and poor performance on field sobriety exercises." *Id.* (quoting *State v. Kliphouse*, 771 So. 2d 16, 23 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f]).

In the instant case, Petitioner agreed to perform field sobriety exercises. Although there was only one "decision clue" indicating impairment on the one-leg-stand exercise, the Deputy observed three decision clues during Petitioner's performance on the walk-and-turn exercise. Petitioner maintains that he should have been provided alternative field sobriety exercises after he informed the Deputy that he had two plates in his knee and three spinal surgeries, and since he was required to perform the regular exercises despite his injuries, his performance on the walk-and-turn exercise is not indicative of impairment. However, considering the totality of the circumstances, competent, substantial evidence supports a determination that probable cause existed for the arrest. In addition to his performance on the field sobriety exercises, Petitioner was stopped shortly after 1:00 am for driving 71 MPH in a 30 MPH zone, had a strong and distinct odor of alcohol, bloodshot and glassy eyes, was lethargic, and was swaying. Accordingly, competent, substantial evidence supports the Hearing Officer's decision upholding Petitioner's license suspension.

Conclusion

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

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

* * *

Municipal corporations—Commissioners—Removal from office—Due process—City's notice of intent to remove commissioners from their positions on housing authority satisfied requirements of section 421.07 and due process where notice of charges were sent to commissioners at their housing authority offices and email addresses—Fact that commissioners chose not to attend hearing or send their attorney to hearing cannot be used as evidence that they were not afforded opportunity to be heard—Because commissioners and their counsel chose not to attend hearing, additional arguments regarding essential requirements of law and whether city council's findings are supported by competent substantial evidence have not been preserved for review

HARRY HARVEY, et al., Petitioners, v. CITY OF ST. PETERSBURG, FLORIDA, Respondents. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 19-000042AP-88B. UCN Case No. 522019AP000042XXXXCI. May 20, 2020. Counsel: Brett B. Pettigrew, Office of the City Attorney, St. Petersburg, for Respondents.

ORDER AND OPINION

Petitioners challenge the decision of the St. Petersburg City Council ("the Council") to remove Commissioners Harry Harvey, Delphinia Davis, and Ann Sherman-White from their positions with the St. Petersburg Housing Authority ("SPHA"). Based on the Court's conclusion that the Commissioners' terminations comported with constitutional due process standards, the Court denies the Petition for Writ of Certiorari.

Facts and Procedural History

On April 29, 2019, Mayor Rick Kriseman drafted cover letters to each of the three Commissioners informing them of his intent to remove them from their positions subject to the concurrence of the Council, pursuant to section 421.07, Florida Statutes. The Mayor provided the Commissioners with the hearing date, May 16, 2019, the opportunity to file a written response by May 10, 2019, and the opportunity to resign before the hearing. His cover letter indicates that he attached a copy of the charges and a binder of related documents to each. Thereafter, sometime between April 29, 2019 and May 6, 2019, envelopes containing those cover letters, the charging documents, and related evidentiary documents supporting the charges were delivered to each Commissioner at the SPHA office and also to each Commissioner's official SPHA email address.

Commissioner Delphinia Davis sent a read receipt to the email correspondence on May 6, 2019, the same day it was sent, but the other two Commissioners did not. The City, however, has provided receipts of delivery for each email. On May 6, 2019, Petitioners were also provided notice by email and hand delivery that a newspaper notice regarding the removal hearing ran in the Tampa Bay Times on May 5, 2019, and were also provided a copy of the procedures for the removal hearing.[1]

On May 15, 2019, the day before the scheduled hearing before the Council, Petitioners' counsel, Mr. Nabatoff, sent a letter to the Executive Assistant City Attorney, Joseph Patner, requesting a

continuance of thirty days. Mr. Nabatoff stated that he had only been retained one day prior, on May 14, and had not had time to review the voluminous materials related to these charges nor to prepare adequate defenses to such, and additionally, that his clients had not properly been given a copy of the charges against them. Mr. Nabatoff argued that delivery of the charges to the Commissioners at SPHA and through their official SPHA email addresses was not sufficient and that no attempt had been made to serve the charges on the Commissioners at their personal emails or addresses. Mr. Patner responded on the same day indicating that Petitioners had been noticed and provided a copy of the charges and supporting documentation several times through email and delivery of physical copies of the documents in question on April 29, 2019. Mr. Patner also referenced the publication in the Tampa Bay Times and the notice of such to Petitioners. Accordingly, Mr. Patner declined to grant a continuance.

The hearing before the Council was held on May 16, 2019, at which time, after a lengthy deliberation, the Council voted to remove the three Commissioners. None of the three Commissioners nor their counsel attended the hearing. City Council members called for Petitioners or Petitioners' representative several times throughout the hearing and even sounded the halls for them. Additionally, the Petitioners did not submit any written responses to the charges.

Discussion

Petitioners assert that the Council violated their due process when the Council failed to provide a copy of the charges against the Petitioners prior to the removal hearing. Petitioners maintain that a copy of the charges should have been served against each of them at either their home address, personal email address, or place of business.

The Court finds that section 421.07, Florida Statutes, dictates the following regarding removal of Commissioners:

> For inefficiency or neglect of duty or misconduct in office, a commissioner of an authority may be removed by the mayor with the concurrence of the governing body, but ***a commissioner shall be removed only after he or she shall have been given a copy of the charges at least 10 days prior to the hearing thereon and had an opportunity to be heard in person or by counsel.*** In the event of the removal of any commissioner, a record of the proceedings, together with the charges and findings thereon, shall be filed in the office of the clerk.

The Court finds the statute provides no indication of and leaves open for interpretation the proper way to provide the Commissioners with the charges.

"The extent of procedural due process afforded to a party in a quasi-judicial hearing is not as great as that afforded to a party in a full judicial hearing. Consequently, such hearings are not controlled by strict rules of evidence and procedure. Nevertheless, a party to a quasi-judicial hearing, by virtue of its direct interest that will be affected by official action, 'must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts." *Carillon Cmty. Residential v. Seminole Cty.*, 45 So. 3d 7 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D1467a] (internal citations omitted). "A quasi-judicial hearing generally meets basic due process requirements if the parties have provided notice of the hearing and an opportunity to be heard." *Id*.

First, the Court finds, Petitioners never argue that they failed to receive actual notice of the charges. In fact, it appears that their counsel had voluminous materials to review and that was part of the reason for the request for a continuance. The Court finds there is no indication in their Petition or Reply that they failed to open the emails sent to their SPHA email addresses or failed to receive the documents delivered by courier to the SPHA offices.

Further, the notice required under due process

> must be "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. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance."

Gamez v. First Union Nat. Bank of Fla., 31 So. 3d 220, 224 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D550a]. Given that the statute does not provide further instruction on how the charges are to be given to the Commissioners, the Court finds that the steps the City took to provide this information to the Commissioners was at least reasonably calculated to apprise them of the charges, the hearing, and the evidence supporting the charges.

Additionally, the Commissioners' decision to not attend the hearing or send their attorney to the hearing cannot now be used as evidence that they were not afforded an opportunity to be heard. *See Hous. Auth. Of City of Tampa v. Robinson*, 464 So. 2d 158, 164 (Fla. 2d DCA 1985) (holding that Appellee's failure to take advantage of the opportunities made available to him to have a post-termination hearing cannot then support a finding that he was constitutionally deprived of his procedural due process rights). "Thus, where a government entity provides notice and a meaningful opportunity to be heard, satisfying the requirements of procedural due process, a defendant's voluntary failure to meaningfully participate in those proceedings will not vitiate the protections accorded." *A & S Entm't, LLC v. Florida Dep't of Revenue*, 282 So. 3d 905, 909 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2341b].

Furthermore, the Court declines to address Petitioners' additional arguments as "in order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) [30 Fla. L. Weekly S548a]. As Petitioners' did not attend the hearing nor send legal representation to the hearing, their additional arguments concerning the essential requirements of law and whether the Council's findings were supported by competent, substantial evidence have not properly been preserved for review by this Court.

Conclusion

Because the City complied with the fundamental requirements of due process by providing reasonable notice and an opportunity to be heard to Commissioners Harry Harvey, Delphinia Davis, and Ann Sherman-White before terminating them, it is

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

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[1]The City also provided notice of the removal to the counsel for SPHA, Jacqueline Kovilaritch; however, Ms. Kovilaritch responded that she would not provide this notice to the Commissioners because she did not and could not represent them in their individual capacity.

* * *

Licensing—Driver's license—Suspension—Driving under influence—Lawfulness of detention—Hearing officer's finding that deputy had reasonable suspicion to request that licensee submit to field sobriety exercises is supported by competent substantial evidence where deputy observed licensee speeding, weaving, and coming to sudden hard stop and, after stop, observed that licensee had watery and glassy eyes and odor of alcohol—Petition for writ of certiorari is denied

MICHAEL ANTHONY GIALLOURAKIS, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 19-000007AP-88A. UCN Case No. 522019AP000007XXXXCI. July 17, 2020. Petition for Writ of Certiorari from Decision of Hearing Officer Bureau of Administrative

Reviews Department of Highway Safety and Motor Vehicles. Counsel: Kevin J. Hayslett, for Petitioner. Christine Utt, Gen. Counsel and Mark L. Mason, Asst. Gen. Counsel, for Respondent.

ORDER AND OPINION

(**PER CURIAM**.) Petitioner challenges a final order from the Department of Highway Safety and Motor Vehicles upholding the suspension of his driving privilege pursuant to § 322.2615, Florida Statutes. Petitioner asserts that the Hearing Officer's decision departed from the essential requirements of law and was not supported by competent, substantial evidence. For the reasons set forth below, the Petition for Writ of Certiorari is denied.

Facts and Procedural History

At 1:02 am on September 14, 2018, Pinellas County Sheriffs Deputy Jacoby observed Petitioner speeding. As Deputy Jacoby was attempting to catch up to Petitioner to pace clock him, Deputy Jacoby noticed Petitioner was drifting within his lane. Deputy Jacoby then saw Petitioner stop abruptly with all four tires past the stop line, at which time Deputy Jacoby pulled him over. Upon making contact with Petitioner, Deputy Jacoby observed Petitioner's eyes to be watery and glassy and detected an odor of alcoholic beverage coming from inside the vehicle (Petitioner was the sole occupant). Deputy Jacoby also stated that Petitioner "appeared impaired."

Deputy Jacoby then asked Petitioner to step out of the vehicle so he could perform an HGN test of Petitioner's eyes, which provided indicators of impairment. Thereafter, Deputy Jacoby requested Petitioner perform additional field sobriety exercises. After performing poorly on the field sobriety exercises, Petitioner was arrested for driving under the influence. He provided breath samples indicating a breath alcohol concentration of .151 and .161. Petitioner's license was suspended based on his breath test results. After a Formal Review Hearing, the license suspension was upheld. Petitioner then filed the instant Petition for Writ of Certiorari.

Standard of Review

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

Discussion

Petitioner asserts he was illegally detained for field sobriety exercises without the requisite reasonable suspicion of criminal activity. Specifically, Petitioner maintains that Deputy Jacoby had an "insufficient basis on which to form a reasonable suspicion of Petitioner's impaired operation of a motor vehicle" because Deputy Jacoby "made the simple conclusory statement in his narrative report that Petitioner 'appeared impaired' . . . without observing or recording any clues of actual impairment before having Petitioner exit for initiation of a DUI investigation." Deputy Jacoby's Offense Report narrative listed the following information about the stop:

> On 09/14/18, at approximately 0102 hours. I observed a green vehicle travelling eastbound on Main Street make a quick and hard stop at the red light on Patricia Avenue. . . . Upon making contact with the driver, . . . [his] eyes were glassy and watery and he appeared impaired.
>
> [Petitioner] agreed to HGN, but had difficulty following the pen with his eyes. . . . [Petitioner] had a distinct odor of an alcoholic beverage emanating from his breath.

At the Formal Review Hearing, Deputy Jacoby testified that he observed Petitioner speeding and "some side to side in the lane, where [Petitioner] was touching the lane markers." Petitioner then made "a quick and hard stop" at a red light with all four tires completely over the stop line. Deputy Jacoby "[m]ade contact with [Petitioner], made some observations that appeared that he was impaired. . . . [H]e had watery, glassy eyes and while speaking, [Deputy Jacoby] started to detect an odor of alcoholic beverage coming from inside the vehicle and [Petitioner] was the sole occupant."

"To request that a driver submit to field sobriety tests, a police officer must have reasonable suspicion that the individual is driving under the influence." *State v. Ameqrane,* 39 So. 3d 339, 341 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1148b]. "Reasonable suspicion is something less than probable cause, but 'an officer needs more than a mere hunch before he can detain a suspect past the time reasonably required to write a citation.' " *Maldonado v. State,* 992 So. 2d 839, 843 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2303a] (internal citations omitted). "Whether an officer's suspicion is reasonable is determined by the totality of the circumstances that existed at the time of the investigatory detention." *Gaffney v. State,* 974 So. 2d 425, 426 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2520c] (internal quotations omitted). Considering the totality of the circumstances "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *State v. Marrero,* 890 So. 2d 1278, 1282 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D252a] (citations omitted).

Upon certiorari review, this "[C]ourt must review the record to assess the evidentiary support for the agency's decision." *Dusseau v. Metro. Dade County Bd. of County Com'rs,* 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a]. Here, a review of the appendix demonstrates competent, substantial evidence supports the Hearing Officer's decision. When considering the totality of the circumstances, which include the entire driving pattern, Petitioner's watery and glassy eyes, and the odor of alcohol, Deputy Jacoby had the requisite reasonable suspicion to request Petitioner submit to HGN and other field sobriety exercises. *See State v. Castaneda,* 79 So. 3d 41, 42 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1347b] (holding that sufficient reasonable suspicion to detain Defendant for the purpose of conducting a DUI investigation existed where "the officer observed Defendant speeding, smelled an alcoholic beverage on Defendant's breath, and observed that Defendant's eyes were bloodshot and watery"); *Origi v. State,* 912 So. 2d 69, 71-72 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a] (holding that traveling at a high rate of speed, the odor of alcohol, and bloodshot eyes "gave rise to a reasonable suspicion sufficient to justify detaining [the driver] for a DUI investigation").

Conclusion

The Hearing Officer's decision to uphold the license suspension did not depart from the essential requirements of law and is supported by competent, substantial evidence.

Accordingly, it is

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is denied. (JACK R. ST. ARNOLD, PATRICIA A. MUSCARELLA, and KEITH MEYER, JJ.)

* * *

Appeals—Absence of transcript—Affirmance of lower tribunal ruling

JAMES FREDERICK SCHOOLER, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 19-AP-75. L.T. Case No. 19-CO-1598. UCN Case No. 512019AP000075APAXWS. February 24, 2020. On appeal from Pasco County Court, Honorable Frank I. Grey, Judge. Counsel: James Frederick Schooler, Hudson, pro se, for Appellant. No response, for Appellee.

ORDER AND OPINION

THIS MATTER comes before the Court *sua sponte* pursuant to

Florida Rule of Appellate Procedure 9.315(a) ("After service of the initial brief in appeals under rule 9.110, 9.130, or 9.140 . . . the court may summarily affirm the order to be reviewed if the court finds that no preliminary basis for reversal has been demonstrated").

Because Appellant did not transcribe the hearing before the trial court, Appellant cannot overcome the presumption of correctness in the trial court's order and the trial court's judgment is summarily affirmed.

STATEMENT OF THE CASE AND FACTS

This is one of five appeals from trial court judgments that Appellant violated sections of the Pasco County Code. *See* Appeal Numbers 19-AP-76; 19-AP-77; 19-AP-78; 19-AP-79.

In this particular case, Appellant was cited for three counts of violating section 106-54, Pasco County Code, for storing a white motorcycle with no license plate attached, a black motorcycle with no license plate attached, and a Chevy vehicle with the front left wheel sunken in the ground. An ordinance violation final hearing was held on August 1, 2019. On August 26, 2019, the trial court issued a written judgment finding Appellant in violation of the charged offenses. The judgment was rendered on September 4, 2019. Appellant timely-appealed.

STANDARD OF REVIEW

Where no transcript of a proceeding is made, an appellate court cannot reverse unless there is an error on the face of the trial court's order. Additionally, the error complained of must be a harmful error resulting in a miscarriage of justice. *Harris v. McKinney*, 20 So. 3d 400, 405-06 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D2077a] (citations and quotations omitted).

LAW AND ANALYSIS

Since the decision of the trial court comes to this appellate court with a presumption of correctness, this court must presume that the trial court's findings are correct unless Appellant can demonstrate that a reversible error was made. *Hirsch v. Hirsch,* 642 So. 2d 20 (Fla. 5th DCA 1994); *Casella v. Casella,* 569 So. 2d 848 (Fla. 4th DCA 1990). Significantly, what is missing from the appellate record is a transcript of the proceedings below or any record that would substantiate any of Appellant's claims. Additionally, there are no errors on the face of the trial court order.

It is therefore **ORDERED AND ADJUDGED** that the trial court's judgment is hereby summarily **AFFIRMED**. (DANIEL D. DISKEY, KIMBERLY CAMPBELL, and LAURALEE WESTINE, JJ.)

* * *

Criminal law—Possession of marijuana—Immunity—Medical marijuana—Trial court correctly found that defendant's amended motion to dismiss claiming immunity as qualifying patient under Medical Marijuana Amendment was legally insufficient where motion asserted that defendant possessed medical marijuana identification card but failed to assert that defendant was diagnosed with debilitating medical condition or that he possessed a physician certification, and defendant failed to correct facial deficiencies during hearing

CHARLES AUGUSTUS MERRITT, II, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 19-AP-43. L.T. Case No. 18-MM-5988. UCN Case No. 512019AP-000043APAXWS. June 15, 2020. On appeal from Pasco County Court, Honorable Anne Wansboro, Judge. Counsel: Christopher DeLaughter, Tampa, for Appellant. Jennifer E. Counts, Assistant State Attorney, for Appellee.

ORDER AND OPINION

Because the trial court correctly found that Appellant's pretrial Motion to Dismiss pursuant to the medical marijuana amendment, Article X, Section 29(a)(1), Florida Constitution, was legally insufficient on its face, the trial court did not err in denying the motion. Accordingly, the judgment and sentence are affirmed. Because this issue warrants affirmance by itself, this Court does not address the remaining issues.

STATEMENT OF THE CASE AND FACTS

Appellant was arrested for battery. During the search incident to arrest, law enforcement found marijuana in leaf form inside a device used for smoking marijuana. Appellant was charged by Information with possession of marijuana and possession of paraphernalia (but not battery). Appellant filed "Defense's Amended Motion to Dismiss under Immunity from Medical Marijuana Amendment."[1]

The Amended Motion to Dismiss

In his amended motion, Appellant argued that (1) the version of section 381.986(1)(j)(2), Florida Statutes (2018), in effect at the time of his arrest was an unconstitutional violation of Section X, Article 29, of the Florida Constitution because it banned smoking marijuana for medical purposes, and (2) because he had a "medical marijuana card,"[2] he was a qualifying patient within the meaning of Article X, Section 29, and was therefore immune from criminal prosecution.

The motion stated that Article X, Section 29, is an amendment to the Florida Constitution that legalized medical marijuana and set definitions and requirements to be followed in order for doctors to prescribe, dispensaries to dispense, and patients and caregivers to possess and use medical marijuana. The motion noted that in 2017, the Florida Legislature amended section 381.986, Florida Statutes, to supplement Article X, Section 29. The amended statute expressly excluded smoking marijuana from the definition of "medical use." *See* §§ 381.986(1)(j)(2) (excluding smoking marijuana from the definition of "medical use"); (12)(d) (providing that marijuana used or possessed that was not for a "medical use" was a violation of section 893.13, Fla. Stat. (2018)).

Appellant's motion asserted that as a result, People United for Medical Marijuana, Inc. filed an action for declaratory judgment and injunctive relief in Leon County Circuit Court. The Leon County trial court found that the smoking ban violated Article X, Section 29, and was therefore unconstitutional. *People United for Med. Marijuana v. Fla. Dep't of Health*, Case No. 37-2017-CA-001394 (Fla. 2d Cir. Ct. March 25, 2018). The Department of Health appealed to the First District Court of Appeal. While not directly referenced in Appellant's motion, this Court notes that the First District reversed the Leon County trial court's post-judgment order lifting an automatic stay of the trial court ruling, writing that People United was unlikely to win on the merits. *See Fla. Dep't of Health v. People United for Med. Marijuana*, 250 So. 3d 825 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D1511b].

However, Appellant's motion correctly noted that neither the First District nor any other Florida appellate court has ruled on whether the 2018 version of section 381.986(1)(j)(2) was unconstitutional for excluding smoking marijuana from the definition of "medical use," thus rendering it illegal under section 893.13. The motion asserted that this is because Governor Desantis ordered the Department of Health to drop the case and the Florida Legislature amended section 381.986 to permit the smoking of medical marijuana. *See* § 381.986(1)(j), Fla. Stat. (2019).

Appellant plainly recognized the possibility that on the date of his offense, the smoking exclusion version of section 381.986(1)(j)(2) applied to him because the motion argued that the trial court below should adopt the Leon County trial court's holding that the smoking exclusion was unconstitutional. Appellant argued that it would then follow that he was immune from criminal prosecution under Article X, Section 29, due to having a medical marijuana card in his possession. The motion noted that the Leon Circuit Court wrote that the smoking exclusion was unconstitutional because "it conflicts with the Florida Constitution and prohibits a use of medical marijuana that is

permitted by the [constitutional] amendment: smoking in private." *People United for Med. Marijuana*, Case No. 37-2017-CA-001394 at *1.

Procedurally, the motion argued that it should be addressed under Florida Rule of Criminal Procedure 3.190(b) pursuant to *Dennis v. State*, 51 So. 3d 456, 464 (Fla. 2010) [35 Fla. L. Weekly S731b] (finding that the proper procedure to assert Stand Your Ground immunity from criminal prosecution is a motion to dismiss under rule 3.190(b)). *Dennis* addressed a statutory immunity from criminal prosecution for justified use of force, the Stand Your Ground law. *See* § 776.032, Fla. Stat. (2019). Notably, Appellant's amended motion omitted a subsequent case that further clarified the procedure for pretrial Stand Your Ground immunity. *See Bretherick v. State*, 170 So. 3d 766 (Fla. 2015) [40 Fla. L. Weekly S411a] (finding that a defendant has the burden to prove entitlement to immunity by a preponderance of the evidence), superseded by statute, *Love v. State*, 286 So. 3d 177, 180 (Fla. 2019) [44 Fla. L. Weekly S293a].

The Hearing on the Amended Motion

The amended motion hearing was an evidentiary hearing. While not admitted into evidence, Appellant presented his patient identification card to both Appellee and the trial court. Appellant initially argued that immunity under Article X, Section 29, should be treated similarly to the current version of Stand Your Ground and therefore Appellant need only establish a prima facie claim for immunity whereupon the burden shifts to Appellee to prove by a preponderance of the evidence (rather than Stand Your Ground's clear and convincing evidence standard) that Appellant is not entitled to immunity.

Appellee rebutted by arguing that the 2019 change to section 381.986(1)(j) removing the exclusion for smoking medical marijuana did not apply to Appellant because Appellant committed his offense in November of 2018 and the change in the law was substantive and therefore not retroactive to Appellant.

Appellant responded by arguing that he was seeking constitutional immunity and not statutory immunity and that the trial court should adopt the reasoning of the Leon County Circuit Court and hold the pre-2019 version of section 381.986(1)(j)(2) unconstitutional before proceeding to the immunity analysis.

The trial court noted that under Article X, Section 29(a)(1), it appeared that for a defendant to claim immunity as a "qualifying patient," he must establish (1) a diagnosis of a debilitating medical condition, (2) possession of a physician certification, and (3) possession of a patient identification card. The trial court initially found that Appellant had not established immunity. However, the trial court impliedly reconsidered by permitting Appellant to testify and hear additional argument after making that finding.

Appellant testified that he has post-traumatic stress disorder (PTSD) and cancer. When he attempted to testify to the physician certification based upon what his physician told him, Appellee objected on hearsay grounds. The trial court sustained the objection.

On cross-examination, Appellant testified that he obtained the pipe from "someone." He further testified that he possessed the leaf form of marijuana and that he did not know the person he texted to obtain it.

In closing, Appellant argued that he is only required to establish a prima facie claim for immunity by bare assertion. He argued that presentation of the patient identification card was sufficient to establish that prima facie claim. Appellant argued that as a result, the burden shifted to Appellee to rebut that presumption by presenting evidence of lack of entitlement to immunity such as a lack of a card, the absence of a medical condition, or the absence of a physician certification.

Appellee argued that Appellant presented information outside the corners of his motion therefore the motion should be denied.

Appellee also argued that regardless of Appellant's arguments, section 381.986(1)(j) defines the appropriate use of medical marijuana and that the additional restrictions of section 381.986 apply even if a patient has a proper identification card. Appellee argued that Appellant testified that he did not receive the device from a qualified caregiver but someone gave it to him and that he received the marijuana from an unknown person via anonymous text message.

Appellee further argued that because the pre-2019 version section 381.986(1)(j)(2) specifically prohibits smoking medical marijuana, immunity does not apply.

The trial court found that "because the constitutional amendment has to be implemented and the only implementation I have is the statute," immunity does not apply because Appellant violated the statute.

The trial court further found that Appellant did not establish immunity because he only presented the patient identification card and therefore failed to establish the three requirements for immunity listed in Article X, Section 29(a)(1), of the Florida Constitution.

Immediately after the denial, Appellant pled no contest to the charged offenses. The trial court withheld adjudication. Appellant reserved the right to appeal the motion to dismiss and timely did so.

STANDARD OF REVIEW

Where a trial court's order ruling on immunity pursuant to a Florida Rule of Criminal Procedure 3.190(b) motion to dismiss presents a mixed question of law and fact, legal conclusions are reviewed *de novo* and findings of fact are reviewed for competent substantial evidence. *Cf. Bouie v. State*, 2020 WL 911979, 45 Fla. L. Weekly D415a at *16-17 (Fla. 2d DCA February 26, 2020) ("Starting with first principles, we think that the question of whether a defendant is entitled to immunity under the statute is a mixed question of law and fact because to answer it one must determine the governing law as stated in the statute, find the operative facts, and apply the law to those facts").

Interpretation of a constitutional provision is reviewed *de novo*. *Lewis v. Leon County*, 73 So. 3d 151, 153 (Fla. 2011) [36 Fla. L. Weekly S525a].

LAW AND ANALYSIS

This appeal raises potential constitutional issues related to Article X, Section 29, including whether the exclusion of smoking marijuana from the definition of "medical use" in the 2018 version of section 381.986(1)(j)(2), Florida Statutes, violates Article X, Section 29; whether an otherwise qualifying patient must establish that the marijuana and paraphernalia came from a Medical Marijuana Treatment Center (MMTC) in order to successfully claim immunity; whether a person claiming immunity must establish compliance with all applicable provisions of section 381.986; and which party has the burden of proof in a motion for immunity from criminal prosecution under the medical marijuana constitutional amendment. However, because the trial court correctly found that Appellant's amended motion to dismiss was legally insufficient, this Court need not address those issues.

Article X, Section 29(a)(1) of the Florida Constitution provides that a "*qualifying patient* in compliance with this section is not subject to criminal . . . liability or sanctions under Florida law." (Emphasis added.) "Qualifying patient" is a legal term for which a definition is provided within the medical marijuana constitutional provision itself. *See* Art. X, § 29(b)(10), Fla. Const. To meet the definition of a qualifying patient, a defendant must meet three requirements: (1) Be diagnosed with a "debilitating medical condition;" (2) possess a physician certification; and (3) possess a qualifying patient identification card.

A "debilitating medical condition" is defined as cancer, epilepsy, glaucoma, positive status for [HIV, AIDS, PTSD, ALS], Crohn's

disease, Parkinson's disease, multiple sclerosis . . . [etc]." Art. X, § 29(b)(3), Fla. Const. However, based upon the language of section 29(a)(1), it is not sufficient to simply testify that you have a debilitating medical condition. Depending on the burden of proof, you must either affirmatively allege or establish with evidence that a doctor diagnosed you with a debilitating medical condition.

A "physician certification" is a "*written document signed by a physician*, stating that in the physician's professional opinion, the patient suffers from a debilitating medical condition, that the medical use of marijuana would likely outweigh the potential health risks for the patient, and for how long the physician recommends the medical use of marijuana for the patient." Art. X, § 29(b)(9), Fla. Const. (Emphasis added.)

An "identification card" is a "document issued by the [Florida] Department [of Health] that identifies a qualifying patient or caregiver." Art. X, § 29(b)(3), Fla. Const.

Appellant attempted to argue before the trial court that because he possesses an "identification card," he is a "qualifying patient" according to the Department because the Department only issues identification cards to qualifying patients. Therefore, the identification card itself creates a prima facie claim that he is a "qualifying patient" for the purpose of pretrial immunity from criminal prosecution. Appellant is incorrect for a number of reasons.

First, the plain language of section 29 (b)(10) requires the establishment of all three elements to meet the definition of a "qualifying patient." Second, the trial court determines whether a defendant is a "qualifying patient" for the purposes of immunity from criminal prosecution, not the Department. Third, whether a defendant is immune from criminal prosecution turns on whether the defendant was a qualifying patient at the time he was alleged to have committed the criminal offenses of possession of marijuana or paraphernalia. The possession of an "identification card" only establishes that the defendant met the definition of a qualifying patient at the time the identification card was issued. Diagnoses can change and physician certifications expire. Thus, in a claim for pretrial immunity from criminal prosecution, a defendant must establish, and the trial court must find, that all three elements were met *at the time of marijuana or paraphernalia possession* for a defendant to claim he is a "qualifying patient" entitled to pretrial immunity.[3]

Having determined what must be established before a defendant can claim he is a qualifying patient entitled to pretrial immunity, the Court now turns to the burden of proof. Appellant argued below that similar to pretrial immunity under the Stand Your Ground statute, a defendant need only assert a prima facie claim for immunity in the written motion, whereupon the State has the burden of proving that a defendant is not entitled to immunity by a preponderance of the evidence.

Initially, like the medical marijuana Constitutional provision, the Stand Your Ground statute used to be silent regarding the burden of proof. As a result of this silence, the Florida Supreme Court found that the defendant bore the burden of proving entitlement to immunity by a preponderance of the evidence. *See Dennis v. State*, 51 So. 3d 459 (Fla. 2010) [35 Fla. L. Weekly S731b]; *Bretherick v. State*, 170 So. 3d 766 (Fla. 2015) [40 Fla. L. Weekly S411a]. After *Bretherick*, the burden of proof in Stand Your Ground immunity changed from the defendant to the State due to a statutory amendment expressly providing the burden of proof. *See* § 776.032(4), Fla. Stat. (2018). No similar change has occurred to Article X, Section 29. Therefore, it is at least arguable that the defendant bears the burden of proving entitlement to medical marijuana immunity by a preponderance of the evidence for the reasons stated in *Dennis* and *Bretherick*.

Ultimately, however, the burden of proof question need not be resolved. This Court holds that the trial court correctly found that even under Appellant's preferred burden of proof, his amended motion failed to make a prima facie claim that he was a qualified patient within the meaning of Article X, Section 29(a)(1) and (b)(10). Therefore, he failed to make a prima facie claim for pretrial immunity.

In order to establish a prima facie *claim*, as opposed to a prima facie *case*, a defendant need only allege a facially sufficient claim of immunity within the written motion itself. No evidence, even prima facie evidence like the State would need to adduce for a trial court to deny a motion for judgment of acquittal, is required. *See Jefferson v. State*, 264 So. 3d 1019, 1029-30 (Fla. 2d DCA 2018) [44 Fla. L. Weekly D135a] ("We interpret section 776.032(4)'s requirement of a prima facie claim . . . to mean that an accused must simply allege a facially sufficient prima facie claim . . . in a motion to dismiss filed under rule 3.190(b) and present *argument* in support of that motion at a pretrial immunity hearing") (emphases added).

Appellant's motion failed to make a prima facie claim because it asserted only one of the three elements required to meet the definition of a "qualifying patient:" that he possessed an identification card. The motion did not assert that he was diagnosed with a debilitating medical condition and did not assert that he possessed a physician certification. Even after the trial court permitted Appellant to testify, he failed to correct these deficiencies. Appellant attempted to testify to the physician certification but the trial court sustained Appellee's hearsay objection. Appellant does not appeal that evidentiary ruling. And even if Appellant had been able to testify to what his physician told him, a physician certification is a physical document. *See* Art. X, § 29(b)(9), Fla. Const. Appellant did not assert in his written motion that he possessed one, did not testify during the hearing that he possessed one, and did not provide one in open court for inspection like he did with his identification card.

Finally, he did not assert in the written motion that he had been diagnosed with a debilitating medical condition. While he testified during the hearing that he had PTSD and cancer, both debilitating medical conditions listed in section 29(b)(1), he did not testify that he was diagnosed with those conditions by a physician. The definition of "qualifying patient" specifically requires a diagnosis. *See* Art. X, § 29(b)(10), Fla. Const.

Because Defendant's written amended motion did not establish a prima facie claim that he was a "qualifying patient" within the meaning of the medical marijuana amendment at the time of his arrest for possession of marijuana and paraphernalia, his motion failed to make a prima facie claim for pretrial immunity from criminal prosecution under Article X, Section 29(a)(1), of the Florida Constitution. Appellant did not correct this facial deficiency during the hearing. Therefore, the trial court did not err in denying Appellant's amended pretrial motion to dismiss for medical marijuana immunity.

CONCLUSION

The trial court correctly found that Appellant's amended motion to dismiss failed to make a prima facie claim for pretrial immunity. Accordingly, the trial court did not err in denying the motion and Appellant's judgment and sentence are affirmed.

It is therefore ORDERED and ADJUDGED that the order of the trial court is hereby AFFIRMED. (DANIEL D. DISKEY, SUSAN G. BARTHLE, and KIMBERLY SHARPE BYRD, JJ.)

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[1]This was Appellant's second medical marijuana motion to dismiss. However, Appellant does not appeal from the order denying the first motion and it is not relevant to the resolution of this appeal.

[2]"Medical marijuana card" is the colloquial term for the "identification card" defined in Article X, Section 29(b)(3), Florida Constitution.

[3]To be clear, this Court *does not hold* that a defendant need only establish that he or she is a qualifying patient in order to be entitled to pretrial immunity. This Court only holds that being a "qualifying patient" is one of the requirements for immunity. It may be that a district court of appeal or the Supreme Court of Florida will eventually hold

that a defendant claiming immunity must also establish, among other things, that the marijuana was for a medical use by asserting that it came from a Medical Marijuana Treatment Center. *See* Art. X, § 29(a)(1) ("The *medical use* of marijuana by a qualifying patient or caregiver . . . is not subject to criminal . . . liability or sanctions."); 29(b)(6) (" 'Medical use' means the acquisition, possession," or "use . . . *not in conflict with Department rules*") (Emphasis added). However, resolution of that and other Constitutional questions is not necessary to resolve this appeal and so this Court does not reach them.

* * *

Licensing—Driver's license—Revocation—DUI manslaughter—Department of Highway Safety and Motor Vehicles has no authority to reinstate non-restrictive driving privileges to licensee convicted of DUI manslaughter

DALE FRANCIS BOUDREAUX, Plaintiff, v. STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Defendant. Circuit Court, 7th Judicial Circuit (Appellate) in and for Volusia County. Case No. 2019 31319 CICI, Division 31. June 23, 2020. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, for Defendant.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(LEAH RANSBOTTOM CASE, J.) THIS CAUSE has come before the Court upon Plaintiffs/Petitioner's Petition for Writ of Certiorari filed July 15, 2019 and the Court being fully advised in the premises, finds as follows:

This court's scope of review is limited to determining whether (1) procedural due process was accorded; (2) the essential requirements of the law were observed; and (3) the administrative agency's findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant,* 419 So.2d 624, 626 (Fla. 1982)

Pursuant to state statue, Petitioner's driving privilege was permanently revoked upon conviction of DUI Manslaughter.[1] Petitioner applied for and was granted a hardship license for business purposes. The Petitioner has no further relief available and the Department is without authority to reinstate nonrestrictive driving privileges. Therefore,

It is ORDERED AND ADJUDGED that said Petition is **DENIED**.

[1]Petitioner has conceded the permanent revocation was lawful following his conviction for DUI manslaughter.

* * *

Appeals—Briefs—Appendix—Motion to strike appendix of brief that contains county court order and related portions of brief is denied—Court order falls within ambit of "other authorities" that may be included in appendix under rule 9.220(b)

FLORIDA HOSPITAL MEDICAL CENTER a/a/o Brandon Moody, Appellant, v. GEICO INDEMNITY COMPANY, Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2019-CV-67-A-O. L.T. Case No. 2018-SC-4385-O. June 12, 2020. Counsel: Chad A. Barr, Chad Barr Law, Altamonte Springs, for Appellant. Rebecca Townsend, Dutton Law Group, Tampa, for Appellee.

ORDER DENYING APPELLEE'S MOTION TO STRIKE APPELLANT'S APPENDIX TO INITIAL BRIEF AND PORTIONS OF APPELLANT'S INITIAL BRIEF

(DIANA M. TENNIS, J.) **THIS MATTER** came before the Court for consideration of Appellee's Motion to Strike Appellant's Appendix to Initial Brief and Portions of Appellant's Initial Brief ("Motion to Strike"), filed on June 8, 2020; Appellant's Appendix to Initial Brief ("Appendix"), filed on June 4, 2020; and Appellant's Initial Brief, filed on June 4, 2020. The Court finds as follows:

The Appendix includes a copy of a recent order from the Hillsborough County Court, *MRI Associates of St. Pete v. Progressive Select Insurance Co.*, No. 2019-CC-002590 (Hillsborough Cty. Ct. Mar. 31, 2020) [28 Fla. L. Weekly Supp. 348a]. The legal argument in Appellant's Initial Brief makes reference to this decision for support.

In the Motion to Strike, Appellee argues that the Appendix must be stricken because it is in violation of Florida Rule of Appellate Procedure 9.220(b), as it includes documents and papers that were not contained within the record on appeal, and it does not include a "conformed copy of the opinion or order to be reviewed" or "any other portions of the record and other authorities." Rather, according to Appellee, the Appendix contains an order from another court, the decision of the Hillsborough County Court in *MRI Associates of St. Pete*, and this Court is not "authorized to take judicial notice" of it. Appellee also argues that the portions of the Initial Brief that make reference to the Appendix should be stricken as well.

The Court finds that Appellee's Motion to Strike lacks merit. Florida Rule of Appellate Procedure 9.220(b) expressly states that an appendix may include "other authorities." The decision of the Hillsborough County Court in *MRI Associates of St. Pete* clearly falls under the ambit of "other authorities" as case law.

Therefore, it is **ORDERED AND ADJUDGED** that Appellee's Motion to Strike Appellant's Appendix to Initial Brief and Portions of Appellant's Initial Brief is **DENIED**.

* * *

Appeals—Briefs—Appendix—Motion to strike appendix of brief that contains circuit court orders denying petitions for writs of certiorari and related portions of brief is denied—Although orders should not be construed as opinions on merits, court is entitled to take judicial notice of its own records

FLORIDA HOSPITAL MEDICAL CENTER a/a/o Brandon Moody, Appellant, v. GEICO INDEMNITY COMPANY, Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2019-CV-67-A-O. L.T. Case No. 2018-SC-4385-O. August 7, 2020. Counsel: Chad A. Barr, Chad Barr Law, Altamonte Springs, for Appellant. Rebecca Townsend, Dutton Law Group, Tampa, for Appellee.

ORDER DENYING APPELLEE'S MOTION TO STRIKE PORTIONS OF APPELLANT'S REPLY BRIEF AND APPELLANT'S APPENDIX TO ITS REPLY BRIEF

(DIANA M. TENNIS, J.) **THIS MATTER** came before the Court for consideration of Appellee's Motion to Strike Portions of Appellant's Reply Brief and Appellant's Appendix to its Reply Brief ("Motion to Strike"), filed on August 5, 2020; Appellant's Response, filed on August 6, 2020; Appellant's Appendix to Reply Brief ("Appendix"), filed on August 5, 2020; and Appellant's Reply Brief, filed on August 5, 2020. The Court finds as follows:

The Appendix includes copies of orders issued by an appellate panel of this Court that denied petitions for writs of certiorari in 13 cases. Appellant's Reply Brief makes reference to these orders, stating that in those petitions, Appellee (as the petitioner in those cases) "made the argument raised herein *verbatim*" and that this Court rejected its argument in denying the 13 petitions. The 13 orders are also listed in a footnote.

In the Motion to Strike, Appellee argues that the Appendix must be stricken because it is in violation of Florida Rule of Appellate Procedure 9.220(b), as it "contains documents that were *not* presented to the trial court, that were *not* considered by the trial court, and that are *not* part of the record on appeal." (Emphasis in original.) Appellee acknowledges that an appendix may contain "other authorities" under Rule 9.220(b), but urges that the 13 orders do not constitute "authority" under Florida law. *See, e.g., Johnson v. Fla. Farm Bureau Cas. Ins. Co.*, 542 So. 2d 367, 369 (Fla. 4th DCA 1988), *review dismissed*, 551 So. 2d 461 (Fla. 1989) ("The successor judge erred in concluding that the previous decision on this subject was the law of the case. A denial of certiorari is not to be construed as an opinion on the merits

of the petition."); *Bevan v. Wanicka*, 505 So. 2d 1116, 1117 (Fla. 2d DCA 1987) (a "simple denial of certiorari without opinion is not an affirmance and does not establish the law of the case"). Appellee also argues that the portions of the Reply Brief that make reference to the Appendix should be stricken as well.

The Court denies Appellee's Motion to Strike. It may well be that the 13 denials without opinion issued by this Court should not be construed as opinions on the merits of Appellee's argument in those cases. *See Johnson*; *Bevan*. But that in and of itself does not furnish a basis to strike Appellant's Appendix and the portions of the Reply Brief referring to them. As the Response points out, the Reply Brief does not cite to this Court's 13 prior denials "as binding authority." In any event, Appellee overlooks that this Court is fully entitled to take judicial notice of its own records. *See, e.g., Straitiff v. State*, 228 So. 3d 1173, 1177 n.2 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D2175e] (on rehearing).

Therefore, it is **ORDERED AND ADJUDGED** that Appellee's Motion to Strike Portions of Appellant's Reply Brief and Appellant's Appendix to its Reply Brief is **DENIED**. This appeal is now deemed to be perfected.

* * *

Counties—Zoning—Special exception—Non-use variance—County's decision to deny non-use variance to open liquor store is supported by competent substantial evidence that proposed liquor store would violate county code regulations on concentration of liquor stores

PUBLIX SUPERMARKETS, INC., Petitioner, v. MIAMI-DADE COUNTY, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2017-82-AP-01. August 11, 2020. On Petition for Writ of Certiorari from Miami-Dade County CZAB Resolution 14-4-17. Counsel: Louis J. Terminello, Greenspoon Marder, P.A., for Petitioner. Abigail Price-Williams, Miami-Dade County Attorney and Andrew Paul Kawel, Assistant Miami-Dade County Attorney, for Respondent.

[Prior order at 27 Fla. L. Weekly Supp. 120a.]

(Before MUIR, B. ARECES and WALSH[1], JJ.)

OPINION ON MANDATE FROM THE THIRD DISTRICT COURT OF APPEAL

(PER CURIAM.) Publix Supermarkets, Inc. ("Publix") sought a non-use variance from Miami-Dade County Community Zoning Appeals Board ("CZAB") to open a liquor store adjacent to one of its existing small grocery stores in a commercial location. To permit the proposed liquor store would violate two Miami-Dade County Code provisions. Miami-Dade County Code section 33-150(A) requires that liquor stores may not be spaced within 1,500 feet, and section 33-311(A)(3) bans Sunday sales of alcohol. A neighbor, T-Rexx Colonial Liquors ("T-Rexx"), objected to granting Publix a non-use variance. T-Rexx is located within 415 feet of the proposed liquor store. Following a public hearing, although the CZAB staff recommended granting the non-use variance, the CZAB voted to deny the application.

A panel of this Court granted Publix's first-tier petition for writ of certiorari, finding that the *objector* failed to produce competent, substantial evidence to support its objection to the variance.

Miami-Dade County petitioned for writ of second-tier certiorari in the Third District Court of Appeal. *Miami-Dade County v. Publix Supermarkets, Inc.,* 2020 WL 2176653 (Fla. 3d DCA May 6, 2020) [45 Fla. L. Weekly D1089a]. The district court found that in granting certiorari, this court applied the wrong standard of review. The district court explained that the standard of review is not, as this Court found, whether the *opponent of an application* for special use variance brought forth competent, substantial evidence to invalidate an agency determination, but rather, whether " '[t]he record as a whole contained] substantial competent evidence to support a denial.' " *Id.* at *2 (quoting *Fla. Power & Light Co. v. City of Dania,* 761 So. 2d 1089, 1091 (Fla. 2000) [25 Fla. L. Weekly S461a]). In combing the record for evidence *supporting the opponent's position,* this Court erroneously applied the standard applicable at the municipal level under *Irvine v. Duval County Planning Commission,* 495 So. 2d 167 (Fla. 1986), rather than the correct standard of review for first-tier petitions for writ of certiorari. As the district court explained, our review is limited to: " ' [1] whether procedural due process is accorded, [2] whether the essential requirements of the law have been observed, and [3] whether the administrative findings and judgment are supported by competent substantial evidence.' " *City of Dania,* 761 So. 2d at 1092 (*quoting City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla.1982)).

Accordingly, the district court has remanded the case for us to determine whether there was competent, substantial evidence to support the CZAB's denial of Publix's application for special use exception.

The following evidence supports the CZAB decision. The objector before the CZAB, T-Rexx Colonial Liquors ("T-Rexx"), is located within 415 feet of Publix's proposed site. A liquor survey submitted by Publix to the CZAB shows that eight other businesses selling alcoholic beverages for on and off-site consumption are also located within 1500 feet. Four more are located within 2500 feet. T-Rexx also submitted evidence of eight liquor stores on a 4.51-mile section of US-1 from where the Publix liquor store would be located, 10 stores within 7.65 square miles of the Publix store and 14 more selling liquor for off-premises consumption. T-Rexx also presented a petition signed by multiple neighbors objecting to the additional liquor store.

The regulation of the concentration of liquor stores is a legislative function which is " 'well founded in the protection of health and morals of the general public.' " *Orange County v. Costco Wholesale Corp.,* 823 So. 2d 732 (Fla. 2002) [27 Fla. L. Weekly S608b] (*quoting Glackman v. City of Miami Beach*, 51 So. 2d 294, 296 (Fla. 1951)). The CZAB had competent, substantial evidence before it of eight liquor stores within 1500 feet of the proposed liquor store, not to mention multiple businesses which sell alcohol located within a several-mile radius of the proposed store. Because the order denying the special use variance was supported by competent, substantial evidence, the petition for writ of certiorari is hereby denied. (MUIR and B. ARECES, JJ., CONCUR.)

[1]Judge Walsh did not participate in the original panel decision.

* * *

Insurance—Appeals—Certiorari—Non-final orders—Denial of motion to consolidate—Fact that denial of motion to consolidate cases will require maintenance of independent actions is not irreparable harm meriting certiorari review—No abuse of discretion in denying motion to consolidate cases involving different patients, different allegations of medical necessity, different policies, and different exigencies justifying out-of-network claims

CELTIC INSURANCE COMPANY d/b/a AMBETTER FOR SUNSHINE HEALTH, Petitioner, v. DIGESTIVE MEDICINE HISTOLOGY LAB, LLC, et al., Respondents. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-299-AP-01, *consolidated with* 2019-300-AP-01[1]. July 29, 2020. Counsel: Allen P. Pegg, Hogan Lovells, US LLP, for Petitioner. Douglas Stein and Kenneth J. Dorchak, for Respondents.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

ORDER OF DISMISSAL

(PER CURIAM.) We dismiss these petitions for writ of certiorari for lack of jurisdiction. We find that the irreparable harm alleged—that maintaining independent actions will result in less efficiency and additional cost—is insufficient to merit certiorari review. *See Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc.,* 104 So. 3d 344 (Fla. 2012) [37 Fla. L. Weekly S691a].

Even if we reached the merits, we would deny this petition. Rule 1.270(a), Florida Rules of Civil Procedure, provides:

> (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it **may** order a joint hearing or trial of any or all the matters in issue in the actions; it **may** order all the actions consolidated; and it **may** make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(emphasis added) The rule is discretionary, not mandatory. The 15 small claims cases pending in the trial courts allegedly[2] involve different patients, different allegations of medical necessity, different policies and different exigencies justifying out-of-network insurance claims. The trial court did not, therefore, abuse its discretion in denying the motion to consolidate. While the cases have issues in common, the "mere possibility of different juries arriving at a different conclusion on a fact common to two lawsuits does not alone mandate consolidation." *See State Farm Fla. Ins. Co. v. Bonham,* 886 So. 2d 1072, 1073 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D2642a]. *See also Commercial Carriers Corp. v. Kelley,* 920 So. 2d 739 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D441c] (even where separate actions arise out of the same accident, consolidation is not mandated).

Finally, Respondents move for attorneys' fees.[3] Pursuant to Section 768.79, Florida Statutes, we provisionally grant entitlement to attorneys' fees, conditioned upon the trial court determining the sufficiency of the proposal for settlement and on the Respondents prevailing below.

Petition dismissed. (TRAWICK, WALSH and SANTOVENIA, JJ., CONCUR.)

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[1]Lower Court Case Numbers:
2019-010221-SP-23, 2019-010227-SP-23, 2019-010230-SP-23, 2019-010231-SP-23, 2019-010233-SP-23, 2019-012172-SP-23, 2019-012193-SP-23, 2019-012204-SP-23, 2019-012210-SP-23, 2019-012223-SP-23, 2019-012486-SP-23, 2019-012487-SP-23, 2019-012489-SP-23, 2019-012501-SP-23, 2019-012502-SP-23

[2]The actions are in their infancy below. No discovery has been done and the Defendant has not yet answered the complaints.

[3]We do not opine on whether the Respondents could be entitled to attorney's fees under sections 627.428(1) or 641.28, Florida Statutes.

* * *

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

UNITED AUTOMOBILE INSURANCE COMPANY, Appellant, v. ZENITH MOBILE DIAGNOSTIC, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2017-000300-AP-01. L.T. Case No. 2013-015705-SP-25. August 6, 2020. On Appeal from the County Court in and for Miami-Dade County, Hon. Gina Beovides, County Court Judge. Counsel: Michael J. Neimand, for Appellant. G. Bart Billbrough and Kevin Whitehead, for Appellee.

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

OPINION

(PER CURIAM.) United Automobile Insurance Company ("UAIC") appeals the trial court's order entering a final judgment on behalf of the provider, Zenith Mobile Diagnostic ("Zenith"). In granting summary judgment below, the trial court first found that Zenith introduced competent evidence supporting its prima facie claim that its bills were reasonable. The trial court then rejected UAIC's affidavit of Monica Johnson, UAIC's adjuster, records custodian, and expert witness, on the ground that the opinion utilized the cited fee schedules as an improper payment limitation without notifying its insured as required by *Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc.,* 141 So.3d 147 (Fla. 2013) [38 Fla. L. Weekly S517a]. In rejecting UAIC's evidence, the trial court rendered the provider's evidence uncontroverted, and thereafter entered summary judgment.

The standard of review of a trial court's entry of final summary judgment is de novo. *See Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.,* 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a]; *Sierra v. Shevin,* 767 So. 2d 524, 525 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1605a]. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *State Farm Mut. Auto. Ins. Co. v. Gonzalez,* 178 So. 3d 448, 450 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2352a], *citing State Farm Mut. Auto. Ins. Co. v. Pressley,* 28 So. 3d 105, 107 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D150b].

Zenith filed in support of its summary judgment motion the affidavit of its owner and physician, Dr. Rodolfo Alfonso, D.C., which opined that the charges for three x-rays of the spine were reasonable.

Monica Johnson, UAIC's adjuster, records custodian and expert witness as to reasonableness, provided an affidavit attesting to her background, training, and experience. Attached to her affidavit were several exhibits including documentation relating to Medicare, Tricare, and Worker's Compensation fee schedules. Johnson has reviewed thousands of medical bills as an insurance adjuster since 1998. Because of her extensive experience, she has gained knowledge of reasonable reimbursement levels in the PIP community of providers in South Florida. She testified in her affidavit to the criteria in Section 627.736(5)(a)(1) of the PIP statute which she applied for determining the reasonableness of each individual charge, including the following: 1) the usual and customary charges and payments accepted by providers at issue, 2) reimbursement levels in the community, 3) various state and federal fee schedules applicable to automobile and other insurance coverages, and 4) other information relevant to the reasonableness of the reimbursement of the services. Her opinion was based upon her background, training, experience and education in the field of insurance as an adjuster coupled with her personal knowledge of reimbursement levels in the community and her personal knowledge of applicable state and federal fee schedules. She testified that the amount charged for the CPT codes at issue was not reasonable.

Notwithstanding that we agree that the provider established a prima facie case for the reasonableness of its bills, we find the trial court erred in rejecting Appellant's expert's affidavit and granting summary judgment on the issue of reasonableness. The trial court's July 28, 2017 summary judgment order noted that the affidavit was not sufficient to raise a disputed issue of material fact and incorrectly utilized the cited fee schedules as an improper payment limitation without notifying its insured as required by *Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc.,* 141 So.3d 147 (Fla. 2013) [38 Fla. L. Weekly S517a].

In her capacity as an insurance adjuster, Johnson was specifically permitted to consider these fee schedules as part of her job. Section 627.736(5)(a)(1) specifically permits an insurer to take all the above information into account when determining whether a medical charge is reasonable. Accordingly, it was an abuse of discretion to accept the provider's affidavit while rejecting UAIC's affidavit. Taking UAIC's affidavit into account, it was error to grant summary judgment. *See State Farm Mutual Ins. Co. v. Gables Insurance Recovery a/a/o Yuderis Rego,* 27 Fla. L. Weekly Supp. 860a (Fla. 11th Cir. Ct. Nov. 20. 2019); *United Automobile Insurance Co. v. Open MRI of Miami Dade, Ltd. a/a/o Rosa Castillo,* Case No. 2017-326-AP-01 (Fla. 11th Cir. Ct. Nov. 6, 2019) [27 Fla. L. Weekly Supp. 791b]; *United Automobile Insurance Co., 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., 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. 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. 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. 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 the amount.

* * *

Landlord-tenant—Return of security deposit—Jurisdiction—County court—No merit to argument that county court lost jurisdiction because amount in controversy alleged in complaint for return of security deposit and counterclaim exceeded jurisdictional limit for small claims court—Due process—Trial court did not deprive landlords of due process by awarding tenants entirety of security deposit sought in their complaint or by entering summary judgment on day of trial under small claims rules—Claim that tenants failed to appear for trial is not supported by record—Trial court erred in failing to address landlords' counterclaim for breach of contract and negligence—No merit to argument that tenants failed to satisfy condition precedent by giving notice of intent to vacate premises by text rather than by mail and by failing to include their address in text where landlords do not contest that they received text and responded by timely submitting notice of claim to tenants—Trial court erred in finding that landlords' notice of claim did not substantially comply with requirements of section 83.49(3)(a)—Because notice substantially complied with statute, landlords are entitled to prove damages entitling them to keep portion of security deposit—Remand for trial on merits of original claim and on counterclaim

ISABEL CASAS and ISORA CASAS, Appellants, v. ANTHONY D. GANAWAY and ANGELA GANAWAY, Appellees. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-144-AP-01. L.T. Case No. 2018-11731-SP 26. August 6, 2020. Counsel: Michael Gulisano, Gulisano Law PLLC, for Appellants. Chad A. Barr and Dalton L. Gray, Law Office of Chad A. Barr, for Appellees.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

(TRAWICK, J.) This matter arises from a dispute regarding the return of a security deposit by the landlord at the termination of a residential tenancy when the tenant vacated the premises. Appellees (Tenants), filed suit for the return of the security deposit when the landlord refused to return the full amount of the deposit. Appellants (Landlords) filed an answer with an affirmative defense along with a counterclaim. The trial court entered final judgment on the original claim in favor of Tenants. Upon a review of the record we find that the trial court erred in entering that judgment and we reverse.

Tenants entered into a written lease with Landlords to rent a residential property. Tenants provided Landlords with a security deposit in the amount of $5,100 at the beginning of the one-year lease term. The lease included the following provision regarding any required notice:

> Any notice which either party may or is required to give, such notice shall be in writing and shall be deemed given when it shall have been deposited in the United States Mails, certified or registered, or hand delivered and addressed to the party for whom it is intended as follows:
>
> FOR THE LANDLORD:
> Isabel C. Casas, (address omitted)
>
> FOR THE TENANT:
> (address omitted)

When the lease term expired, Tenants remained in the premises month to month.[1] Tenants subsequently notified Landlords via text message that they would vacate the property on August 10, 2018, but did not vacate the property until August 11, 2018.

On September 10, 2018, Landlords sent Tenants, pursuant to Section 83.49. Florida Statutes, a "Notice of Claim" of $3,096.83 against the security deposit as a result of damages Landlords alleged had been caused by Tenants. On September 14, 2018, Tenants objected to Landlords' claim, contending that Landlords were not entitled to any part of the deposit. As a result of this dispute Tenants filed a small claims action for the return of the security deposit. They claimed that they were entitled to the full deposit amount of $5,100. However, within the body of the complaint and in two separate "wherefore" clauses, Tenants sought $2,909.83 and $2,003.17 in damages.[2] This totaled $4,913.00, an amount within the limitation for a small claims action.

Landlords filed a pro se answer listing a litany of damages they maintained were caused by Tenants and that they were entitled to retain part of the security deposit as compensation.[3] They also filed a counterclaim for breach of contract and negligence in which they claimed that they should be awarded the entire deposit of $5,100.

Neither party requested that the Rules of Civil Procedure be invoked.[4] The case was set for non-jury trial for May 3, 2019. On April 11, 2019, Tenants filed a motion for partial summary judgment asking the Court to find that Tenants were entitled to portion of the security deposit unclaimed by Landlords, or $2,003.17. Landlords filed a response stating that their damages exceeded the amount originally claimed in the notice of claim.

Ten days before the scheduled trial date, Tenants filed a motion to allow them to appear at the trial telephonically. The record before this Court does not indicate whether the trial court ever ruled on that motion. Additionally no record of the events of May 3, 2019, were provided to this Court other than a document entitled "Non-Jury Trial Minutes" which indicates that the length of "trial" was 1 1/4 hours and that the Plaintiff (Tenants) were awarded $5,420.[5] The trial court entered "Final Judgment at Non-Jury Trial" on May 8, 2019 entering judgment in favor of Tenants in the amount of $5,000. In this final judgment the trial court specifically found that the Landlords "failed to properly inform the Plaintiffs of Defendants' Intent to impose a claim against the Plaintiffs (sic) security deposit as required by Fla. Stat. 83.49(3), by failing to meet the statutory requirements of Fla. Stat. 83.49(3)(a)." No mention was made of the counterclaim. The trial court later denied Landlords' motion for rehearing.

Landlords have raised several arguments. First, they maintain that the trial court lacked jurisdiction because the amount claimed in both the original claim and the counterclaim exceeded the threshold for a small claims matter. Second, they maintain that they were denied due process since a) the trial court awarded Tenants more than what they asked for in the complaint; b) the trial court entered summary judgment under Fla. Sm. Cl. R. 7.135 on the day of trial; c) the Tenants failed to appear for trial; and d) the trial court failed to address their counterclaim. Third, they argue that the trial court erred in granting summary judgment because the Tenants failed to prove a condition precedent to their claim, that they provided proper notice pursuant to requirements in the lease to the Landlords prior to vacating the property. Fourth, they contend that their notice of lien under Section 83.49 (3)(a) substantially complied with the requirements of the statutes. Finally, the Landlords believe that the trial court erred in granting summary final judgment because there was a genuine issue of material fact raised by their affirmative defense of set off.

The Landlord first argues that the trial court lacked jurisdiction. This argument is premised on a mistaken understanding of the jurisdiction of the county courts of this State. "Small Claims Courts" are not a constitutional creation, but are part of the county court. As a matter of procedure, not jurisdiction, such courts are limited to matters

in controversy that do not exceed $5,000. If the amount in controversy should exceed $5,000, the county court maintains jurisdiction as long as the sum sought does not exceed $15,000. *See Lasalla v. Pools by George of Pinellas County, Inc.,* 125 So.3d 1016, 1017 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D1426a]. The *Lasalla* court held that

> for purposes of the concept of subject matter jurisdiction, a county court that applies the Florida Small Claims Rules in a particular proceeding is not a separate court from a county court that applies the Florida Rules of Civil Procedure.

Id. Lasalla continued by stating that a shift in the rules that from the Small Claims Rules to the Rules of Civil Procedure "is not a change of jurisdiction." *Id. See also Conner v. Moran,* 278 So.3d 790, 791-92 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D2052b]. As a result, the trial court here did not lose jurisdiction simply because the amount in controversy alleged in both the original complaint and the counterclaim exceeded $5,000.

Landlords next claim that they were denied procedural due process for several reasons. First, they aver that the trial court's award of $5,100 to the Tenant exceeded the amount the Tenants claimed in their complaint. This argument is refuted by the plain language of the complaint which specifically stated that Tenants were entitled to the return of the full amount of the security deposit. Indeed in their counterclaim, the Landlords sought the same sum. Landlords were well aware of the amount in controversy, and the trial court acted within its discretion in awarding the sum of $5,000 to the Tenants.

The Landlords also claim that they were denied due process because the trial court entered summary judgment on the day of trial. We do not agree. Since there is nothing in the record to indicate that either party invoked the Rules of Civil Procedure, the Small Claims Rules were properly applied. Fla. Sm. Cl. R. 7.135 states:

> At pretrial conference or at any subsequent hearing if there is no triable issue, the court shall summarily enter an appropriate order or judgment.

This provision gave the trial court the discretion to enter summary judgment at the pretrial conference or at any time thereafter, including on the day of trial. While the record is not clear as to whether the court granted the Tenants' motion for summary judgment or not, any such order was well within the province of the trial court.[6] Such a determination would not have denied Landlords' due process.

As to the assertion that the Landlords were denied due process because the Tenants failed to appear for trial, there is no record before the Court establishing the Tenants absence on the trial date. Without such a record, this Court is unable to determine whether the Landlord's assertions are accurate and whether any error may have occurred. *See 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 the Landlord to rebut that presumption. *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 (Fla. 3d DCA 1987). Landlords have failed to meet their burden.[7]

Landlords final due process argument is that the trial court failed to address their counterclaim. The face of the final judgment makes no mention of the counterclaim, nor does the record establish any other disposition. Thus, we must remand this matter for the trial court to conduct further proceedings on the counterclaim.

Landlords also contend that the trial court erred in granting summary judgment in that the subject lease imposes a condition precedent to the filing of a notice of lien under Florida Statutes section 83.49(3)(a). The lease requires that the Tenants submit a written notice of their intent to vacate the premises and that the notice would be deemed received upon posting in the U.S. Mail by either certified or registered mail or upon hand delivery to the Landlords. Tenants instead sent the Landlords a text. In addition, the Landlords argue that the Tenants' text failed to include the address where the Tenants could be reached, thus violating the landlord-tenant notice requirements contained within Florida Statutes section 83.49(5). While there is certainly an argument that the notice requirement has been substantially complied with, we need not reach this issue. The Landlords do not contest the fact that they received the text or that they responded by timely submitting to Tenants their Notice of Claim. Additionally, as we observed above, the record does not conclusively establish whether the trial court entered summary judgment.

The Landlords next attack the primary finding of the final judgment. They believe that their notice of claim substantially complies with the notice of lien requirements under Florida Statutes section 83.49(3)(a). The trial court specifically found that it did not. We disagree. Section 83.49(3)(a) states in pertinent part:

> Upon the vacating of the premises for termination of the lease . . . the landlord shall have 30 days to give the tenant written notice by certified mail to the tenant's last known mailing address of his or her intention to impose a claim on the deposit and the reason for imposing the claim. The notice shall contain a statement *in substantially the following form*:
>
> This is a notice of my intention to impose a claim for damages in the amount of ____ upon your security deposit, due to _____. It is sent to you as required by s. 83.49(3), Florida Statutes. You are hereby notified that you must object in writing to this deduction from you security deposit within 15 days from the time you receive this notice or I will be authorized to deduct my claim from your security deposit. Your objection must be sent to (landlord's address).
>
> If the landlord fails to give the required notice within the 30-day period, he or she forfeits the right to impose a claim upon the security deposit and may not seek a setoff against the deposit but may file an action for damages after return of the deposit.
>
> (emphasis added).

The Landlords' notice states in pertinent part:

> This letter shall serve as formal notice of our intent to impose a claim for damages, due to the condition in which you left the house upon vacating, in the amount of $3,096.83 against your security deposit pursuant to Florida Statutes Section 83.49(3). The reasons for the imposition of this claim are as follows (damage itemization omitted).
>
> Pursuant to Section 83.49 of the Florida Statutes, you have fifteen (15) days after the receipt of this letter to object to the imposition of this claim on your security deposit. Should you fail to object within fifteen (15) days the landlord may then deduct the amount of the claim. Your objection must be sent to: Isabel C. Casas and Isola Casas (address omitted).

We find that the notice provided by the landlord provides all of the information necessary to inform Tenants of why the claim was being made, the total amount of the claim along with itemized damages, as well as the Tenants right to submit an objection within 15 days to the landlords' address. Tenants were also informed that if they failed to respond, the Landlords' claim would be deducted from the security deposit. The Landlords' notice substantially comports with the form language contained in Section 83.49(3)(a). The trial court erred in finding otherwise. Consequently, the Landlords were entitled to prove their damages entitling them to keep a portion of the security deposit.

Likewise, the judgment does not state whether it resolved the counterclaim filed by the Landlords. On remand, the trial court shall conduct proceedings on the counterclaim.

Finally, Landlords argue that the trial court erred in granting summary final judgment because there was a genuine issue of material fact raised by their affirmative defense of set off. As there is an

insufficient record to determine whether the trial court entered summary judgment or conducted a non-jury trial, we decline to address this point.

The final judgment entered by the trial court is hereby **REVERSED**. This case is hereby **REMANDED** to the trial court for trial on the merits of the original claim and counterclaim provided that a trial on the merits of either or both was not conducted. If a trial was held, the trial court should make appropriate findings consistent with this opinion and conduct a hearing on damages as appropriate.

Appellees' motion for attorney's fees is **DENIED**. Appellant's motion for attorney's fees is conditionally **GRANTED** upon a determination by the trial court of entitlement as well as the appropriate amount of fees. (WALSH and SANTOVENIA, concur.)

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[1]The lease provided that its terms would apply to any extension beyond the one year lease term.

[2]While it appears that the amount of $2,003.17 is the difference between the full security deposit and the amount claimed by the Landlords in their notice of claim, it is not clear how the Tenant arrived at the $2,909.83 figure.

[3]Although not delineated as such, we construe these damage claims as raising an affirmative defense of set off.

[4]Fla. Sm. Cl. R. 7.020(c) permits any party to ask the court to order that the proceedings be governed by the Florida Rules of Civil Procedure. Neither party did so here.

[5]While Landlords maintain that Tenants did not attend the May 3 proceeding, nothing in the record supports this.

[6]It is arguable that the trial court may have granted Tenants' motion for partial summary judgment for the $2,003.17, the amount Landlords originally indicated they would return to Tenants, and then held a non-jury trial as to the remaining amount. It is just as arguable that the trial court did not entertain the partial summary judgment motion and tried the entire claim. We cannot speculate as there is no record to support a conclusion either way.

[7]It appears that Landlords attempted to correct the record to support their arguments when they filed a Motion for Leave to Correct Record on Appeal. This Court granted Landlords leave to prepare a statement of proceedings subject to the approval of the trial court. The trial court declined to accept the proposed statement, stating that the statement "cannot reasonably be relied upon by the Appellate Division panel for accuracy. . . ."

* * *

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

UNITED AUTOMOBILE INSURANCE COMPANY, Appellant, v. OPEN MRI OF MIAMI DADE, LTD., a/a/o Deogracia Barreras, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-103-AP 01. L.T. Case No. 2012-4185 SP 23. July 21, 2020. On Appeal from the County Court in and for Miami-Dade County. Hon. Myriam Lehr, Judge. Counsel: Michael Neimand, for Appellant. Kenneth J. Dorchak, Buchalter Hoffman and Dorchak, for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

(PER CURIAM.) Appellant 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 Appellant's expert witness, Monica Johnson. As this panel and the majority of prior panels from this Court have found, it was an abuse of discretion to exclude Appellant's conflicting affidavit on whether the medicals bills were reasonable in price. Taking Appellant's excluded affidavit into account, it was error to grant summary judgment. This case is indistinguishable from our decisions in *United Automobile Insurance Co. v. Miami-Dade MRI a/a/o Bermudez,* 2018-164 AP 01 (Fla. 11th Cir. Ct. June 3, 2020) [28 Fla. L. Weekly Supp. 299a] and *United Auto Ins. Co. v. Miami Dade County MRI, Corp. a/a/o Rodas Santo,* 2018-103 AP 01 (Fla. 11th Cir. Ct. June 23, 2020), among numerous other cases. Accordingly, the summary judgment and final judgment entered below are hereby **REVERSED,** and this cause is **REMANDED** to the trial court for proceedings consistent with this opinion.

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

* * *

Insurance—Personal injury protection—Summary judgment—Error to reject affidavit of expert on reasonableness of charges and relatedness and medical necessity of treatment

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant, v. GABLES INSURANCE RECOVERY, INC., a/a/o Alexis Revollo, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2017-000158-AP-01. L.T. Case No. 2013-3539-SP-26. August 13, 2020. On Appeal from the County Court in and for Miami-Dade County, Florida, Hon. Lawrence D. King, County Court Judge. Counsel: Nancy W. Gregoire, Birnbaum, Lippman & Gregoire, PLLC and Christopher L. Kirwan, Kirwan, Spellacy & Danner, P.A., for Appellant. G. Bart Billbrough, Billbrough & Marks, P.A., for Appellee.

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

OPINION

(PER CURIAM.) State Farm Mutual Automobile Insurance Company ("State Farm") appeals a final judgment entered by the trial court following its order granting summary judgment on behalf of Gables Insurance Recovery, Inc. ("Provider"). Here, the trial court rejected the conflicting affidavits offered by State Farm of Michael W. Mathesie, D.C., a chiropractor and Edward A. Dauer, M.D., a radiologist regarding reasonableness, relatedness and medical necessity and summary judgment was granted on the Provider's Motion for Summary Judgment.

As this panel and the majority of prior panels from this Court have found, it was an abuse of discretion to accept Plaintiff/Appellee's affidavits while rejecting State Farm's conflicting affidavits on whether the medical bills at issue were reasonable in price, related and medically necessary. Taking State Farm's affidavits into account, it was error to grant summary judgment on behalf of the Provider as the affidavits were sufficient to raise disputed issues of material fact precluding 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. 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. 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. 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. 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 the amount.

* * *

Insurance—Personal injury protection—Appeals—Non-final orders—Order granting motion to amend complaint to include claim for bad faith is not reviewable by certiorari where order does not result in irreparable harm that cannot be addressed on plenary appeal—No merit to argument that order departed from essential requirements of law because it was entered after insurer confessed judgment—Confession of judgment did not moot amount of damages that could be awarded to medical provider

GEICO INDEMNITY COMPANY, Petitioner, v. ALL X-RAY DIAGNOSTIC SERVICES, a/a/o Regla Arzuaga, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-48-AP-01. L.T. Case No. 2016-9781 SP 26. August 12, 2020. On Petition for Writ of Certiorari from Miami-Dade County Court, Hon. Lawrence D. King, Judge. Counsel: Scott W. Dutton and Rebecca O'Dell Townsend, Dutton Law Group, PA, for Petitioner. Stuart L. Koenigsberg, A Able Advocates—Stuart L. Koenigsberg, P.A., for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

OPINION

(PER CURIAM.) Geico Indemnity Company ("Geico") petitions this Court to issue a writ of certiorari to quash the trial court's order granting leave to amend a complaint. After Geico filed a "Confession of Judgment" in the amount of $99.99, Respondent, All X-Ray Diagnostic Services, as assignee of Regla Arzuaga ("All X-Ray"), filed a motion to amend its complaint to include a claim for bad faith, requesting the remaining amount it claimed was due in the underlying lawsuit, an amount less than $2500.00. Because Geico has failed to establish that the order granting leave to amend caused irreparable harm which could not be remedied on appeal, we deny this petition.

Background

All X-Ray treated Regla Arzuaga for her injuries related to a car accident occurring on or about September 11, 2016. Ms. Arzuaga assigned her Geico Personal Injury Protection ("PIP") benefits to All X-Ray, and All X-Ray demanded $1,153.73 in overdue PIP benefits. On December 29, 2016, All X-Ray filed suit.[1] Geico failed to comply with its discovery obligations for over two years, leading to an order compelling discovery on February 13, 2019. Seven months later, still without responding to discovery, Geico filed a "Notice of Filing Confession of Judgment" in the amount of $99.99 in benefits and $17.90 in interest.

On September 11, 2019, All X-Ray filed a motion for leave to file an amended complaint for bad faith. Specifically, the amended complaint alleged damages "that [do] not exceed $2500." Its claim for bad faith alleges that Geico failed to offer a reasonable explanation for denying the full claim, failed to make a good faith attempt to settle the claim, and failed to act fairly and honestly. On September 18, 2019, after filing its motion to amend but four months before setting it for hearing, All X-Ray filed a civil remedy notice of violation of section 624.155, Florida Statutes, a condition precedent for filing a claim for bad faith. Geico never responded to this notice. On January 9, 2020, the trial court granted the motion to amend. Geico moved for rehearing or reconsideration on July 17, 2020, and rehearing was denied on February 3, 2020.

The standard of review of a petition for writ of certiorari is as follows:

> As a general rule, a petitioner seeking certiorari relief must establish that the trial court's nonfinal order "departs from the essential requirements of law and thus causes material injury to the petitioner throughout the remainder of the proceedings, effectively leaving no adequate remedy on appeal." *Allstate Ins. Co. v. Langston,* 655 So.2d 91, 95 (Fla. 1995) [20 Fla. L. Weekly S217a]; *Robles v. Baptist Health South Florida, Inc.,* 197 So.3d 1196, 1199 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1618c].

Robins v. Colombo, 253 So. 3d 94, 95 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1821a].

" 'The threshold question that must be reached first [when determining whether to grant certiorari] is whether there is a material injury that cannot be corrected on appeal, otherwise termed as irreparable harm.' " *See Safeco Ins. Co. of Illinois v. Rader,* 132 So. 3d 941 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D425c] (quoting *Rodriguez v. Miami-Dade County,* 117 So. 3d 400, 404 (Fla. 2013) [38 Fla. L. Weekly S445a]). The petitioner fails to establish this threshold element and we must therefore deny this petition.

An order granting a motion to amend to include a claim for bad faith does not, without more, result in irreparable harm which cannot be addressed by plenary appeal. In an *en banc* decision, the Third District Court of Appeal explained in *State Farm Fla. Ins. Co. v. Seville Place Condo. Ass'n, Inc.,* 74 So. 3d 105 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D1558a] that a trial court order permitting an amended complaint including a claim for bad faith does not establish irreparable harm to support a writ of certiorari. Finding "[n]o irreparable injury has yet occurred, and none is certain to follow," the district court denied certiorari. *Id.* at 108. The court further "recede[d] from the broad holding that 'certiorari is available to challenge a premature bad faith claim or premature bad faith discovery.' " (receding from its prior holding in *XL Specialty Ins. Co. v. Skystream, Inc.,* 988 So. 2d 96, 98 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D1790b]).

Here, All X-Ray claims damages in its amended complaint which do not exceed $2,500. Discovery on the bad faith issues has not yet begun. Because damages are minimal, there will be no likelihood that All X-Ray will try to engage in invasive financial discovery of the insurer. The only harm claimed by Geico is that it be "required to litigate two legally insufficient causes of action after having confessed judgment." Such harm does not constitute the kind of irreparable harm necessary to justify granting the extraordinary remedy of certiorari relief. *See Rader,* 132 So. 3d at 947 (cost, delay, and the burden of having to litigate a potentially unnecessary bad faith does not constitute irreparable harm to justify certiorari).

Moreover, in *Riano v. Heritage Corp. of So. Fla.,* 665 So. 2d 1142, 1145 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D147b], the court explained,

> '[c]ertiorari is not designed to serve as a writ of expediency and should not be granted merely to relieve the petitioners seeking the writ from the expense and inconvenience of a trial.' *Whiteside v. Johnson,* 351 So.2d 759, 760 (Fla. 2d DCA 1977)). *See also Martin-Johnson, Inc. v. Savage,* 509 So.2d 1097 (Fla.1987) (litigation of a non-issue and inconvenience and expense of same not the type of harm sufficient to permit certiorari review); *Continental Equities, Inc. v. Jacksonville Trans. Auth.,* 558 So.2d 154 (Fla. 1st DCA 1990) (fact that if ruling on damages was incorrect, matter would have to be retried after appeal and at great expense to the parties did not entitle petitioner to writ of certiorari to review the ruling); *Kessel Constr. Corp. v. Clark-Haney Dev. Team,* 487 So.2d 1123 (Fla. 4th DCA 1986) (Glickstein, J., concurring) (cost of trial and appeal is not the kind of damage certiorari is intended to forestall); *Leibman v. Sportatorium, Inc.,* 374 So.2d 1124 (Fla. 4th DCA 1979) (fact that petitioner might have to go through a needless trial did not constitute material injury of an irreparable nature); *Siegel v. Abramowitz,* 309 So.2d 234 (Fla. 4th DCA 1975) (fact that petitioner would have gone through trial under the burden of the order complained of, would incur substantial expenses for experts and case might need to be retried was not sufficient to show irreparable harm).

Because Geico fails to establish the threshold requirement of demonstrating irreparable harm, this petition must be denied.

Furthermore, even had Geico demonstrated irreparable injury, we would still deny certiorari because the order granting leave to amend is not a departure from the essential requirements of law. Geico

argues, as did the insurer in *Rader,* that the trial court departed from the essential requirements of law because once Geico confessed judgment, the trial court lost jurisdiction to do anything other than enter a final judgment, as there was no further judicial labor to perform. In rejecting this point, the trial court relied upon *Fridman v. Safeco Ins. Co. of Illinois,* 185 So. 3d 1214 (Fla. 2016) [41 Fla. L. Weekly S62a].

In *Fridman,* a claimant in an uninsured motorist ("UM") action did not accept the insurer's confession of judgment for policy limits—but instead was allowed to proceed to trial for a jury determination of *full damages* for the loss, in excess of the UM policy limits. The jury returned a verdict in excess of the policy limits and the trial judge entered a partial judgment for policy limits—the amount confessed by the insurer. The trial court then reserved jurisdiction to allow the claimant to file an amended complaint for bad faith. If the claimant succeeded in his bad faith claim, final judgment would be rendered in the amount of the jury's verdict, which was in excess of the policy limits. On appeal, the insurer argued—as does Geico here—that its confession of judgment[2] relieved the trial court of its jurisdiction to do more than enter judgment for the policy limits. Instead, the Florida Supreme Court in *Fridman* explained:

> the amount of damages in the UM case does not become moot by virtue of an insurer's "confession of judgment" and tendering of the policy limits. Such a position as that taken by the Fifth District majority would "countenance the actions of an insurer that confesses judgment at the last hour in an effort to avoid a trial that would reveal, through the jury's verdict, the true extent of the insured's injuries and provide a basis to award damages in the inevitable bad faith action the insurer foresaw on the horizon." [*Safeco Ins. Co. of Illinois v. Fridman,* 117 So. 3d 16 (Fla. 5th DCA 2013) [39 Fla. L. Weekly D425c], *decision quashed,* 185 So. 3d 1214 (Fla. 2016)] at 29 [41 Fla. L. Weekly S62a].

Likewise, Geico's "confession of judgment" here did not moot the amount of damages which could be awarded to the plaintiff here. We are mindful of the decision in *Rodante v. Fid. Nat. Ins. Co.,* 725 So. 2d 1151 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D2480a], in which the district court held that no bad faith claim could lie once the insurer pays the insured the *limits of liability for PIP coverage* within the 60-day statutory cure period to file a bad faith action. However, the insurer here did not pay the limits of its liability to the insured. It did not even pay the full claim demanded. Rather, the insurer 'confessed" to a judgment of $99.99. And it did not respond within 60 days to All X-Ray's statutory notice containing the amount of the underpayment. Further, the amended complaint does not seek an amount in excess of PIP policy limits, but rather, merely the remainder of the overdue claim. Whether captioned as a "bad faith" claim or just the continuation of the lawsuit to amend the claim for the total damages owed, this amended claim was not rendered moot by the insurer's $99.99 confession. Accordingly, there is no departure from the essential requirements of law in permitting All X-Ray to amend its complaint.

For these reasons, we deny the petition for writ of certiorari. (TRAWICK, WALSH and SANTOVENIA, JJ., concur.)

[1]In its Statement of Claim under "General Allegations," All X-Ray pled that damages do not exceed $99.99. However, in its count for breach of contract, All X-Ray claims that Geico failed to make full payment of its claim for $4,275. In its counts for declarative relief, All X-Ray claims supplemental relief for unpaid PIP benefits. Geico opines that its "confession" for $99.99 moots the litigation, binding All X-Ray strictly to its general statement that damages "do not exceed $99.99" in its small claims pleading. All X-Ray was absolutely entitled to amend its Statement of Claim to include the full amount of the unpaid PIP claim which, in effect, was what the amended complaint for Bad Faith purports to do. *See Spectrum Interiors, Inc. v. Exterior Walls, Inc.,* 65 So. 3d 543 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D1292a] (abuse of discretion to deny motion to amend complaint to allege special damages. "[A]s a general rule, leave to amend should be freely granted unless it appears that allowing the amendment would prejudice the opposing parties, the privilege to amend has been abused, or amendment would be futile").

[2] In *Fridman,* the insurer's confession was for policy limits, while here, Geico confessed to $99.99—an amount All X-Ray pled in a preliminary statement in its initial pleading—an amount which conflicted with the amounts referenced in the prayers for relief. Further, the demand letter put Geico on notice that the claim was for the difference between what it paid and what was charged, or $1,153.73. Thus, Geico's "confession of judgment" appears to be a tactic in which "confessing" to the "$99.99" amount would curtail the litigation without having to defend the underpayment.

* * *

Appeals—Non-final order—No statute authorizes appeal of order setting aside judicial default—Order is not reviewable by certiorari where there was no error for which appellant cannot seek plenary appeal if final judgement is entered against him

JOSHUA CITRON, Appellant, v. H.G.C. AUTO COLLISION, INC., Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-261-AP-01. L.T. Case No. 2019-6287-CC-25. August 11, 2020. On Appeal from the County Court in and for Miami-Dade County. Hon. Linda Diaz, Judge. Counsel: Joey D. Gonzalez, Joey Gonzalez Attorney PA, for Appellant. Alexander Karantzalis, The Law Offices of A.K. Esquire, PLLC, for Appellee.

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

ORDER OF DISMISSAL

(PER CURIAM.) This is an appeal from an order granting a motion to set aside a judicial default[1]. The case below is open and pending. Finding we have no jurisdiction, we dismiss this appeal. In the underlying lawsuit, Defendant/ Appellee, HGC Auto Collision, Inc. ("HGC") filed on July 23, 2019 a motion to set aside a judicial default which was entered on July 22, 2019. Following Appellant/Plaintiff's filing of its response to the Motion to set aside judicial default, the motion was granted. Nothing prevents the Appellee from raising this issue on plenary appeal, should the case be adjudicated on behalf of the Defendant, HGC.

Appellant filed a notice of non-final appeal pursuant to Rule 9.130(a)(3)(C)(i), Florida Rules of Appellate Procedure. Although not raised by the parties, "[a]n appellate court has an independent duty to determine whether it has appellate jurisdiction and is not bound by the trial court's caption or the parties' characterization of an order." *Medeiros v. Firth*, 200 So. 3d 121 (Fla. 5th DCA 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]. Because the order on appeal is neither an appealable non-final order nor a final order, this appeal must be dismissed.

Jurisdiction to hear nonfinal appeals in the district courts of appeal is governed by Rule 9.130. See Art. V, § 4(b)(1), Fla. Const.; Rule 9.130(a)(1), Fla. R. App. P. However, jurisdiction to hear appeals from nonfinal orders in the circuit courts is governed by general law. See Art. V, § 5, Fla. Const. ("The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law"); *Blore v. Fierro*, 636 So. 2d 1329 (Fla. 1994) ("The authority for appeals to the circuit court is established solely by general law as enacted by the legislature"). Here, no statute authorizes an appeal from an order setting aside a judicial default. 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).

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

Nor is the trial court's order reviewable by certiorari because there was no departure from the essential requirements of law resulting in irreparable harm. *See Pannell v. Triangle/Oaks Ltd. Partnership*, 783 So. 2d 325 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D989a]; *citing Rodriguez v. Young America Corp.*, 717 So. 2d 621 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D2196b] (citing numerous cases). The trial court's order merely granted a motion to set aside a judicial default—the case remains pending. There was no error for which Appellant cannot seek redress through plenary appeal if and when a final judgment is secured against it.

Further, the fact that Appellant will be forced to litigate this case does not constitute the type of irreparable harm which would authorize the writ. *See, e.g., AVCO Corp. v. Neff*, 30 So. 3d 597 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D541a] (because the error complained of may be addressed on plenary appeal, the trial court's order denying summary judgment did not cause irreparable harm).

We therefore dismiss this appeal because an order which grants a motion to set aside a judicial default is not an appealable order.

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

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[1]While the Appellant's Initial Brief erroneously refers to the order on appeal as one setting aside an order granting a default judgment, the order is one setting aside an order granting a judicial default and not a final judgment.

* * *

Contracts—Construction—Action by subcontractor for unpaid balance of purchase order for windows—Trial court's rejection of set-off defense alleging that contractor incurred damages due to delay in subcontractor's delivery of windows and product defects is supported by competent substantial evidence where there is evidence that there was no requirement that windows be delivered by date certain, that any delivery delay was not caused by subcontractor, and that any window leaks were caused by faulty installation rather than faulty manufacturing

SOL-A-TROL ALUMINUM PRODUCTS, INC., Appellant, v. GENERAL IMPACT GLASS & WINDOWS CORP., Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-216-AP-01. L.T. Case No. 2012-28206 CC 25. July 28, 2020. An Appeal from the County Court for Miami-Dade County, Hon. Robert Watson, Judge. Counsel: Brian A. Wolf, Smith, Currie & Hancock, LLP, for Appellant. Jorge L. Cruz, William O. Diab, and Justin S. Miller, Daniels, Rodriguez, Berkeley, Daniels & Cruz, P.A., for Appellee.

(Before TRAWICK, WALSH, and R. ARECES, JJ.)

(WALSH, J.) Sol-a-Trol Aluminum Products, Inc. ("Sol-a-Trol") was hired by a general contractor to supply and install windows as part of a construction project to build a school. Sol-a-Trol hired General Impact Glass & Windows ("General Impact") as a sub-contractor to fabricate the windows for Sol-a-Trol to install. The parties entered a purchase order for delivery of the windows. Sol-a-Trol made a partial payment to General Impact, and General Impact built and supplied the windows. Sol-a-Trol failed to make the final payment.

Over a month after delivery, General Impact demanded the balance. In response to the demand, Sol-a-Trol alleged that some of the windows leaked and asked to apply the cost of repairing the leaky windows against the remaining balance. In response, General Impact requested a lab test before it would acknowledge any defect attributable to its production. Sol-a-Trol refused to lab test the windows, and the balance was never paid.

General Impact sued Sol-a-Trol (as well as the bonding company on the construction job) to recover the unpaid amount. Following a bench trial, the trial judge entered judgment for General Impact and rejected Sol-a-Trol's affirmative defense of set-off.

On appeal, Sol-a-Trol argues that it presented *unrebutted* competent substantial evidence to support its affirmative defense of entitlement to setoff, and the trial court therefore erred in rejecting the defense.

This appeal turns upon correct application of the standard of review. The standard of review of a judgment entered after a bench trial is succinctly stated in *Negron v. Resolution Life Holdings, Inc.,* 271 So. 3d 137 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D700c]:

> On appeal of a judgment entered after a bench trial, while the parties are entitled to de novo review of the trial court's legal rulings, an appellate court is bound by the trial court's findings of fact where the findings are supported by competent, substantial evidence. *Tylinski v. Klein Auto., Inc.,* 90 So.3d 870 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1350a] (citing *Craigside, LLC v. GDC View, LLC,* 74 So.3d 1087 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D1577e]). Furthermore, in an appeal from a bench trial, "the trial judge's findings of fact are clothed with a presumption of correctness on appeal, and these findings will not be disturbed unless the appellant can demonstrate that they are clearly erroneous." *Universal Beverages Holdings, Inc. v. Merkin,* 902 So.2d 288, 290 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D1338b].

The question on appeal, therefore, is whether there is competent, substantial evidence in the record **to support the trial judge's findings**. If there is such evidence in the record to support the trial judge's rejection of the affirmative defense, we must affirm. The trial judge's findings are presumed correct and will not be disturbed unless "clearly erroneous." *Id.*

Sol-a-Trol bases its affirmative defense of set-off upon two theories—first, that General Impact failed to timely deliver the windows, and second, that the windows were damaged in production, and that its repair of the windows caused undisputed damages which Sol-a-Trol was entitled to set off against the unpaid invoice. In response, General Impact argued that any delay in production or delivery was caused by Sol-a-Trol and that the windows were either not defective or faulty installation caused any alleged leaks. The trial court ultimately agreed with General Impact and rejected the defense of set-off.

Examining the record here, we find that the trial court's findings were not clearly erroneous and were supported by competent substantial evidence.

First, there was no requirement in the purchase order that the windows be delivered within a particular time frame. But even if there were a delivery time required, there was evidence that Sol-a-Trol, not General Impact, delayed production and delivery of the windows.

Sol-a-Trol insisted that General Impact use Sol-a-Trol's painting vendor to paint the windows. Sol-a-Trol's painting vendor damaged the windows by bending the frames and causing holes. As a result of the vendor's damage, General Impact had to remake the windows (at its own expense) and submit them again to the painter. Thus, Sol-a-Trol, in insisting that General Impact use its painting vendor, caused any delay. Additionally, when the windows were ready, Sol-a-Trol refused to pick them up until after the Christmas holidays. Accordingly, the trial court relied upon competent evidence in concluding that General Impact did not cause any delay.

Second, competent evidence supported the trial court's rejection of the set-off defense on the ground that General Impact did not fabricate leaky windows. As a threshold matter, the trial court could have rejected outright Sol-a-Trol's assertion that the windows were defective. Sol-a-Trol did not raise any issue concerning leaky windows until almost 50 days after delivery and installation, after General Impact demanded payment on the delinquent amounts. The trial court could have, therefore, rejected the claim of set-off on the ground that Sol-a-Trol had motive to invent a "defect" to avoid payment.

Even if the windows were leaky, Sol-a-Trol refused to subject them to a lab test. The principal of General Impact, Mr. Zuniga, testified that the windows were not defective when Sol-a-Trol retrieved them. Because Zuniga witnessed the windows' condition at delivery, the trial judge could rely on Zuniga's testimony and the inference that any leaks were caused by faulty installation and not faulty manufacture. *See Marrone v. Miami Nat. Bank,* 507 So. 2d 652 (Fla. 3d DCA 1987) (appellate court will not disturb trial court's findings in a bench trial "which are presumed correct, unless they are totally unsupported by competent and substantial evidence").

Therefore, the judgment rejecting the affirmative defense of set-off is supported by competent, substantial evidence, and may not be disturbed on appeal. We affirm. (TRAWICK and R. ARECES, JJ., Concur.)

* * *

Landlord-tenant—Security deposit—Trial court erred in concluding that tenants waived claim for security deposit by insufficiently pleading their right to recover deposit—Right to contest seizure of deposit is guaranteed by statute, and tenants specifically pled entitlement to recover deposit—Failure of tenants to give landlord seven-day notice that they were vacating premises relieved landlord of obligation to give notice of intent to impose claim on deposit but did not forfeit tenants' right to lay claim to all or part of deposit

JOHN SERAK and LAUREN SERAK, Appellants, v. SANDRINE VAN VLIERBERGHE d/b/a CASA PARAISO, LLC., Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-263-AP-01. L.T. Case No. 2017-008203-SP-26. July 22, 2020. An Appeal from the County Court for Miami-Dade County, Gloria Gonzalez-Meyer, Judge. Counsel: James W. Muir, Jacqueline C. Ledon, and Virginia Lee Perez, J. Muir & Associates, for Appellant. Manuel L. Crespo, Greenspoon Marder LLP, for Appellee.

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

(WALSH, J.) Tenants John and Lauren Serak ("Tenants") executed a lease agreement with Sandrine Van Vlierberghe, d/b/a/ Casa Paraiso LLC ("Landlord") and provided a deposit of Two Thousand Nine Hundred ($2,900.00). When the lease expired, the Tenants remained in a month-to-month tenancy.[1] The Tenants left the residence without prior notice and demanded return of their security deposit. The Landlord, also without prior notice, only returned a portion of the deposit. The Tenants sued for the remainder. The trial court granted final summary judgment in favor of the Landlord.

On appeal, the Tenants contend that their failure to provide statutory notice of intent to vacate their month-to-month tenancy did not waive their entitlement to recover the remainder of their deposit from the Landlord. The trial judge concluded that the Tenants insufficiently pled their right to recover the deposit and thereby waived the claim. Because a tenant's right to contest seizure of a security deposit is guaranteed by the plain language of section 83.49(5), Florida Statutes, (2018) and because the Seraks specifically pled entitlement to recover their deposit, we reverse the order granting summary judgment.

The standard of review of a trial court's entry of final summary judgment is *de novo. See Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.,* 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a]; *Sierra v. Shevin,* 767 So. 2d 524, 525 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1605a]. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *State Farm Mut. Auto. Ins. Co. v. Gonzalez,* 178 So. 3d 448, 450 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2352a], *citing State Farm Mut. Auto. Ins. Co. v. Pressley,* 28 So. 3d 105, 107 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D150b].

Whether a landlord is permitted to retain or required to return a tenant's security deposit depends upon the interplay between sections 83.49(3)(a) and 83.49(5), Florida Statutes (2018). Section 83.49(3)(a), Florida Statutes governs the landlord's duty:

> (a) Upon the vacating of the premises for termination of the lease, if the landlord does not intend to impose a claim on the security deposit, the landlord shall have 15 days to return the security deposit together with interest if otherwise required, or **the landlord shall have 30 days to give the tenant written notice by certified mail to the tenant's last known mailing address of his or her intention to impose a claim on the deposit and the reason for imposing the claim**.

(emphasis added). Section 83.49(5), Florida Statutes governs the tenant's duty:

> (5) Except when otherwise provided by the terms of a written lease, any tenant who vacates or abandons the premises prior to the expiration of the term specified in the written lease, or any tenant who vacates or abandons premises which are the subject of a tenancy from week to week, month to month, quarter to quarter, or year to year, **shall give at least 7 days' written notice by certified mail or personal delivery to the landlord prior to vacating or abandoning the premises** which notice shall include the address where the tenant may be reached. **Failure to give such notice shall relieve the landlord of the notice requirement of paragraph (3)(a) but shall not waive any right the tenant may have to the security deposit or any part of it**.

(emphasis added). Here, neither the Landlord nor Tenants abided by their statutory notice obligations. What happens under these circumstances? If the tenant fails to advise the landlord that they are vacating a month-to-month tenancy (as happened here), subsection (5) of the statute says, "[f]ailure to give such notice shall relieve the landlord of the notice requirement of paragraph (3)(a) but shall not waive any right the tenant may have to the security deposit or any part of it." The landlord's notice obligation is forgiven—but the tenant does not forfeit the right to lay claim to all or part of their deposit. *See Plakhov v. Serova,* 126 So. 3d 1221, 1223 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D2520a].

The trial court granted summary judgment for the Landlord for the following reasons:

> THE COURT: I think this ends the case. This ends the case. They're not entitled to it. They Forfeited [the security deposit] when they didn't give the seven days' written notice.
>
> MS. PEREZ: Your honor, that's not the law. Even if the landlord hadn't given a 30-day notice of intent, and even if [the Tenants] hadn't given the notice of the mail, of my new address, of their new address—
>
> THE COURT: Well, I guess you're going to have to take an appeal because I'm going to grant his MSJ which, to me, ends the case.

The trial court incorrectly concluded that the Tenants' failure to give notice results in a forfeiture of their right to claim the deposit.

Counsel for the Landlord argued further that the Tenants forfeited their right to claim the deposit because their pleading was deficient:

> MR. CRESPO:— that's not their complaint. Their complaint is limited to the statutory—
>
> THE COURT: What about their Amended Complaint?

MR. CRESPO: Their Amended Complaint is exactly the same as their initial Complaint. They just restated the same cause of action, and it's statutorily driven. What they're arguing is statutory forfeiture of the landlord's right to retain the security deposit.

THE COURT: I guess you can bring a separate action for the rest of the damages because it's not covered in your Amended Complaint.

* * *

I have your Amended Complaint right here. Let's look at it. Here it is. Okay. It's 19 paragraphs long. **It states Plaintiff sues Defendant for return of security deposit. That's all it's limited to**.

*** * ***

So that's all we're talking about. If you want anything else, you have to plead it.

MS PEREZ: but we have the issue of how much damages the landlord's entitled to, versus the condition of the property. So that's still an issue. What we are—

THE COURT: I totally disagree.

(emphasis added)

The Appellee concedes that the Tenants' failure to give statutory notice does not result in waiver of their entitlement to seek return of the deposit. Nonetheless, the Appellee argues that we should affirm because the Tenants' Amended Complaint was deficient. According to the Landlord, the Tenants only pled a claim that the Landlord forfeited its right to retain the deposit by failing to give statutory notice—but failed to state a claim to recover all or part of the security deposit.

We disagree. The Tenants' Amended Complaint was "for Return of Security Deposit." The Tenants demanded judgment for One Thousand Nine Hundred and Fifty ($1,950.00), the remainder of their security deposit. In paragraph 16 of the Amended Complaint, the Tenants stated, "Plaintiffs left the property in great condition with only minor wear and tear that was reasonable for residing there for over four (4) years and therefore are entitled to the return of their security deposit."

There is no heightened pleading requirement under the Small Claims Rules. *See* Rule 7.050, Fla. Sm. Cl. R. The Landlord invoked the civil rules of procedure in this small claim case. There is similarly no rule of civil procedure requiring a heightened pleading standard for return of a tenant's security deposit. *See* Rule 1.110, Fla. R. Civ. P. Instead, the rule for pleadings requires merely a "short and plain statement of the grounds upon which the court's jurisdiction depends" and a "short and plain statement of the ultimate facts" supporting such grounds. *Id.* The Tenants' Amended Complaint suffices.

The Landlord argued below that the Tenants' claim was a "statutory" claim. This is true. But *under a plain reading of both relevant sections of the statute,* the Tenants' failure to give notice does not operate as a forfeiture of their right to recover their deposit and the Tenants are entitled to ask for all or part of their deposit to be returned. Accordingly, we find that there was no failure of pleading and therefore, it was error to dispose of the case at summary judgment.

We reverse and remand for a trial on the Tenants' claim for the security deposit. (TRAWICK and SANTOVENIA, JJ., concur.)

[1]We do not disturb the trial judge's finding that the Tenants were tenants at will. Even assuming that there was evidence, as the Tenants argue, of a valid lease extension, the Tenants remained 17 days after the alleged lease extension expired. They were therefore tenants at suffrage at the time they vacated the premises. § 83.04, Fla. Stat. (2016). Thus, there was no factual dispute that they were tenants on a month-to-month tenancy.

* * *

Municipal corporations—Appeals—Certiorari—Mayoral veto of city commission resolution is not quasi-judicial act subject to certiorari review

MIAMI-DADE COUNTY, Appellant, v. CITY OF MIAMI, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-167-AP-01. July 22, 2020. On Petition for Writ of Certiorari from City of Miami mayoral veto of City Commission Resolution R-19-0169. Counsel: Abigail Price-Williams, Miami-Dade County Attorney and James Edwin Kirtley, Jr., Assistant County Attorney, for Petitioner. Victoria Méndez, City Attorney, John A. Greco, Deputy City Attorney, and Kerri L. McNulty, Senior Appellate Counsel, for Respondent.

(Before TRAWICK, WALSH and ZAYAS, JJ.)

OPINION

(WALSH, J.) Does the circuit court have certiorari jurisdiction to review a municipal mayor's veto? The Mayor of the City of Miami, Francis Suarez, vetoed a City of Miami Commission resolution quashing a decision by the Historical and Environmental Preservation Board ("HEPB"). Miami-Dade County (the "County") has filed a petition for writ of certiorari to quash the Mayor's veto and reinstate the Commission's resolution.

Notwithstanding the substantive grounds in the County's petition, the threshold question we must decide is whether we have jurisdiction to review the City of Miami Mayor's veto. This determination hinges upon whether a City of Miami Mayor's veto is a quasi-judicial act. We find it is not a quasi-judicial act, and therefore dismiss this Petition for lack of jurisdiction.

Historical Background of the Coconut Grove Playhouse

The City of Miami owns the historic Coconut Grove Playhouse ["Playhouse"], located on Main Highway in Coconut Grove. Miami-Dade County and Florida International University currently hold a lease on the Playhouse and seek to renovate the property. Their current renovation plan, approved by the Commission but vetoed by the Mayor, would demolish the theater, build new elements and a new, smaller theater, and retain only the historic façade.

The Playhouse was designed in 1926 by the "critically important architectural firm of Keihnel and Elliott"[1] and renovated and redesigned by architect Robert Browning Parker, "considered one of the outstanding and precedent-setting architects [from] the 1950s and beyond . . . ." *Id.*

In 2005, the City of Miami initiated the process to designate the Playhouse as a historic site. The City of Miami Preservation Officer prepared a Report to the HEPB in support of historic designation. In recommending historic designation of the Playhouse, the report relied upon three factors set forth in the City of Miami Code:[2]

3. Exemplifies the historical, cultural, political, economical, or social trends of the community.

The Coconut Grove Playhouse exemplifies the historical, cultural economical, and social trends of Coconut Grove during the twentieth century, particularly the Boom and Bust cycles that characterize the history of Miami. The theater was built as the Coconut Grove Theater during the heyday of the 1920's real estate boom. Designed in a flamboyant "Spanish Baroque" style, the theater reflects the optimism and disposable wealth of Miami's citizens and the fascination with Mediterranean architectural precedents. Reborn in 1955 as the Miami's first live, legitimate theater, the Coconut Grove Playhouse evolved into one of the most important regional theaters in the country.

5. Embodies those distinguishing characteristics of an architectural style, or period, or method of construction.

The design of the Coconut Grove Playhouse embodies the Mediterranean Revival style, and featured a highly decorative entrance, enriched window surrounds, and decorative detail associated with the design. Despite a few alterations, the Playhouse still retains enough integrity to convey its original Mediterranean Revival style and still exhibits its major character-defining elements.

6. Is an outstanding work of a prominent designer or builder.

The Coconut Grove Playhouse is associated with two of South Florida's most prominent architects. Richard Keihnel, who designed the original building, is considered one of South Florida's most outstanding architects. Kiehnel completed much of his work during the real estate boom of the 1920s, but also went on to make contributions into the 1930s and 1940s. As editor of the publication *Florida Architecture and the Allied Arts,* Kiehnel also influenced generations of new architects. Alfred Browning Parker is considered an outstanding living architect whose work is more aptly described as "Modernist." Parker remodeled the interior of the theater, dramatically changing its style from a highly decorative Mediterranean revival tour de force to a building that reflected the "clean," unornamented, geometrically defined architecture of the era to which he belonged.

Thus, Miami's 2005 Historical Designation was based upon multiple factors set forth in Section 23-4 of the City Code, not solely the Playhouse's archetectural origins in its design by Kiehnel. The 2005 report also cited Alfred Browning Parker's subsequent "modernist" restyling of the theater and the theater's historical significance. The **entire playhouse** was designated as one of the "[c]ontributing structures within the site." The Report specifically defined "contributing structures" to include the playhouse:

> **Contributing structures within the site include the Coconut Grove Playhouse itself.** Only the south and east facades possess architectural significance. There are no contributing landscape features. (emphasis added)

In reliance upon the 2005 report, the City of Miami passed Resolution No. HEPB-2005-60 "**designating the Coconut Grove Playhouse . . . as a historic site**, after finding that it has significance in the historical heritage of the City of Miami, possesses integrity of design, setting, materials, workmanship, feeling and association; and meets criteria 3, 5, and 6 of Section 23-4(a) of the Miami City Code." The resolution incorporated the 2005 Report of the City of Miami Preservation Officer.

The parties agree that the 2005 Resolution designating the Playhouse as a historic site (including the incorporated report) controls whether any plan of demolition or renovation proposed by Miami-Dade County may be granted a certificate of appropriateness.

2017 First Certificate of Appropriateness

In 2017, Miami-Dade County applied for a special certificate of appropriateness to the HEPB to develop the Playhouse. *See* § 23-6.2(b)(4), City of Miami Code. The application did not set forth a comprehensive plan, but rather, in broad strokes, a "Masterplan Concept." It proposed to restore only the "entire front historic building to the original 1927 Kiehnel & Elliott design," and survey the remaining interior elements, but did not propose to preserve the theater. Instead, the plan proposed to design a "new state-of-the-art theater and orient the theater on axis with the original theater and its corner entrance through the historic front building." In other words, the "Masterplan Concept" proposed to retain only the front façade, demolish the theater, and build a new theater on the original footprint.

The 2017 staff analysis for the HEPB concluded that demolition of the theater was appropriate because the 2005 historic designation report described only the "original Keihnel structure containing the South and East facades" as requiring preservation. The 2017 staff's conclusion that the interior of the theater was not designated as historic credited only one sentence of the following paragraph contained in the 2005 historical designation report:

> Contributing structures within the site include the Coconut Grove Playhouse itself. **Only the south and east facades possess architectural significance.** There are no contributing landscape features. (emphasis added)

In so doing, the staff disregarded the 2005 report's description of the Parker Browning renovation of the interior of the theater and the *historical significance* of the entire theater and its builders. In reliance upon the staff analysis, the HEPB approved this 2017 certificate of appropriateness.

Although the City Commission passed a resolution approving the 2017 certificate of appropriateness, the Commission added requirements, including preservation of the entire Playhouse structure and protection of certain interior elements. On a petition for writ of certiorari brought by city residents, a panel of this Court held: (1) that residents had no standing to appeal and (2) the City of Miami violated due process by expanding the requirements of the certificate of approval because, in the prior panel's view, the interior of the theater was not designated as a historical structure. *Miami-Dade County v. City of Miami,* 26 Fla. L. Weekly Supp. 800b (Fla. 11th Cir. Ct. Dec.3, 2018) ("*Playhouse I*").

Since *Playhouse I* was decided, the 2017 certificate of appropriateness has expired. *See* § 23-6.2(g), City of Miami Code of Ordinances.

Listing on the National Register of Historic Places

In 2018, the City of Miami applied for and obtained a listing for the Playhouse in the National Register of Historic Places. In describing the historical significance of the interior, the report in support of the national registry listing stated:

> While the levels of architectural integrity vary depending on the portion of the building examined, the Playhouse still retains a high degree of associative integrity with the events that occurred at that location. The theater's auditorium retains a high level of integrity from the period of significance associated with George Engles and Zev Buffman and the productions they coordinated and sponsored.
>
> * * *
>
> The Coconut Grove Playhouse retains to a high degree its integrity of feeling. The building clearly conveys a sense of early twentieth-century glamor, which Kiehnel and Elliott built and Parker maintained. While the interior has been altered and degraded, it still maintains its historic feeling as well.
>
> Overall Integrity
>
> The building retains sufficient integrity of location, setting, design, materials, workmanship, association and feeling for listing on the National Register of Historic Places.

Second Certificate of Appropriateness—Current Demolition and Development Plan

The County applied again to the HEPB for a special certificate of appropriateness to develop the property. The County's new plan proposed to preserve only the front structure of the Playhouse, demolish the existing theater, build a new 300-seat theater and additional structures, attempt to preserve certain interior elements and redesign new elements to echo the original 1927 theater. After a hearing, the HEPB denied this application.[3]

The City of Miami Commission reversed the denial in a 3-2 vote in Resolution R-19-0169—Coconut Grove Playhouse Appeal.

On May 17, 2019, the City of Miami Mayor vetoed the Commission's resolution.

In his veto, the Miami Mayor stated:

> We must uphold historic preservation requirements in our community, and the Coconut Grove Playhouse should be no exception. The Playhouse is "a signature building reflecting the heyday of Coconut Grove." *See* City of Miami Preservation Officer 2005 Report. The HEP Board recognized this fundamental truth and I seek to reinstate that decision.[4]

The Mayor further stated, "[t]he County's current plan that cannibalizes the historic structure will not meet my approval." But the Mayor suggested that the County could immediately build the parking garage structure and restore the 1927 façade while resubmitting an amended certificate of appropriateness for a more suitable plan to the City.

The County sought an override of this veto pursuant to Section 4(g)(5) of the City Charter which failed by a Commission vote of 3-2.

The County then filed this petition seeking to quash the mayoral veto.

Jurisdiction

Generally, we have jurisdiction to issue writs of certiorari. Art. V, § 5(b), Fla. Const. ("The circuit courts . . . . shall have the power to issue writs of . . . certiorari"). "Common-law certiorari has been made available to review quasi-judicial orders of local agencies and boards not made subject to the Administrative Procedure Act when no other method of review is provided." *Haines City Community Development v. Heggs,* 658 So.2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a], *citing De Groot v. Sheffield,* 95 So. 2d 912 (Fla.1957).

In *Teston v. City of Tampa,* the Supreme Court of Florida explained:

> In the absence of specific valid statutory appellate procedures to review the particular order, it becomes necessary to ascertain whether the order is quasi-judicial or quasi-legislative. If the order is quasi-judicial, that is, **if it has been entered pursuant to a statutory notice and hearing involving quasi-judicial determinations**, then it is subject to review by certiorari.

Citing DeGroot v. Sheffield, 95 So. 2d 912 (Fla. 1957); *Bloomfield v. Mayo,* 119 So. 2d 417 (Fla. 1960) (emphasis added).

Therefore, we have jurisdiction to hear a petition for writ of certiorari to review a municipality's quasi-judicial act, but none to review a quasi-legislative act. To determine whether an act is quasi-judicial, we must determine whether the act in question was made subject to notice, hearing and fact-finding. "[A] judgment becomes judicial or quasi-judicial, as distinguished from executive, when notice and hearing are required, and the judgment of the board is contingent on the showing made at the hearing. In such cases, certiorari, not mandamus, should be employed as the proper method of review." *Anoll v. Pomerance,* 363 So. 2d 329, 331 (Fla. 1978), *citing Davies v. Howell,* 192 So. 2d 43 (Fla. 2d DCA 1966).

Certiorari Review of a Mayoral Veto

Under the City of Miami Charter and City of Miami Code of Ordinances, the HEPB's denial of the County's certificate of appropriateness and the City of Miami Commission's review of the HEPB denial are undoubtably quasi-judicial acts. But under the same charter and ordinances, the nature of a mayoral veto is quite different.

Section 23-6.2, of the City of Miami Code of Ordinances governs applications for certificates of appropriateness to the HEPB. To review applications for certificates of appropriateness, the HEPB is required to abide by a host of procedural requirements, including:

- The right to public hearing and provisions for rehearing
- Notice by mail to the applicant at least ten days prior to the hearing
- An advertisement shall be placed in a newspaper of general circulation at least ten days prior to the hearing.
- Additional notice deemed appropriate by the board.
- The right to appeal to the City Commission

Id. The HEPB decision at issue here denying a certificate of appropriateness was made subject to required notice, the opportunity to be heard, a public hearing, and the right to appeal. This decision by the HEPB was therefore quasi-judicial in nature.

The City Commission's decision overruling the HEPB denial was similarly quasi-judicial in nature. Under section 23-6.2(e) of the City Code of Ordinances, the Commission's review of the HEPB decision is also girded by a number of procedural safeguards:

- Right of any aggrieved party to appeal to the Commission
- Right to public hearing
- Right to notice and opportunity to be heard
- Final decision of the Commission is appealable to the courts[5]

§ 23-6.2(e), City of Miami Code of Ordinances. As set forth in this section, "[t]he decision of the city commission shall constitute final administrative review, and no petition for rehearing or reconsideration shall be considered by the city." *Id.* Thus, the Commission's resolution reviewing the HEPB constitutes a final, quasi-judicial act reviewable in this Court by certiorari.

But the Commission's decision overruling the HEPB is not before us on review. The Mayor's veto is. And a mayoral veto is quite a different thing.

Powers are granted to municipalities by the Florida Constitution and by general law. Article VIII, section 2(b) provides:

> **SECTION 2. Municipalities. —**
>
> * * *
>
> (b) POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective.

Section 166.021, Florida Statutes (2018) provides:

> (1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.

Section 4(a) of the City of Miami Charter distributes the City of Miami's municipal powers between the Commission, Mayor and City Manager:

> (a) General description. The form of government of the City of Miami, Florida, provided for under this Charter shall be known as the "mayor-city commissioner plan," and the city commission shall consist of five citizens, who are qualified voters of the city and who shall be elected from districts in the manner hereinafter provided. **The city commission shall constitute the governing body with powers (as hereinafter provided) to pass ordinances adopt regulations and exercise all powers conferred upon the city except as hereinafter provided. The mayor shall exercise all powers conferred herein** and shall appoint as provided in section 4(g)(6) of this Charter a chief administrative officer to be known as the "city manager."

(emphasis added)

The Mayor's powers are set forth in Sections 4(b) and4(g) of the Charter. Among the powers reserved to the Mayor is veto power:

> (5) **The mayor shall, within ten days of final adoption by the city commission, have veto authority over any legislative, quasi-judicial, zoning, master plan or land use decision of the city commission,** including the budget or any particular component contained therein which was approved by the city commission; provided, however that if any revenue item is vetoed, an expenditure item in the same or greater dollar amount must also be vetoed. The city commission may, at its next regularly scheduled or special meeting after the veto occurs, override that veto by a four-fifths vote of the city commissioners present, notwithstanding any provisions to the contrary contained in the Charter and city code. Said veto power shall include actions pursuant to sections 29-B through 29-D of the Charter.

§ 4(g)(5), City of Miami Charter. (emphasis added).

Unlike the HEBP decision and the City Commission appeal, a mayoral veto contains no hallmarks of a quasi-judicial act. A mayoral veto requires no notice, no opportunity to be heard, no public meeting. Nor is there any avenue for review, except for a Commission override.[6] Absent the hallmarks of quasi-judicial action, clearly then, a mayoral veto is not a quasi-judicial act.[7]

Instead, a veto is an act which *prohibits.* The word "veto" comes from the Latin "vetare" which means to forbid or prohibit.[8] The meaning of the word veto has not changed over time. It was first used in 1629 as a noun to describe an ecclesiastical censure. *Id.* In the context of politics and government, the word "veto" is defined as "the power to refuse to allow something to be done, or such a refusal."[9] The word veto is commonly known and understood to mean the sole, discretionary exercise of power to prohibit a legislative act, a power which is generally unreviewable. *See, e.g., Brown v. Firestone,* 382

So. 2d 654, 664 (Fla.1980) (governor's constitutional "veto power is intended to be a negative power, the power to nullify, or at least suspend, legislative intent. It is not designed to alter or amend legislative intent").[10]

Accordingly, we conclude that we have no jurisdiction to review the Mayor's veto.[11] Therefore, we may not address the merits of this petition.

This Petition is therefore dismissed. (TRAWICK and ZAYAS, JJ., Concur.)

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[1]2005 Report of the City of Miami Preservation Officer to the Historic and Environmental Preservation Board

[2]§§ 23-3, 23-4(c), City of Miami Code of Ordinances. Pursuant to Section 23-4, City of Miami Code of ordinances, designation of a site as historic requires consideration of a number of factors set by the United States Secretary of the Interior.

[3]The County argues that it was denied due process at the HEPB proceeding because of ex parte communications involving the chair of the HEPB, in addition to other due process challenges. We decline to address these claims.

[4]The Mayor cited several other grounds in his veto. The Mayor opined that the appeal was premature. The Mayor considered that subsequent to the 2017 certificate of appropriateness, the Playhouse was listed on the National Register, and demolishing it could disturb its prestigious listing. The Mayor expressed concern that the plan contemplating demolition violated Section 267.061(2)(b), Florida Statutes because it failed to ensure that no "feasible and prudent" alternative exists to demolition. And the Mayor opined that the application is fatally flawed because it does not make a request for demolition.

[5]It should be noted that there is no right of *appeal* to the circuit courts granted by this final provision in section 23-6.2(e), City of Miami Code of Ordinances. Appeals, under Article V, section 5(b), may only be reviewed by the circuit courts as provided by *general law.* A municipality may not confer jurisdiction upon the circuit courts. *Pleasures II Adult Video, Inc. v. City of Sarasota,* 833 So. 2d 185, 188 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2637a]. The only avenue of circuit court review of a quasi-judicial decision is by petition for writ of certiorari.

[6]The County's attempt to secure a Commission override failed by a vote of 3-2.

[7]Is a mayoral veto therefore quasi-legislative? Or is it executive? Section (4)(g) of the City of Miami Charter does not describe the Mayor as an "executive" in the way that the Constitution describes the Governor as the "supreme executive power." *See* Article IV, section 1, Fla. Const. *See, e.g., Citizens for Reform, etc. v. Citizens for Open Government, Inc.,* 931 So. 2d 977 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1512a] (Amendment to Miami-Dade County Charter increasing administrative power of County Mayor did not create separate executive function for County Mayor). But neither does mayoral veto power fit neatly in the description of "quasi-legislative" power, because it negates the power of the Commission. But no matter how veto power is described, it is not quasi-judicial and therefore, not properly reviewable by certiorari.

[8]WATSON, RICHARD A. "Origins and Early Development of the Veto Power." *Presidential Studies Quarterly, vol.* 17, no. 2, 1987, pp. 401-412. JSTOR, www.jstor.org/stable/40574459. Accessed 9 July 2020.

[9]*Cambridge Academic Content Dictionary,* Cambridge University Press, https://dictionary.cambridge.org/dictionary/english/veto.

[10]By analogy, there" is no judicial review of a Governor's veto absent a violation of Article III, section 8(a) of the Florida Constitution, which is the sole limitation of a gubernatorial veto of a legislative appropriation. *See Chiles v. Children A, B,* C, *D, E, and F,* 589 So. 2d 260, 265 (Fla.1991) ("[I]t is well settled that the executive branch does not have the power to use the veto to restructure an appropriation."). But absent such a constitutional violation, a "governor may exercise his veto power for any reason whatsoever." *Firestone,* 382 So. 2d at 668.

[11]In *McMullen v. Bennis,* 20 So. 3d 890, 892 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D1808a] court observed that a trial court is not authorized to issue advisory opinions.

* * *

Municipal corporations—Zoning—Nonconforming use—Petition for certiorari challenging board of adjustment's decision to reverse planning director's determination that package liquor store was not legal nonconforming use following enactment of ordinance prohibiting package liquor stores in district is denied—Liquor store's failure to renew its business tax receipt during fiscal year in which ordinance was enacted did not necessarily terminate its status as nonconforming use—Failure to maintain BTR did not constitute abandonment of liquor store's nonconforming use where store was in continuous operation until city forced it to close, and owner acted to rectify lapse in BTR

CITY OF MIAMI BEACH, a Florida municipal corporation, Petitioner, v. BEACH BLITZ, CO., d/b/a OCEAN 9 LIQUOR, INC., a Florida corporation, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-22-AP-01. July 21, 2020. On a Petition for Writ of Certiorari seeking to quash an Order of the City of Miami Beach's Board of Adjustment (File Number: ZBA18-0077). Counsel: Richard J. Ovelmen, Enrique D. Arana, Todd. M. Fuller, and Scott E. Byers, Carlton Fields Jorden Burt, P.A., for Petitioner. Morgan L. Swing and Phillip M. Hudson III, Duane Morris LLP, for Respondent.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

(TRAWICK, J.) Petitioner, City of Miami Beach, Florida (the "City"), seeks to quash an Order of its Board of Adjustment (the "BOA"), which reversed the City Planning Director's determination that the operation of a package liquor store by Beach Blitz, Co., d/b/a Ocean 9 Liquor ("Blitz"), was not an established legal nonconforming use under the Code of the City of Miami Beach, Florida (the "Code")[1] The sole issue before this Court is whether the BOA complied with the essential requirements of the law in reversing the Planning Director's decision.[2]

Blitz owned and operated a package liquor store located at 865 Collins Avenue, Miami Beach, Florida, since 2012 in the City's Mixed-Use Entertainment District ("MXE"). It maintained a current Business Tax Receipt ("BTR") until the 2016-2017 fiscal year when it failed to renew the BTR.[3] On October 19, 2016, the City enacted Ordinance 2016-4047 (the "Ordinance"), which prohibited package liquor stores and the sale of alcoholic beverages by any retail stores or alcoholic beverage establishments in the MXE District. After the enactment of this ordinance, Blitz was issued two citations for failing to obtain a BTR, the first being issued on June 25, 2017 and the second on October 6, 2017. Upon the issuance of the second citation, Blitz was ordered closed by a City Code Enforcement Officer accompanied by two police officers. With this show of force Blitz closed its package liquor store.

On October 11, 2017, Blitz' owner submitted payment to renew the BTR for its package liquor store. The payment was rejected because the BTR was not renewed during the fiscal year and had been placed in closed status. The City maintained that pursuant to Code section 102-371, it was necessary to apply for a "new" BTR rather than a "renewed" BTR.[4] On or about December 27, 2017, Blitz applied for a new BTR. On January 19, 2018, the Planning Department denied the application for a new BTR, indicating that package liquor stores had not been permitted in the MXE District since the enactment of the Ordinance on October 30, 2016.

Blitz appealed the Planning Director's denial of its application for a BTR to the BOA. At the May 4, 2018 hearing before the BOA, Blitz argued for the first time that its package liquor store should be considered a nonconforming use. The BOA refused to entertain the issue because it was not raised before the Planning Department. The BOA found that the Planning Department properly denied Blitz's request for a BTR to operate a package liquor store in the MXE District since package liquor stores were prohibited in the MXE District by the Ordinance. As a result, the BOA denied the appeal.

On May 18, 2018, Blitz requested a determination from the Planning Director that its package liquor store was a legal nonconforming use. That determination was made on June 12, 2018, when the Planning Director found that Blitz was not a legally established nonconforming use based upon the Ordinance. Blitz appealed this determination. The BOA subsequently voted 5-2 to reverse the Planning Director's decision. This Petition for Writ of Certiorari followed.

It is uncontested that Blitz's package store was a legal existing use which conformed to the Code when it was legally established in 2012. This petition raises the question of whether the package store's legal existing use became a legally established nonconforming use upon enactment of the Ordinance and maintained that status at the time of the Planning Director's determination to the contrary.

Code section 118-393(a) provides, in part, that "[except] as otherwise provided in these land development regulations, the lawful

use of a building existing at the effective date of these land development regulations may be continued, although such use does not conform to the provisions hereof."

Code section 114-1 (Definitions) defines a nonconforming use as:

> a use which exists lawfully prior to the effective date of these land development regulations and is maintained at the time of and after the effective date of these land development regulations, although it does not conform to the use restrictions of these land development regulations.

Code section 118-390(b) defines the term "nonconformity" as "a use, building, or lot that does not comply with the regulations of this article. Only **legally established** nonconformities shall have rights under this section." (emphasis added). Code section 118-390(d)(3) defines "**legally established**" to include, "[a]n existing **use** which conformed to the code **at the time it was established**." (emphasis added).

Conforming and nonconforming "uses " are defined and governed by Code sections 114-1 and 118-390. These sections are found in, Subpart B, of the Code pertaining to Land Development Regulations. The City argues that Blitz's package liquor store was operating unlawfully because it did not have a current BTR for the 2016-2017 fiscal year when the Ordinance prohibiting package liquor store uses in the district was enacted in October 19, 2016. Code sections 102-356, 102-357, and 102-360 require a current BTR for the privilege of engaging in a business, profession or occupation within the City's jurisdiction. These sections are found in a separate and distinct part of the Code, Subpart A of the Code's General Ordinances under Chapter 102, governing "Taxation." We find that the lack of a current BTR under the General Ordinances governing Taxation in Code Subpart A, does not necessarily terminate the "use " status under the Land Development Regulations in Code Subpart B.

Chapter 102 does not provide for termination of a "use" for failing to maintain a current BTR, nor has the City pointed to any case supporting such a conclusion. Rather, remedies for failing to have a current BTR include monetary penalties, enjoining business operations, and even imprisonment. *See* Code section 102-377. The only provision for termination of a nonconforming use is found in the Land Development Regulations in Section 118-394(b), which provides, in part, for the discontinuance of a nonconforming use if there is an "intentional and voluntary abandonment of the nonconforming use." "An intentional and voluntary abandonment of use includes, but is not limited to, vacancy of the building or structure in which the nonconforming use was conducted, or discontinuance of the activities consistent with or required for the operation of such nonconforming use." *Id.*

> Abandonment occurs when the landowner intentionally and voluntarily foregoes further nonconforming use of the property. (citation omitted). Neither attrition nor abandonment occurs where a nonconforming use is interrupted or discontinued involuntarily by compulsion of governmental action. (citation omitted). Temporary cessation of a nonconforming use or the temporary vacancy of buildings used for the nonconforming use does not operate to effect abandonment of the nonconforming use. (citation omitted). Accordingly, an involuntary cessation of the nonconforming use of a premises for the sale of alcoholic beverages due to the loss of a beverage license in administrative disciplinary proceedings does not constitute abandonment and terminate the grandfathered status of such nonconforming use of such premises.

Lewis v. City of Atlantic Beach, 467 So. 2d 751, 755 (Fla. 1st DCA 1985).

While Blitz may have allowed its BTR to lapse, this did not, in and of itself, constitute an abandonment of its nonconforming use. Instead, it is one factor that may be considered in determining whether Blitz' package store maintained its nonconforming status. "In order for a nonconforming use to retain a nonconforming status, the evidence, collectively, shall at a minimum demonstrate at least one of the following: (1) Continual operation of the use; (2) Continual possession of any necessary and valid state and local permits, building permits, licenses, or active/pending application(s) for approval related to prolonging the existence of the use." Section 118-394(c).

It is the Planning Director's or his designee's duty to "evaluate the evidence of an intentional and voluntary abandonment of a nonconforming use and determine the status of the nonconforming use." Section 118-394(c.).[5] While the Planning Director had clear evidence that Blitz did not have a BTR for the fiscal year 2016-2017, evidence available to the Planning Director also shows that Blitz' package liquor store was in continuous operation from 2011 until the City forced it to close on October 6, 2017. Additionally, Blitz retained professional assistance to remedy purported violations and to rectify the lapse in its BTR.[6] As a result, the record does not support a conclusion that Blitz intended to abandon its nonconforming use.

In reaching our conclusions, we have considered the record before us and the applicable Code provisions in light of the axiom that "[z]oning laws are in derogation of the common law and, as a general rule, are subject to strict construction in favor of the right of a property owner to the unrestricted use of his property." *Mandelstam v. City Comm'n of City of S. Miami,* 539 So. 2d 1139, 1140 (Fla. 3d DCA 1983). Further,

> [s]ince zoning regulations are in derogation of private rights of ownership, words used in a zoning ordinance should be given their broadest meaning when there is no definition or clear intent to the contrary and the ordinance should be interpreted in favor of the property owner.

Rinker Materials Corp. v. City of North Miami, 286 So. 2d 552, 553 (Fla.1973). Interpreting the language used in the Code by giving it its broadest meaning and which inures in favor of the property owner Blitz, we find that the BOA correctly ruled that the Planning Director erred in finding that Blitz' package liquor store was not an established legal nonconforming use under the Code. Further, the nonconforming use was not abandoned by the store owner.

Based upon the above analysis, the Petition for Writ of Certiorari is hereby DENIED. (WALSH and SANTOVENIA, JJ. concur.)

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[1]Certiorari review by a circuit court typically requires a determination as to whether: (1) procedural due process was accorded, (2) the essential requirements of the law were observed; and, (3) the administrative findings and judgment were supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982).

[2]No argument has been raised that the City was not accorded procedural due process or that the decision of the BOA was not supported by competent substantial evidence. Instead, the Petition focuses only on the second prong of the standard.

[3]A fiscal year runs from October 1 through September 30 of the following year. Code section 102-360. Accordingly, Blitz' BTR expired September 30, 2016.

[4]On November 30, 2017, Blitz filed a federal lawsuit alleging procedural and substantive due process violations against the City, its former mayor, current and former commissioners, City Attorneys, and the City Manager for their alleged roles in the closure of Blitz' package liquor store. *Beach Blitz Co. v. City of Miami Beach, Florida, et. al.,* Case No. 1:17-cv-23958-UU (S.D. Fla.). The district court denied the motion for temporary injunction and dismissed the complaint for failure to state a claim.

[5]"Evidence of an intentional and voluntary abandonment of a nonconforming use may include, but shall not be limited to: (1) Public records, including those available through applicable City of Miami Beach, Miami-Dade County, and State of Florida agencies; (2) Utility records, including water/sewer accounts, solid waste accounts, and electrical service accounts; (3) Property records, including executed lease or sales contracts." Code section 118-394(d).

[6]A member of the BOA noted that:

> the concept of that he [Blitz' owner] intentionally abandoned his property and intentionally didn't pay, I seem to believe is refuted directly by the amount of money, as an attorney myself, that he's probably being [sic] incurred from now going forward in fighting this. It doesn't seem like he's someone who wants to abandon his business. (Tr. 78).

* * *

Landlord-tenant—Eviction—Trial court erred in entering final judgment for damages where affirmative defenses and motion to amend pleadings to add counterclaim were pending

TATIANA MAYA DELGADO, Appellant, v. OCTAVIO PINO, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000184-AP-01. L.T. Case No. 2019-011507-CC-05. July 21, 2020. An Appeal from the County Court for Miami-Dade County, Judge William Altfield. Counsel: Michael Van Cleve, for Appellant. Octavio Pino, pro se, for Appellee.

(Before TRAWICK, WALSH, SANTOVENIA, JJ.)

(**PER CURIAM.**) Affirmed in part and Reversed in part. The trial court appropriately entered final judgment as to Count I of the complaint for the removal of the Appellant. *See KD Lewis Enterprise Corp. v. Smith,* 445 So. 2d 1032, 1035 (Fla. 5th DCA 1984). However, it was error for the trial court to enter final judgment as to Count II for damages with outstanding affirmative defenses pending. Further, a motion to amend pleadings filed by the Appellant to add a counterclaim was filed between the hearing on the Appellee's motion to determine rent and the entry of final judgment. This motion must be addressed by the trial court. This matter is therefore remanded for proceedings on the remaining count of the complaint and on Appellant's motion to amend pleadings. (TRAWICK, WALSH and SANTOVENIA, JJ. concur.)

* * *

Appeals—Non-final orders—No statute authorizes appeal of order granting partial summary judgment—Order is not reviewable by certiorari where there was no error which cannot be remedied on plenary appeal from final judgment

HORACIO SEQUEIRA, Appellant/Petitioner, v. H.G.C. Auto Collision, Inc., Appellee/Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-148-AP-01. L.T. Case No. 2016-18839-SP-05. August 13, 2020. On Appeal from the County Court in and for Miami-Dade County, Hon. Christina M. Diraimondo, Judge. Counsel: Horacio Sequeira, pro se. Courtney B. Wilson and Ryan P. Forrest, Littler Mendelson, P.C., for Appellee.

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

ORDER OF DISMISSAL

(PER CURIAM.) This is an appeal from an order granting a motion for partial summary judgment on one of two claims asserted within Appellant's statement of claim. The first of those claims is an alleged violation of the Miami-Dade Living Wage Ordinance for failing to pay Appellant certain hourly wages. The second claim is that Appellee improperly garnished his pay. The trial court entered partial summary judgment in favor of Appellee on the Living Wage Ordinance claim. The remaining claim was not addressed, and the case below is open and pending. Finding we have no jurisdiction, we dismiss this appeal. Nothing prevents the Appellee from raising the trial court's entry of partial summary judgment on plenary appeal.

Appellant filed a notice of non-final appeal pursuant to Florida Rules of Appellate Procedure 9.110 pertaining to final orders, and 9.160 pertaining to the discretionary review of county court decisions by a district court of appeal. Neither rule is applicable here. Because the order on appeal is neither an appealable non-final order nor a final order, this appeal must be dismissed.

Jurisdiction to hear nonfinal appeals in the district courts of appeals is governed by Rule 9.130. See Art. V, § 4(b)(1), Fla. Const.; Rule 9.130(a)(1), Fla. R. App. P. However, jurisdiction to hear appeals from nonfinal orders in the circuit courts is governed by general law. See Art. V, § 5, Fla. Const. ("The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law"); *Blore v. Fierro,* 636 So. 2d 1329 (Fla. 1994) ("The authority for appeals to the circuit court is established solely by general law as enacted by the legislature"). Here, no statute authorizes an appeal from an order granting partial summary 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).

Nor is the trial court's order a final order or judgment which would be appealable under section 59.06, Florida Statutes. "Florida's test of finality for appellate purposes is well established: the order constitutes the end of judicial labor in the trial court, and nothing further remains to be done to terminate the dispute between the parties." *Bloomgarden v. Mandel,* 154 So. 3d 451, 454 (Fla. 3d DCA 2014) [40 Fla. L. Weekly D95a], *citing Miami-Dade Water and Sewer Auth. v. Metro. Dade County,* 469 So. 2d 813, 814 (Fla. 3d DCA 1985). Clearly, judicial labor is not at an end—the case below remains pending. And again, Rules 9.110 and 9.160 do not establish the jurisdiction of this Court to hear such an appeal—only the Florida Statutes may authorize circuit court appellate jurisdiction.

Nor is the trial court's order reviewable by certiorari because there was no departure from the essential requirements of law resulting in irreparable harm. *See Pannell v. Triangle/Oaks Ltd. Partnership,* 783 So. 2d 325 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D989a]; *citing Rodriguez v. Young America Corp.,* 717 So. 2d 621 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D2196b] (citing numerous cases). The trial court's order merely granted a partial motion for summary judgment—the case remains pending. There was no error for which Appellant cannot seek redress through plenary appeal if and when a final judgment is secured against it.

Further, the fact that Appellant will be forced to litigate this case does not constitute the type of irreparable harm which would authorize the writ. *See, e.g., AVCO Corp. v, Neff*, 30 So. 3d 597 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D541a] (because the error complained of may be addressed on plenary appeal, the trial court's order denying summary judgment did not cause irreparable harm).

This appeal is hereby DISMISSED. (TRAWICK, WALSH and SANTOVENIA, JJ., concur.)

* * *

Municipal corporations—Code enforcement—Unsafe structures—Final order of city unsafe structures panel requiring demolition of property found to be 70% deteriorated and to present health, fire, and hazard problem is affirmed—No merit to claim that panel failed to consider valuation criteria contained in city code—Due process—Notice—Where property owner received notice that city building department was going to initiate demolition proceedings if he did not comply with requirement to obtain demolition or building permit within ten days and subsequent notices telling him to contact department for compliance information, but owner took no action in response to notices, owner cannot claim on appeal that he was surprised to learn of demolition recommendation at hearing before panel

CUTTING EDGE REAL ESTATE SOLUTIONS, LLC, Appellant, v. CITY OF MIAMI, BUILDING DEPARTMENT, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-131-AP-01. L.T. No. BB2019000684. August 11, 2020. Appeal from the City of Miami Building Department's Unsafe Structures Panel. Counsel: Jorge Garcia-Menocal, Garcia-Menocal Irias & Pastori LLP, for Appellants. Victoria Mendez, City Attorney, and Eric J. Eves, Assistant City Attorney, for Appellees.

(TRAWICK, WALSH and SANTOVENIA, JJ.)

(TRAWICK, J.) The City of Miami issued several notices to Appellant regarding a structure the City's Building Department ("the Department") deemed to be in an extreme state of disrepair. The notices warned of possible demolition if the condition of the structure was not remedied. The Unsafe Structures Panel ("the Panel") held an evidentiary hearing and adopted the Department's recommendation that the structure be demolished. Appellant brings this appeal contesting that determination.

On January 14, 2019, the Department issued a notice to Appellant titled "Repair or Demolish—First Notice" pertaining to a structure owned by Appellant. The notice stated that the property was found to be unsafe, abandoned, and unsecured with advanced deterioration throughout. The notice required the Appellant to obtain a demolition permit or to begin repairs on the structure. The notice further warned that "[i]f either a demolition or building permit is not obtained or we do not hear from you by January 24, 2019, it will be necessary to move toward demolition of your building. . . ." The notice also provided contact information for the Department's Unsafe Structures Section ("the Section"), including the mailing address, telephone number and email address. The record does not reflect that the Appellant made any effort to obtain a permit or contact the Section within the required time. Three weeks after the first notice, on March 4, 2019, the Department issued a second notice imposing a special assessment lien pursuant to Chapter 8-5 of the Miami-Dade County Code and Chapter 10, Article VI, Section 10-101 of the City of Miami Code. The notice also stated that Appellant should contact the Chief of the Section for lien and compliance information. Two days later the Department issued a notice of hearing to be held before the Panel, notifying Appellant of the hearing date and that Appellant could contact the appropriate representative of the Department regarding the alleged violations and compliance requirements. Prior to the hearing, the Section provided documents relevant to the valuation determination of the property as required by City of Miami Code Chapter 10, Article VI, Section 10-101. The only documents in the record were documents titled "Case Resume," and "Calculation Sheet," as well as photographs of the structure. The Case Resume included a determination that the structure was 70% deteriorated, that the current value of the property was $22,757, that the approximate cost of repair was $53,995 and that demolition was recommended. The Calculation Sheet included the property's square footage and construction cost per square foot, as well as the estimated depreciation for the interior, windows, roof and the structure overall. The Calculation Sheet also indicated a replacement cost of $76,752, a repair cost of $53,995 and a present value of $22,757.

At the hearing before the Panel on April 12, 2019, the chief of the Section summarized the property issues, including roof damage, water penetration, water damage, termite damage, damage to the electrical and plumbing systems, and broken and malfunctioning fixtures. He also stated that the percentage of deterioration was 70% and that the structure presented a health, fire and hazard problem. All of this information was included in the Case Resume and the Calculation Sheet. Representatives of the Appellant testified that they understood the recommendation of the Department; that they had secured the property; that they had engaged an architect or an engineer (Appellant's testimony appeared confused as to which) to have plans for the property drawn up; and that they were on their way to get the permits approved. At the conclusion of the testimony the Panel adopted the recommendations of the Department and issued a final order of demolition.

Appellant maintains that the Panel departed from the essential requirements of law when it failed to consider the valuation criteria contained in City of Miami Code, Chapter 10, Article VI, Section 10-101. They also argue that the Panel departed from the essential requirements of law because they did not receive proper notice of the City's intent to demolish the property pursuant to the same City Code provision.

In an appeal of the decision of an administrative agency, this Court is required to consider whether procedural due process was accorded, whether the essential requirements of law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. *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).

Chapter 10, Article VI, Section 10-101(d) describes the valuation criteria for a building or structure:

> (d) Valuation criteria:
>
> (1) If the cost of completion, alteration, repair and/or replacement of an unsafe building or structure or part thereof exceeds 50 percent of its value, such building shall be demolished and removed from the premises. If the cost of completion, alteration, repair and/or replacement of an unsafe building or structure or part thereof does not exceed 50 percent of its value, such building or structure may be repaired and made safe, as provided herein.
>
> (2) For purposes of application of this formula, value shall be the estimated cost to replace the building in kind, excluding depreciation. The estimate shall be derived from multiplying the value of the square footage of the construction used by the building department to calculate the applicable permit fee. That estimate shall be broken down on a percentage basis into an estimate of the following critical elements of construction, as applicable: structural, roofing, electrical, plumbing and mechanical, and other building components. ("valuation of construction components"). The cost of completion, alteration, repair or replacement shall be estimated by application of the percentage of deterioration found on site for each of the critical elements of construction to the valuation of construction components for the structure, to arrive at an overall estimated cost to repair the affected structure. The appointing authority shall by administrative order provide a form for the application of the formula set forth above for the various types of construction.

Contrary to the arguments of Appellant, the Panel had before it the required valuation criteria under Chapter 10, Article VI, Section 10-101(d). The record includes the Case Resume and Calculation Sheet discussed above. These documents enabled both the Section when it made its recommendation of demolition, as well as the Panel in adopting that recommendation, to determine that the "cost of completion, alteration, repair and/or replacement" of the Appellant's structure exceeded 50 percent of its value. The Panel thus observed the essential requirements of law.

The Appellant also contends that the first notice issued by the Section on January 14, 2019, failed to state the nature of the alleged structural infirmities. They also argue that the notice failed to say "that the specific details concerning violations can be obtained in writing from the building official on request," language which Appellant argues is required by City of Miami Code Chapter 10, Article VI, Section 10-101(h). Further, Appellant says that the notice gave him ten days to obtain a building permit, a demolition permit or to contact the Department. Since the notice gave him the option to repair the property, Appellant contends that the City should have followed the procedures contained in Chapter 10, Article VI, Section 10-101(h) titled, "Unsafe Structures Not Meeting Valuation Criteria for Immediate Demolition." Appellant argues that contrary to the prescribed procedure, the Department for the first time at the hearing sought immediate demolition rather than repair, following the procedures contained in Chapter 10, Article VI, Section 10-101(g) titled "Unsafe Structures Meeting Valuation Criteria for Immediate Demolition." Appellant concludes that the City failed to observe the essential requirements of law due to this discrepancy between the

notice and the process followed by the City. While not expressly stated, it also appears that Appellant is raising a procedural due process argument by contending that the notice he received was insufficient.

City of Miami Code Chapter 10, Article VI, Section 10-101(g), provides:

> (g) Unsafe Structures Meeting Valuation Criteria for Immediate Demolition
>
> (1) The provisions below shall apply to buildings or structures meeting the valuation criteria for demolition.
>
> (2) The building official shall prepare a notice of violation. The notice shall state in summary form the nature of the defects which constitute a violation of this article and shall order the structure to be demolished within such time as is reasonable, subject to extension when requested in writing within the reasonable discretion of the building official. The notice shall state that the specific details concerning the violation can be obtained in writing from the building official upon request. In addition, the notice will explain the right of appeal of the decision of the building official to the unsafe structures panel, in its appellate capacity, and advise that unless the decision is appealed, the building or structure shall be demolished without further notice.
>
> . . .
>
> (8) The notices provided in this section are intended to serve as full and effective notice of the hearing and the violations related to the structure. Failure of one form of notice shall not invalidate or impair the full effectiveness of notice provided by other means pursuant to this section.

The January 14, 2019, notice gave the Appellant ten days to obtain a demolition or building permit or to contact the Section. The notice also provided contact information. The notice specifically warned the Appellant that if he failed to obtain the required permit or contact the Section, "it will be necessary to move toward demolition of your building . . . ." The Appellant was thus on notice of the Department's intent to proceed toward demolition without immediate action by Appellant. Despite this admonition, the Appellant failed to act as required. Three weeks after the first notice was issued, on March 4, 2019, the Department issued a second notice imposing a special assessment lien, again advising the Appellant to contact the Section for "compliance information." Again, there is nothing in the record to show that Appellant made contact with any authorized representative of the Section. Finally, the Appellant received a Notice of Hearing, once again advising the Appellant to contact the Section for compliance information. Yet again the Appellant failed to contact the Section.

The Appellant was provided the necessary notice to inform him that the Department was going to initiate demolition proceedings if he did not comply with the first notice's requirements within ten days. He did not do so. He received subsequent notices telling him to contact the section for compliance information. Appellant did not respond. Appellant cannot sit on his hands, ignore the specific directions provided, and now be heard to say that he was surprised to learn for the first time at the hearing of the Department's demolition recommendation. Indeed, at the hearing Appellant said he understood the Department's recommendation. The Department correctly followed the procedure required by Chapter 10, Article VI, Section 10- 101(g), and in so doing observed the essential requirements of law. The Department also accorded Appellant procedural due process.

Appellant failed to make any argument that the Panel's findings and judgment were not supported by competent substantial evidence, thus waiving this as an issue. *Rosier v. State,* 276 So. 3d 403, 406 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D1686a]; *Parker-Cyrus v. Justice Administrative Commission,* 160 So. 3d 926, 928 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D582a]. However, on the record before us, we find that competent substantial evidence supports the Panel's findings and judgment.

The final judgment of the Panel is **AFFIRMED**. (WALSH and SANTOVENIA, JJ., concur.)

* * *

Insurance—Personal injury protection—Summary judgment—Error to reject affidavit of expert on reasonableness of charges and relatedness and medical necessity of treatment

UNITED AUTOMOBILE INSURANCE COMPANY, Appellant, v. COUNTY LINE CHIROPRACTIC CENTER, INC., a/a/o Vicente Delgado, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-217-AP-01. L.T. Case No. 10-4569-CC-23. August 11, 2020. On Appeal from County Court in and for Miami-Dade County, Florida, Hon. Linda Singer Stein, Judge. Counsel: Michael J. Neimand, House Counsel for United Automobile Insurance Company, for Appellant. G. Bart Billbrough, Billbrough & Marks, P.A. for Appellee.

(Before TRAWICK, WALSH, and GINA BEOVIDES, JJ.)

OPINION

(PER CURIAM.) United Auto Insurance Company ("UAIC") appeals the trial court's order granting final summary judgment on behalf of County Line Chiropractic Center, Inc. ("Provider"). Here, the trial court rejected the conflicting affidavit offered by UAIC of Dr. Don Morris, and summary judgment was granted on the Provider's Motion for Summary Judgment regarding Reasonableness, Relatedness and Medical Necessity.

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, the medical treatment was related to the accident, and the prescribed diagnostic testing, treatment, and services were medically necessary. 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.

* * *

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

UNITED AUTOMOBILE INSURANCE COMPANY, Appellant, v. HALLANDALE

OPEN MRI, LLC, a/a/o Carita Ghent, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2017-316-AP-01. L.T. No. 13-15916-SP-23. August 11, 2020. On Appeal from County Court in and for Miami-Dade County, Florida, Hon. Alexander Bokor, Judge. Counsel: Michael J. Neimand, House Counsel for United Automobile Insurance Company, for Appellant. Chad A. Barr and Heather M. Kolinsky Law Office of Chad A. Barr, P.A., for Appellee.

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

OPINION

(PER CURIAM.) United Auto Insurance Company ("UAIC") appeals the trial court's order granting final summary judgment on behalf of Hallandale Open MRI, LLC. ("Provider"). Here, the trial court rejected the conflicting affidavit offered by UAIC of Denorah Lang, and summary judgment was granted on the Provider's Motion for Summary Judgment regarding Reasonableness[1].

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]Appellant, UAIC, stipulated to the issues of Relatedness and Medical Necessity.

* * *

Criminal law—Driving without valid driver's license—Evidence—Statements of defendant—Accident report privilege—Defendant's statements to officer investigating crash should have been excluded from evidence under accident report privilege—Error in admitting statements was harmless where defendant testified at trial and admitted all elements of charged offense

ANGEL DIAZ MIRANDA, Appellant, v. THE STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-186-AC-01 L.T. Case No. AB99W6E. August 12, 2020. An Appeal from Miami-Dade County Court, Hon. Robin Faber, County Court Judge. Counsel: Carlos Martinez, Miami-Dade Public Defender, and Manuel Alvarez, Assistant Public Defender, for Appellant. Katherine Fernandez Rundle, Miami-Dade State Attorney, and David B. Harden, Assistant State Attorney, for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

OPINION

(WALSH, J.) Angel Diaz Miranda appeals from conviction and sentence for driving without a valid driver's license, in violation of section 322.03(1), Florida Statutes. At issue in this appeal is whether Mr. Miranda's statements to the police following his motorcycle accident should have been excluded under Florida's accident report privilege, codified at section 316.066(4), Florida Statutes.

Mr. Miranda was involved in a traffic accident while riding his motorcycle. At trial, Officer Figone testified that he arrived to investigate the crash, and while "in the preliminary grabbing information," spoke to both drivers involved in the accident. Mr. Miranda told the officer that he was driving the motorcycle and that he was involved in the accident. The State introduced proof that Mr. Miranda was unlicensed at the time of his accident.

Mr. Miranda chose to testify at his trial. He denied making any statements to the officer after the crash. However, Mr. Miranda testified that indeed, he was operating his motorcycle at the time of the crash, with his wife riding on the back of the motorcycle. He also testified that he is unlicensed and does not have a motorcycle endorsement to lawfully operate a motorcycle.

Mr. Miranda argues that his statements to the police after the accident should have been excluded under Florida's accident privilege. § 316.066(4), Fla. Stat. (2019). The Defendant is correct. His statements were made "to a law enforcement officer for the purpose of completing a crash report." Such statements, pursuant to the statute, "may not be used as evidence in any trial, civil or criminal." *Id.*

Notwithstanding the error, we affirm. Mr. Miranda chose to testify at trial in his defense, wherein he admitted all elements of the offense. The State argues that any error in admitting the defendant's statements to the police was harmless. We agree. Mr. Miranda's testimony established all elements of the charged offense (he was more intent on proving that the other driver was at fault for the crash). Were he to be retried, his testimony from his first trial would be admissible in the State's case-in-chief. *See State v. Mosley,* 760 So. 2d 1129 (Fla. 5th Dist. App. 2000) [25 Fla. L. Weekly D1651a] (former testimony of defendant at murder trial admissible as non-hearsay at retrial under section 90.803(22), Florida Statutes). Since the Defendant admitted all elements of his offense at trial, and this testimony would without any doubt prove his guilt irrespective of his statements to the police, any error in admitting his statements to the police was harmless and there is no purpose to be served in granting a retrial. Accordingly, we affirm. (TRAWICK and SANTOVENIA, JJ. Concur.)

* * *

UNITED AUTOMOBILE INSURANCE COMPANY, Appellant, v. DOCTOR REHAB CENTER, INC., a/a/o Juliet Fernandez, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-000228-AP-01. L.T. Case No. 2011-001980-SP-26. April 16, 2020. An Appeal from the County Court for Miami-Dade County, Judge Lawrence D. King. Counsel: Michael J. Neimand, House Counsel for United Auto. Ins. Co., Miami Gardens, for Appellant. Majid Vossoughi, Majid Vossoughi, P.A., Miami, for Appellee.

[Second-tier Cert. DENIED; 45 Fla. L. Weekly D1766a.]

(Before DARYL E. TRAWICK, LISA S. WALSH, and THOMAS J. REBULL, JJ.)

(**PER CURIAM.**) Affirmed. Appellant is precluded from re-litigating the issue of reasonableness under the doctrine of collateral estoppel. *See Pearce v. Sandler,* 219 So.3d 961 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1214b].

* * *

LARRY JAMES BARBER, Appellant, v. ALEX/ANN MARGARET RAMOS, Appellees. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000335-AP-01. L.T. Case No. 2016-015420-SP-05. August 20, 2020. An Appeal from the County Court for Miami-Dade County, Judge Gina Beovides. Counsel: Larry James Barber, pro se, Appellant. Alex/Ann Margaret Ramos,

pro se, Daniel Vann Etten, pro se, Appellees.

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

(PER CURIAM.) **Affirmed.** *See* Rules 7.080(a),(b) and 7.110(e) Fla. Sm. Cl. R.; Fla. R. Jud. Admin 2.516(b)(1)(C) and 2.516(b)(2); Fla. R. App. P. 9.200(e); *Sparre v. State*, 289 So. 3d 839, 848 (2019) [44 Fla. L. Weekly S315a]; *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150 (Fla. 1979).

* * *

Criminal law—Criminal history record—Expunction or sealing—Florida Department of Law Enforcement properly refused to issue certificate of eligibility where offense of which defendant was found guilty and for which adjudication was withheld, battery domestic violence, rendered her ineligible for expungement—Fact that offense was eligible for expunction at time adjudication was withheld does not mean that defendant is entitled to expunction where that offense is not eligible for expunction under current law—No merit to argument that defendant's application is not barred because she did not plead guilty or no contest to charge—Withheld adjudication is treated as conviction in context of expunction statute—Petition for writ of mandamus is denied

GERALDINE TURLINGTON-SANTANA, Petitioner, v. STATE OF FLORIDA DEPARTMENT OF LAW ENFORCEMENT, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 20-CA-6027. Division I. August 5, 2020. Counsel: Henry G. Gyden, Gyden Law Group, P.A., Tampa, for Petitioner.

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

THIS CASE is before the court on Petitioner Geraldine Turlington-Santana's July 29, 2020, Petition for Writ of Mandamus. Petitioner seeks an order directing Respondent to issue a "certificate of eligibility" under §943.0585, Florida Statutes. The certificate is a prerequisite to petitioning the court for expunction of certain judicial records. A letter from Respondent informed Petitioner that it was denying her application for the certificate under §943.0584(2), which contains a list of offenses for which expunction is not eligible. The offense with which Petitioner was charged was eligible for expunction at the time adjudication was withheld, but it is not eligible under current law. Petitioner contends that in denying her eligibility on this ground, Respondent erroneously applied later-enacted law retroactively, thereby altering substantive rights available to Petitioner at the time the records were created. The court finds, however, that the case law Petitioner cites in support of that contention does not, in fact, support it.[1] Moreover, the law is clear that it is the law in effect at the time a petition for expunction is filed that governs the proceeding. *State v. Goodrich,* 693 So.2d 1093, 1094 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D1285a], *citing State v. Greenberg*, 564 So. 2d 1176, 1177 (Fla. 3d DCA 1990) (law in effect at time of filing petition for expunction applies.)

Petitioner's argument that § 943.0584, Florida Statutes (2020), does not bar Petitioner's application because Petitioner never pled guilty or no contest to the charge of Battery Domestic Violence is similarly unavailing. Section 943.0584 says:

> (1) As used in this section, the term "conviction" means *determination of guilt which is the result of a trial* or the entry of a plea of guilty or nolo contendere, regardless of whether adjudication is withheld, or if the defendant was a minor, a finding that the defendant committed or pled guilty or nolo contendere to committing a delinquent act, regardless of whether adjudication of delinquency is withheld. (Emphasis added.)

According to the docket of her case 10-CM-017955, Petitioner was found guilty after a nonjury trial held November 16, 2010. (See attached exhibit.)[2] The withheld adjudication in this context is treated as a conviction.

Because Petitioner has not set forth a legal right to the requested relief, it is ORDERED that the petition is DENIED without need for a response on the date imprinted with the Judge's signature.

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[1]The court is referring to case law in the petition's paragraph 9. The court is aware there is a typographical error in one of the citations.

[2]It is hoped that Petitioner overlooked this fact, rather than willfully chose not to disclose it to the court.

* * *

Criminal law—Forfeiture of property—Habeas corpus—Petition for writ of habeas corpus seeking review of order denying relief from forfeiture judgment is dismissed for lack of jurisdiction where petition seeks to litigate issues that could have been raised on direct appeal, does not seek release of person illegally detained, and seeks review of order of another circuit court

CALVIN K. WILSON, Petitioner, v. STATE OF FLORIDA, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Circuit Civil Division. Case No. 03-CA-006433, Division G. July 14, 2020. Counsel: Calvin Wilson, Bowling Green, Pro se, Petitioner.

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

(MARTHA J. COOK, J.) This case is before the court on CALVIN K. WILSON'S Petition for Writ of Habeas Corpus filed July 1, 2020, in the circuit court. The petition seeks review of a December 13, 2019, order denying relief from a forfeiture judgment. Petitioner is incarcerated and claims he did not receive a copy of the order denying relief until February 25, 2020, after the time to file an appeal had expired. The court has reviewed the petition as well as the history of the case and determines it must be dismissed on jurisdictional grounds.

The petition seeks belated review of a December 13, 2020, order denying relief from a forfeiture judgment.[1] Petitioner contends he did not receive it until February 25, 2020, after the time to file an appeal had expired. Rule 9.110(b), Fla. R. App. P. In support of this contention he attached to his petition a copy of the mail log. This is not Petitioner's first attempt at review of the subject order, however. An examination of the docket in this case shows that on March 11, 2020, Petitioner previously sought review of the order challenged in this petition in the Second District Court of Appeal under case number 2D20-853. The appeal was dismissed as untimely on April 24, 2020. Thereafter, Petitioner filed a request for belated appeal of the same order to the District Court under 2D20-1498 on May 8, 2020. It was dismissed on May 14, 2020.

According to the December 13, 2020, Order, Petitioner's efforts through his criminal case (03-CF-8814-A) to obtain the relief he seeks herein were fully heard, and eventually denied, back in early 2008.[2] Further examination of Petitioner's criminal case reveals that a petition for writ of mandamus on the same claim was denied on January 6, 2017. The order denying the mandamus petition was affirmed on appeal on December 28, 2017.[3]

On July 1, 2020, Petitioner filed the habeas petition now before this court. It must be dismissed. A petition for writ of habeas corpus is not a second appeal and cannot be used to litigate issues which could have been or were raised on direct appeal. *Pagan v. State,* 29 So. 3d 938, 958 (Fla. 2009) [34 Fla. L. Weekly S561a]. Moreover, the writ of habeas corpus lies only to obtain the release of *persons* illegally detained or kept from the control of someone entitled to the person's custody. *Henry v. Santana,* 62 So. 3d 1122, 1124-25 (Fla. 2011) [36 Fla. L. Weekly S191a]; *Robenson v. McNeil,* 39 So. 3d 350, 351 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D1271a]. Finally, this circuit court cannot, through a habeas petition or any other *appellate* mechanism, *review* another circuit court's order. Although, if true, the delay in Petitioner's receipt of the subject order is concerning, this court

determines that his present effort is successive, untimely, and does not set forth a legal basis for granting the writ.

It is therefore ORDERED that the petition is DISMISSED for lack of jurisdiction. This order is appealable to the District Court within 30 days.

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[1]The original style of this case is *City of Tampa v. $111,119 U.S. Currency, Calvin K. Wilson, et al*. The forfeiture judgment was rendered in 2003. Because the file has been destroyed, it is not possible to view it, and Petitioner did not attach a copy of the file to this petition. It appears, but is not certain, that Petitioner was defaulted in the 2003 order. It appears Petitioner's motion for relief relates to that order. There is no activity in the file between 2005 and 2019, when Petitioner filed his motion for relief from judgment that led to this proceeding.

[2]Order Denying Motion for Return of Property, February 14, 2008; Order Denying Rehearing, March 10, 2008. The Second District Court of Appeal affirmed these orders in *Wilson v. State,* 2 So. 3d 270 (Fla. 2d DCA 2008).

[3]*Wilson v. State,* 2D17-1045.

* * *

Counties—Code enforcement—Storm water permits—Code enforcement special magistrate's order finding that construction company violated county code and terms of its storm water permit is affirmed—Fact that state elected not to pursue citations for violations after company came into compliance did not render the cited storm water discharges compliant with company's permit and did not prevent county from proceeding with enforcement proceedings—State law allows local enforcement, and county sought to prevent future violations and sanction any such violations with fines

RIPA & ASSOCIATES, LLC, Appellant, v. HILLSBOROUGH COUNTY, FLORIDA, Appellee. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Civil Appellate Division. Case No. 19-CA-11310, Division X. Code Enf. Case No. PUD19001. July 16, 2020. On review of a decision of the Code Enforcement Special Magistrate for Hillsborough County. Counsel: Amy Wells Brennan, Manson Bolves Donaldson Varn, P.A., Tampa, for Appellant. Kenneth C. Pope, Senior Assistant County Attorney, Tampa, for Appellee.

APPELLATE OPINION

(THOMAS, J.) This case is before the court to review a final order of the Code Enforcement Special Magistrate (hereinafter "magistrate") finding that Appellant contractor RIPA & Associates, LLC, violated the county code and the terms of its storm water permit insofar as it regulates discharge of sediment into waterways from construction sites. Because of this finding, future violations are subject to fines. RIPA contends the order should be reversed where the State determined RIPA was in compliance with its permit *before* the subject order was entered. Although the State elected not to pursue the violations for which it cited RIPA after RIPA came into compliance, proceedings that the County initiated before RIPA complied could proceed, where state law allows local enforcement, and the County sought to prevent and sanction future violations. Accordingly, the decision must be affirmed.

The county code adopts state and federal water quality standards and provides a mechanism for local enforcement. The record shows that RIPA was responsible for a number of incidents of ineffective control of runoff from its construction site, beginning as early as November 2018, in violation of its National Pollution Discharge Elimination System (NPDES) permit. The NPDES program is established through §403.0855, Florida Statutes. This storm water program regulates point source discharges from, among other things, construction activities. The record shows RIPA's activities' impact on the waterways. The record is replete with photographs depicting significant turbidity and showing multiple breaches of, and failures to maintain, barriers designed to contain runoff. Some even show the sediment running into the water, while others show waterways with a marked line of demarcation where the sediment was flowing into water that was clear—a photographic before and after. After three agencies—the State Department of Environmental Protection (DEP), Hillsborough County Environmental Protection Commission (EPC), and Hillsborough County Public Utilities Department (PUD), sent RIPA warning letters specifying the violations, along with numerous citizen complaints, RIPA finally took steps to correct problems. Record testimony indicates complaints spanned about nine months. Thereafter, but not before RIPA was cited by PUD for code violations, DEP later determined RIPA was compliant with its NPDES permit. Although the state did not take the matter any further, the county's code enforcement proceeding proceeded. At the hearing, the magistrate determined a) that RIPA had violated the code, and b) that the property was compliant at the time of the hearing. The order further directed that RIPA continue to control runoff and imposed fines for future violations.

Jurisdiction/Standard of Review

This court has jurisdiction to review final orders of code enforcement boards and special magistrates under §162.11, Florida Statutes. In addition, this court reviews the decision below to determine whether Appellant was afforded due process, whether competent, substantial evidence supports the decision, and whether the decision comports with the essential requirements of law. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

Competent Substantial Evidence

RIPA contends competent substantial evidence does not exist for several reasons. One is that there is no competent evidence that the state DEP found violations of RIPA's NPDES permit. The second relates to findings made in the order under review, specifically that a reference to an affidavit contains the date of the notice to which the affidavit was attached, rather than the date of the affidavit itself. The other relates to the alleged lack of findings made by the code enforcement magistrate.

RIPA's violations were long-term and significant. The state DEP sent a warning letter on July 26, 2019 based on photos taken July 21st which showed sediment runoff into area waterways. The letter noted "insufficient BMPs (Best Management Practices) in place, including stabilization and structural controls to treat turbid stormwater discharging off-site and to protect surface waters." Thereafter, on August 22nd, the state conducted a re-inspection and sent a compliance letter on August 29th. The compliance letter and the detailed report it is based on are included in the record.

Independently of the state, two county agencies also undertook to address problems. The county EPC inspected RIPA's site on July 18th, and sent a warning notice July 19th. It noted water discharge exceeding the allowable limit of 29 NTUs (national turbidity units—a water quality standard measurement). The notice directed RIPA to "repair all non-functional silt fence, install additional BMPs as needed and install floc-logs at all off-site discharge locations."

The county PUD also was involved. It conducted five separate inspections starting on July 8th and sent a notice of violation on July 29, 2019. The letter memorialized earlier communications between the county and RIPA. The letter recalled county staff's May 14, 2019 communication with the NPDES manager for RIPA, Benjamin Buttelman, regarding violations, specifically RIPA's failure to properly maintain erosion control BMPs and take necessary precautions to prevent discharge of sediment off site. It noted that similar violations were observed at the July 8th inspection. It noted RIPA's failure to resolve the issues observed during the July 18th inspection, and that on July 25th, violations remained. It advised RIPA that under Ord. 14-4,[1] all persons found in violation shall take immediate action upon receipt of written notification. It required a written response within five business days outlining temporary and permanent measures taken to correct the violation and a proposed schedule for completion of each corrective measure. In addition to requiring a

written response setting forth measures taken to correct the violation, it warned that the failure to comply with the ordinance would result in prosecution by the county code enforcement board.

PUD conducted another inspection on August 5th and forwarded its findings to code enforcement, which issued a notice of violation/hearing on August 16th. Code enforcement set a hearing for October 4th. The notice identified the property at 1107 W. Shell Point Road, and cited violations of Ord. 14-4[2]: failure to maintain erosion control BMPs and take necessary precautions to prevent sediment offsite. Notably, the notice of violation *predates* the state's August 22nd compliance letter.

Contrary to the county's argument in its answer brief, at a code enforcement hearing, the county, not RIPA, bears the burden to show by a preponderance of evidence that a violation of its code exists. Sec. 14-26(d), Hillsborough County Code. The following are relevant, substantive code provisions to assist in determining whether evidence is competent and substantial.

Sec. 24-149[3] of the Hillsborough County Code of Ordinances provides:

> B. Any person responsible for discharges determined *by the County* to be contributing to the degradation of the County's MS4[4] or the waters of the State or U.S., either directly or through a MS4, shall provide corrective measures in accordance with a schedule approved by the County and may be subject to paying fines and damages.

Sec. 24-150[5] - Stormwater Discharges from Industrial Activities and Construction Activities provides:

> A. Stormwater from construction sites shall be controlled in such a way *as to retain sediment on site and prevent violations of state water quality standards or NPDES permits.* All erosion, pollution, and sediment controls are required pursuant to the pollution prevention plan of a NPDES stormwater permit for construction or required pursuant to a state stormwater permit issued by either the Florida Department of Environmental Protection or the Southwest Florida Water Management District shall be properly implemented, maintained, and operated (emphasis added).

Sec. 24-165[6] - PROHIBITION OF ILLICIT DISCHARGES AND ILLICIT CONNECTIONS provides:

> Any discharge, other than stormwater, *to the County's MS4 or to waters of the State or U.S. which is not exempt under Section 6-1 of this Ordinance,* and any connection which is not composed entirely of stormwater or specifically permitted through an NPDES permit, *is considered an illicit discharge* or an illicit connection and is prohibited (emphasis added).

The county, not the state, makes necessary determinations under the ordinance. Sec. 24-149, Hillsborough County Code. Mr. Baker from PUD testified that turbid water breached the silt screen fence put in place to keep sediment onsite and spilled onto the streets. He noted violations on July 8, 18, 22, 25, and 29, 2019. Also testifying at the hearing was Louis John Ambrosio. Mr. Ambrosio stated that he was appearing "on behalf of a residential stakeholders' community impacted by stormwater discharge over the past approximately year. . .that stormwater has been discharging into the Ruskin Inlet and the Little Manatee River proper from activities on the site in question by RIPA's construction activities." He also lives in the area, owns a small construction company, and is a marine science professor at University of Tampa. In addition to providing a power point presentation, he testified that runoff caused the water to look more like "the Ganges in monsoon season than a typical river in central Florida."

Numerous photographs show degradation of water quality and poorly maintained and inadequate runoff control measures. Dates and locations were recorded. In addition, photographs showing good BMPs offer a contrast to the "before" pictures. Clearly, there was competent, substantial evidence to illustrate the violations.

Due Process

RIPA contends numerous errors on the county's notice denied it due process. Notices and citations are addressed under §125.69, Florida Statutes, which says in pertinent part:

> (a) Prior to issuing a citation, a code inspector shall provide notice to the violator that the violator has committed a violation of a code or ordinance and shall establish a reasonable time period within which the violator must correct the violation. Such time period shall be no more than 30 days. If, upon personal investigation, a code inspector finds that the violator has not corrected the violation within the time period, a code inspector may issue a citation to the violator. A code inspector does not have to provide the violator with a reasonable time period to correct the violation prior to issuing a citation and may immediately issue a citation if the code inspector has reason to believe that the violation presents a serious threat to the public health, safety, or welfare, or if the violation is irreparable or irreversible.
>
> (b) *A citation issued by a code inspector shall state the date and time of issuance, name and address of the person in violation, date of the violation, section of the codes or ordinances, or subsequent amendments thereto, violated, name of the code inspector, and date and time when the violator shall appear* in county court (emphasis added).

Sec. 14-64,[7] Hillsborough County Code (definition for "citation") tracks the foregoing statute. The citation fulfills all legal requirements. It says:

> The property owned by you and located at 1107 W Shell Point Rd, Ruskin, FL 33570 has been found to be in violation of Hillsborough County Ordinance No. 14-4 by failure to properly maintain erosion control BMP's and take necessary precautions to prevent discharge of sediment off site. County staff spoke with the NPDES manager for RIPA, Benjamin Buttelman, on May 14th regarding these violations. Similar violations observed during July 8th County inspection. Site developer failed at resolving these issues during the July 18th inspection [see attached inspection reports]. As of July 25th violations are still present on site.

Photographs of violations were included with the notice and attached affidavit. The notice and affidavit indicate that RIPA was previously apprised of the violations and necessary corrective steps it needed to make. RIPA's remaining claims of due process violations lack merit and will not be discussed.

Departure from the Essential Requirements of Law

RIPA argues that the order must be set aside because sec. 24-187,[8] Hillsborough County Code, provides absolute exemptions from the ordinance's other requirements. It states:

> The following activities shall be *exempt* from the requirements of this Ordinance:
>
> . . .
>
> B. Discharges from facilities *in compliance with the conditions of all required NPDES permits* issued under the authority of the U.S. Environmental Protection Agency or the Florida Department of Environmental Protection (emphasis added).

RIPA asserts that if discharges from RIPA's site were in compliance with the conditions of its state-issued NPDES permit, as DEP later determined, then the exemption applies to RIPA's activities and RIPA could not be found to have violated substantive requirements of the ordinance.

RIPA informs the court that the state's warning letter is not an adjudication. Perhaps this is true, but in support of the warning letter is a detailed report, which RIPA does not mention, containing significant findings that are violations of the NPDES permit and the code. The compliance letter provides similar detail specifying how the violations had been rectified.

In asserting that the county cannot act against the violations

because of DEP's compliance letter, RIPA is taking inconsistent positions. RIPA suggests that the warning letter is not an adjudication of violations, but simultaneously argues that the compliance letter acts as an adjudication that it is complying with its permit. RIPA seems to invite this court to take an extraordinary leap to the conclusion that it somehow never was out of compliance. The court must decline this invitation. If the warning letter isn't an adjudication, the closeout letter cannot be an exoneration.

The fact that the state DEP closed out the case because it determined at a later inspection that RIPA had come into compliance with its NPDES permit does not render the subject discharges occurring before the closeout letter compliant with the permit. RIPA's assertion is based solely on the fact that DEP determined it would not (not that it *could not*) pursue enforcement. The compliance letter did not indicate that RIPA had not violated its permit, only that RIPA wasn't in violation at the last inspection. For reasons that will become evident, the state appears to favor local enforcement.

As further support for its contention that the county could not prosecute the violations, RIPA argues that the sole mechanism for enforcement by the county is by filing a legal action under §403.412(2)(a), Florida Statutes. It says in pertinent part:

> (1) This section shall be known and may be cited as the "Environmental Protection Act of 1971."
>
> (2)(a) The Department of Legal Affairs, *any political subdivision or municipality of the state,* or a citizen of the state *may maintain an action for injunctive relief against*:
>
> 2. Any person, natural or corporate, or governmental agency or authority to enjoin such persons. . .or authorities from violating any laws, rules, or regulations for the protection of the air, water, and other natural resources of the state.[9]
>
> (c) As a *condition precedent to the institution of an action pursuant to paragraph (a),* the complaining party shall *first file with the governmental agencies or authorities charged by law with the duty of regulating or prohibiting the act or conduct complained of a verified complaint setting forth the facts upon which the complaint is based and the manner in which the complaining party is affected.* Upon receipt of a complaint, the governmental agency or authority shall forthwith transmit, by registered or certified mail, a copy of such complaint to those parties charged with violating the laws, rules, and regulations for the protection of the air, water, and other natural resources of the state. *The agency receiving such complaint shall have 30 days after the receipt thereof within which to take appropriate action.* If such action is not taken within the time prescribed, the complaining party may institute the judicial proceedings authorized in paragraph (a). However, failure to comply with this subsection shall not bar an action for a temporary restraining order to prevent immediate and irreparable harm from the conduct or activity complained of (emphasis added).

The foregoing allows, among other things, counties to pursue an action for injunctive relief against polluters.[10] It also affords a period of time for the agencies to take action. Nothing about this statute indicates that it is the sole mechanism for enforcement against a polluter. If anything, it indicates the opposite in that it requires a litigant to file a complaint with the appropriate government entity charged by law with enforcement *before* filing an action under the statute's terms.

Further support for the county's authority to enforce violations appears in §403.182, Florida Statutes, which says:

> 403.182 Local pollution control programs.—
>
> (1) *Each county and municipality or any combination thereof may establish and administer a local pollution control program if it complies with this act.* Local pollution control programs in existence on the effective date of this act shall not be ousted of jurisdiction if such local program complies with this act. All local pollution control programs, whether established before or after the effective date of this act, must:
>
> (a) Be approved by the department as adequate to meet the requirements of this act and any applicable rules and regulations pursuant thereto.
>
> (b) *Provide by ordinance, regulation, or local law for requirements compatible with, or stricter or more extensive than those imposed by this act and regulations issued thereunder.*
>
> (c) *Provide for the enforcement of such requirements by appropriate administrative and judicial process.*
>
> (d) Provide for administrative organization, staff, financial and other resources necessary to effectively and efficiently carry out its program (emphasis added).

Under §403.182, counties may establish and administer local pollution control programs. Counties may adopt ordinances compatible with or stricter than those under the state act. And counties may provide for the enforcement of those requirements administratively and judicially. That §403.0885, Florida Statutes, may require DEP to issue permits does not preclude local government agencies from enforcement activity. It says:

> To the extent other sections of this chapter apply and do not conflict with federal requirements, the application of such sections to discharges regulated under this section is *not* prohibited.

§403.0885(2), Fla. Stat. Contrary to RIPA's argument, this court reads §403.885(2) as supporting laws promoting local enforcement as long as they comply with the federal Clean Water Act. RIPA has not shown that the county's program fails to comply with the Act.

Based on the foregoing the administrative judgment is AFFIRMED on the date imprinted with the Judge's signature. (THOMAS, COOK, HUEY, JJ.)

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[1]Sec. 24-131 et seq., Hillsborough County Code of Ordinances. It is entitled the Hillsborough County Stormwater Quality Management Ordinance (Ord. 14-4). The "code" citation format will be used preferentially over ordinance numbers, as ordinances are grouped by year, whereas the code is grouped by subject matter.

[2]Sec. 24-149, 24-150, 24-165, Hillsborough County Code of Ordinances.

[3]Ord. 14-4, Art. 3-1(b).

[4]MS4 stands for Municipal Separate Storm Sewer System.

[5]Ord. 14-4, Art. 3-2.

[6]Ord. 14-4, Art. 4-1

[7]Ord. 14-28, Art. 4.

[8]Ord. 14-4, Art. 6(1).

[9]Under the statute, a county may sue to enforce the law or be sued for failing to do so.

[10]It's not clear how this operates when the complaining party *is* a governmental agency or authority, particularly when a county has a local enforcement mechanism in place like Hillsborough County has. But even a governmental agency may require judicial intervention for immediate relief.

* * *

Counties—Code enforcement—Building codes—Exemption—Farm stands—Special magistrate correctly found that section 604.50, which exempts from local and state building codes "non-residential farm buildings" on "bona fide agricultural land," does not exempt farm stand where value adjustment board denied agricultural greenbelt exemption to land beneath farm stand—Fact that VAB also found that farm stand is "integral part of a farm operation" has no bearing on stand's exemption from building codes

LAWRANCE PROPERTIES, LLC, Petitioner, v. HILLSBOROUGH COUNTY, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County. Case No. 19-CA-8634. Consolidated with 18-CA10128 and 18-CA-11459, Division X. L.T. Case No. CE 18005494. August 11, 2020. On review of a decision of the Code Enforcement Special Magistrate for Hillsborough County. Counsel: Geoffrey Todd Hodges, G. T. Hodges, P.A., Lutz, for Petitioner. Kenneth C. Pope, Senior Assistant County Attorney, Tampa, for Respondent.

The Court withdraws its original opinion rendered July 20, 2020,

and substitutes the opinion below. The substituted opinion corrects scrivener's errors only. The result is unchanged, and the time for rehearing, which has expired, is not extended by this substitution.

APPELLATE OPINION (AMENDED)

(THOMAS, J.) This appeal is before the court to challenge an order of Hillsborough County's Code Enforcement Special Magistrate (CESM). Appellant Lawrance Properties LLC ("Lawrance") contends that the code enforcement administrative judgment against him should be set aside because the County is precluded by state law from enforcing building codes against farm buildings. Code enforcement decisions are reviewed on appeal to determine whether an appellant was afforded due process, whether the decision comports with the essential requirements of law, and whether competent, substantial evidence supports it. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). Because the CESM correctly determined that the subject structure is located on land that has been denied "bona fide agricultural" classification under §§604.50 and 193.461(3)(b), Florida Statutes, despite the VAB special magistrate's description of the building as an "integral part of a farm operation," the original order finding a violation and the order denying Lawrance's contest of the finding of noncompliance must be affirmed.

THE FACTS:

In 1895, in the northwest part of Hillsborough County, the Bearss family began farming a tract of land that included the subject parcel. In 1959, with the adoption of the "greenbelt" statute §193.461, Florida Statutes, the property received an agricultural (greenbelt) classification for property tax purposes. In 1993, Barry Lawrance went to work for the Bearss family in their farming operation. In 2006, Lawrance began leasing the entire farm property from the Bearss family. In 2012, the Bearss family sold most of its farm parcel to a land developer, which built a subdivision on it. Lawrance formed Lawrance Properties LLP ("Lawrance") to purchase the remaining tract. It consists of approximately 2.75 acres located at 14316 Lake Magdelene Boulevard in Tampa. When Lawrance acquired the property the greenbelt status lapsed. He did not know about the lapse until code enforcement cited him for several violations.

On or about April 16, 2018, Lawrance received a Notice of Violation from Hillsborough County Code Enforcement describing unlawful accumulations of junk, trash, debris, and discarded equipment, along with open storage of equipment on the property. The notice directed Lawrance to correct the violations. These violations are not at issue in this appeal.

When he was cited, Lawrance's operation of what is being referred to as an ag-stand or farm stand came to the County's attention. Ag-stands of 150 square feet or less are not regulated by the County. Typically, these are limited to selling products grown or harvested from the farm. In this case the subject "stand" is a significantly more substantial 3000+ square-foot building with refrigeration cases. It sells a number of prepackaged items like milk, orange juice, and bread. Being pre-packaged, these are not products of the farm on which the stand operates. The "stand" was described as a retail operation. It was not initially cited.

On or about April 20, 2018, Lawrance received a second Notice of Violation, informing him that the farm stand violated the code because it lacked conditional use approval and site plan approval. The notice required Lawrance to remove the farm stand or obtain the necessary review and approval. Lawrance did not comply with the demands in the Notices of Violation related to the farm stand. As a result, code enforcement issued a "Final Notice" to him on or about May 31, 2018, threatening fines if the property did not comply. Because the violations continued, a hearing was set for September 14, 2018. Meanwhile, Lawrance filed an application for agricultural classification with the Hillsborough County Property Appraiser. The application was initially denied, but Lawrance appealed the denial to the Value Adjustment Board.

At the September 14, 2018, hearing, his first before the CESM, Lawrance, through counsel, presented evidence of the agricultural history of the property. He asserted that the property was an integral part of a bona fide farm operation and that the farm stand and other buildings on the property were "nonresidential farm buildings" as defined in §§ 604.50 and 553.73, Florida Statutes. Lawrance argued that the property's agricultural use exempts the farm stand on it from regulation.

Code enforcement inspector Mike Johnson informed the CESM that Lawrance's greenbelt application had been denied, though he acknowledged it was still under review. He explained that code enforcement uses a property's greenbelt status as the sole determinant of whether the property qualifies for exemption from local codes. He acknowledged that if a property were approved for agricultural assessment by the Property Appraiser, it was exempt from most local codes. Lawrance countered that the greenbelt status was irrelevant because, whether or not it was specifically located on exempt land, the building was nevertheless "on a farm" and an "integral part of a farm operation."

Because the Property Appraiser had denied the property greenbelt status, the CESM determined that the stand violated the code and gave Lawrance 60 days to comply. Under the terms of this order,[1] Lawrance's continued failure to comply would result in the imposition of a daily fine. Although Lawrance did not file an appeal of this order per se, he filed an action styled as declaratory relief in circuit court within 30 days of the order. The complaint sought the same relief he would in an appeal of the action. Correspondence in the record referred to the action as an appeal of the order.

On or about November 26, 2018, code enforcement notified Lawrance of its continued noncompliance. Fines began accruing. Lawrance requested to contest the finding of noncompliance. During the pendency of the code enforcement proceeding, the special magistrate to the Value Adjustment Board issued a report concluding that Lawrance's property is a bona fide agricultural operation. Although the report determined that Lawrance was engaging in retail sales, it nonetheless opined that the farm stand was an "integral part" of Lawrance's overall farming operation. As a result, Lawrance received *partial* greenbelt status on the farm storage and other areas of the property used for farming. But, at seeming odds with its earlier conclusion that the stand was an integral part of a farm operation, the report concluded that the magistrate could *not* recommend greenbelt status to the portion of the property on which the store sits. That is because state rule precludes wholesale and retail sales in a farm operation.[2] In all, about half the property received greenbelt status. The farm stand and residence were excluded. The Value Adjustment Board ultimately adopted the magistrate's report and recommendations in their entirety.

After several continuances, the code enforcement hearing on Lawrance's contest of the noncompliance finding was held July 19, 2019. In addition, the CESM would consider whether to recede from his prior ruling and quash the citations issued to Lawrance or uphold his prior rulings. County inspector Mike Johnson again argued that because the farm stand was specifically denied a greenbelt exemption, it was not a bona fide agricultural use, and it was not exempt from regulation. Lawrance argued that because it was found to be an integral part of the overall farming operation, the farm stand was a "nonresidential farm building" within the ambit of §604.50, Fla. Stat. (2019), and, accordingly, exempt from county regulation.

At the end of the hearing, the special magistrate orally upheld his prior ruling, advised Lawrance of his right to appeal, and continued

the freeze of the fines. He issued a written "Order Denying Contest" July 22, 2019, referred to in this opinion as the second order. This appeal followed.

JURISDICTION:

At the outset, the County argues that this court lacks jurisdiction to review the order denying contest because Lawrance did not appeal the original order finding a violation and imposing fine, somehow making the appeal of the second order untimely. In support of this argument, the County cites this court's decision in *Gabor Czinke and Eva Czinke v. Hillsborough County, Florida*, 27 Fla. L. Weekly Supp. 796a (Fla. 13th Jud. Cir. [Appellate] Oct. 22, 2019). In *Czinke,* the court determined that the issues on appeal had been addressed in an earlier, unappealed order finding a violation and imposing fine. Because the subsequent order denying contest addressed no *new* issues, and the Czinkes did nothing more than reargue the facts and findings in the earlier order, the court determined that it lacked appellate jurisdiction over those determinations even though the appeal of the second order was technically timely. The timely second appeal did not resurrect appellate jurisdiction over the original order's determination. Although the court has jurisdiction to review a subsequent finding of noncompliance, the Czinkes did not argue issues relating to the noncompliance in its appeal. In contrast, here, Lawrance timely filed in circuit court a proceeding intended to be, if not described as, an appeal of the original order. Rule 9.040(c), Fla. R. App. P. He also filed this timely appeal of the subsequent order denying contest. The matter involving the original order has been consolidated into this proceeding. The appeal of the order denying contest was timely filed and is proper for review by this court.

ISSUE ON APPEAL:

The substantive issue before the court is whether §604.50, Florida Statutes (2019), which generally exempts from local and state building codes statutorily-defined "nonresidential farm buildings" on "bona fide agricultural land," exempts the subject farm stand. The question arises because the special magistrate for the Value Adjustment Board declared the structure to be an "integral part of a farm operation" while simultaneously denying greenbelt status to the land beneath the farm stand. Because of the greenbelt denial, the County believes the farm stand is subject to regulation. Lawrance asserts that its being an integral part of a farm operation exempts it from regulation. For reasons explained below, the court determines 1) that the denial of greenbelt status for the subject property is determinative of the issue, and 2) that the "integral part of a farm operation" declaration has no independent effect on the structure's exemption from regulation under state law.

In support of his position that his farm stand is exempt from local code enforcement, Lawrance cites § 604.50 (1) which provides in relevant part:

> (1). . . "notwithstanding any provision of law to the contrary, any *nonresidential farm building . . . that is located on lands used for. . .bona fide agricultural purposes* is exempt from the Florida Building Code and any county. . .code or fee . . ."
>
> (2) As used in this section, the term:
>
> (a) "Bona fide agricultural purposes" has the same meaning as provided in *s. 193.461(3)(b).*
>
> ***
>
> (d) "Nonresidential farm building" means any temporary or permanent building or support structure that is classified as a *nonresidential farm building on a farm under s. 553.73(10)(c)* ***or*** *that is used primarily for agricultural purposes, is located on land that is an integral part of a farm operation or is classified as agricultural land under s. 193.461, and is not intended to be used as a residential dwelling.* The term may include, but is not limited to, a barn, greenhouse, shade house, farm office, storage building, or poultry house.

(Emphasis added.)

No one disputes that the structure is nonresidential. To be exempt from building codes a structure must also be a *farm* building. Farm buildings are defined in §604.50(2)(d), as any temporary or permanent building. . .that is classified as a *nonresidential farm building on a farm under s. 553.73(10)(c)* ***or*** *that is used primarily for agricultural purposes, is located on land that is an integral part of a farm operation* ***or*** *is classified as agricultural land under s. 193.461, and is not intended to be used as a residential dwelling.* The term may include, but is not limited to, a barn, greenhouse, shade house, farm office, storage building, or poultry house. Being used solely for retail sales, the building is not used for any of the listed farming activities. The court notes, however, that the list is not an exhaustive one.

Lawrance contends that his building is a nonresidential farm building on a farm under §553.73 (10)(c). Section 553.73(10)(c) also exempts farm buildings from regulation, but it does not define them. He asserts the structure's use for selling his farm products renders its use as being "primarily for an agricultural purpose." In addition, Lawrance argues that §604.50 must be interpreted so that its provisions are meaningful, and cannot presume that a given statute employs useless language. *Johnson v. Feder*, 485 So. 2d 409 (Fla. 1986). He has a point. The definition of "farm building" in §604.50(2)(d) is broader than are the requirements for *exemption* from local codes in §604.50(1).

Section 604.50(2)(d) defines "farm building" in terms of its use (agricultural purposes), relationship to a farm (nonresidential, located on land that is an integral part of a farm operation), *or* its location (on land classified as agricultural land under s. 193.461). Under this definition, a farm building *may* be located on land that is classified as bona fide agricultural land, but it does not have to be. Under the definition, being an integral part of a farm operation also appears to be sufficient to meet the definition of farm building.

The exemption from building codes and fees is distinct from the definition, however. The exemption found in §604.50(1) incorporates the definition of "farm building" in subsection (2)(d) but limits the exemption to nonresidential farm buildings "*located on lands used for. . .bona fide agricultural purposes. . .*" It is not enough to be a farm building. The farm building must be on bona fide agricultural land. And to be "bona fide agricultural" land, the land must meet the criteria found in §193.461(b)(3). Section 193.461 is followed by property appraisers in determining whether to grant greenbelt status to property.

Section 604.50(2)(a) defines "bona fide agricultural purposes" as having the same meaning in §193.461(3)(b). Section 193.461(3)(b) says:

> (3)(b) Subject to the restrictions specified in this section, only lands that are used primarily for *bona fide agricultural purposes* shall be classified agricultural. *The term "bona fide agricultural purposes" means good faith commercial agricultural use of the land.*
>
> 1. In determining whether the use of the land for agricultural purposes is bona fide, the following factors may be taken into consideration: (no criteria relevant to this case follows).
>
> (5) For the purpose of this section, the term "agricultural purposes" includes, but is not limited to, horticulture; floriculture; viticulture; forestry; dairy; livestock; poultry; bee; pisciculture, if the land is used principally for the production of tropical fish; aquaculture as defined in s. 597.0015; algaculture; sod farming; and all forms of farm products as defined in s. 823.14(3) and farm production.

Two things stand out. First, §193.461(1) requires property appraisers to, on an annual basis, classify for assessment purposes all lands within the county as either agricultural or nonagricultural. Since this occurs annually, this court concludes that §§193.461(1), (3)(b), and 604.50(1) taken together do not require a property appraiser to

first classify property as agricultural for a farm building to qualify for an exemption from regulation if it otherwise meets the statutory criteria in §193.461(3)(b). But where, as here, a property appraiser affirmatively *denies* greenbelt status under §193.461(3)(b), the property is not entitled to an exemption from local building codes under §604.50(1). Second, nothing in the foregoing definition of "agricultural purpose" includes sales of any kind.

Farmers enjoy a tax break to protect farmland and green spaces. Allowing a tax break while having the ability to engage in retail sales would give farmers an unfair advantage over other commercial enterprises who are likely paying more in property taxes. In Hillsborough County, an enterprise like Lawrance's may operate a 150 square-foot stand without government interference. As previously noted, the subject structure was 3000 square feet with refrigerator cases. Counsel for the Property Appraiser challenged Lawrance's reliance on the [partial] greenbelt designation and "integral part of a farm operation" determination as supporting his operation of the farm stand.

> Mr. Shepherd: . . . "that if you read the statute and the code, it's quite clear that retail does not fall under greenbelt. There is no retail aspect of any agricultural activity that has ever been granted greenbelt, and it doesn't have greenbelt. So let me clarify that."

Mr. Shepherd went on to say that parts of the operation were entitled to greenbelt, but that in his 21 years as counsel to the property appraiser, the retail portion is not something that had ever been granted greenbelt status and would not be. He noted Lawrance was selling pre-packaged items not produced on the farm.

> Mr. Shepherd: When you get into packaged items. . .you're selling bread and milk, orange juice. . .that type of thing that are packaged, that's retail. That's not an ag stand or agricultural use.

In determining that the farm stand property was not bona fide agricultural use, both the Property Appraiser and Value Adjustment Board relied on a 1976 Department of Revenue rule addressing sales on farms:

> 12D-5.001 Agricultural Classification, Definitions.
>
> (1) For the purposes of Section 193.461, F.S., agricultural purposes *does not* include the wholesaling, retailing or processing of farm products. . .

(Emphasis added.) Rule 12D-5.001(1), Florida Admin. Code.

Section 553.73(10)(c) exempts farm buildings from regulation without the bona fide agricultural use requirement. Section 604.50(1), however, being more specific, controls. A more specific statute covering a particular subject is controlling over one covering the same subject in general terms. *Cricket Properties, LLC v. Nassau Pointe at Heritage Isles Homeowners Ass'n, Inc.*, 124 So.3d 302, 307 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D2163e].

In conclusion, a structure may meet the *definition* of a farm building under §604.50 (2)(d) or §553.73(10)(c) without being entitled to an exemption from local building codes if the property cannot be classified as bona fide agricultural under §193.461(3)(b). The *exemption* found in §604.50(1), requires the building to meet one of the definitions of "farm building" *and* be on land that is used for bona fide agricultural purposes. Because the building's use for retail sales disqualified the land from bona fide agricultural status, the judgments are AFFIRMED. (THOMAS, COOK, HUEY, JJ.)

[1]This is the order that will be referred to later in this opinion as the first order.
[2]Rule 12D-5.001, Fla. Admin. Code

* * *

Insurance—Appeals—Stay—Motion to stay appeal pending Florida Supreme Court decision is denied, as policies at issue in cases are distinguishable

GERALD T. STASHAK, M.D., P.A., Appellant, v. SECURITY NATIONAL INSURANCE COMPANY, Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Civil Division AY. Case No. 50-2020-AP-000020-CAXX-MB. L.T. Case No. 50-2012-SC-023358-XXXX-SB. July 13, 2020. Counsel: Chad A. Barr, Chad Barr Law, Altamonte Springs, for Appellant. Anthony J. Parrino, Saint Petersburg, for Appellee.

BY ORDER OF THE COURT:

(JAMES L. MARTZ, J.) **THIS CAUSE** came before the Court on Appellee's Opposed Motion to Stay Case, filed on June 12, 2020, and Appellant's Opposition to Appellee's Motion to Stay the Case, filed June 19, 2020. Appellee requests a stay pending the Florida Supreme Court's decision in SC18-1390, stating that while the case would not necessarily be dispositive because the policies at issue are distinguishable, the decision in SC18-1390 may provide clarification. Appellant filed opposition to the Motion stating that the stay is unnecessary because the policies are distinct and the a stay would cause needless delay. Accordingly, it is

ORDERED that Appellee's Opposed Motion to Stay Case is **DENIED**. Appellant shall serve and file the Initial Brief on or before fifty (50) days of rendition of this Order.

* * *

Insurance—Appeals—Stay—Motion to stay appeal pending Florida Supreme Court decision is denied where policies at issue in cases are distinguishable

BEACHES OPEN MRI OF BOYNTON BEACH LLC, Appellant, v. SECURITY NATIONAL INSURANCE COMPANY, Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Civil Division AY. Case No. 50-2020-AP-000019-CAXX-MB. L.T. Case No. 50-2012-SC-016358-XXXX-SB. July 13, 2020. Counsel: Chad A. Barr, Chad Barr Law, Altamonte Springs, for Appellant. Anthony J. Parrino, Saint Petersburg, for Appellee.

BY ORDER OF THE COURT:

(JAMES L. MARTZ, J.) **THIS CAUSE** came before the Court on Appellee's Opposed Motion to Stay Case, filed on June 12, 2020, and Appellant's Opposition to Appellee's Motion to Stay the Case, filed June 19, 2020. Appellee requests a stay pending the Florida Supreme Court's decision in SC18-1390, stating that while the case would not necessarily be dispositive because the policies at issue are distinguishable, the decision in SC18-1390 may provide clarification. Appellant filed opposition to the Motion stating that the stay is unnecessary because the policies are distinct and the a stay would cause needless delay. Accordingly, it is

ORDERED that Appellee's Opposed Motion to Stay Case is **DENIED**. Appellant shall serve and file the Initial Brief on or before fifty (50) days of rendition of this Order.

* * *

Landlord-tenant—Eviction—Appeals—Where landlord did not timely appeal order dismissing eviction action or order denying emergency motion, which landlord asserts were entered without due process, circuit court acting in its appellate capacity lacks jurisdiction to review either order in appeal from final judgment awarding attorney's fees and costs to tenant—Landlord may challenge validity of allegedly void orders through rule 1.540(b)(4) motion in trial court—Where order setting hearing on motion for attorney's fees was sent to incorrect address for landlord, final judgment is void—Tenant has waived argument that landlord was actually present at hearings despite orders being sent to wrong address, where appellate court previously relinquished jurisdiction to trial court to allow parties to prepare statement of evidence regarding landlord's presence at hearings, tenant filed notice with appellate court stating that issue was ripe for resolution, and only evidence in record is order containing incorrect address for landlord

ROGER QUISENBERRY, Appellant, v. MANDY BALDWIN, Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Division (Civil) AY. Case No. 502019AP000058CAXXMB. L.T. Case No. 502018CC-008458XXXXMB. July 29, 2020. Appeal from the County Court in and for Palm Beach County; Paige Gillman, Judge. Counsel: James D. Ryan and Lauren J. Schindler, North Palm Beach, for Appellant. Allegra Fung, West Palm Beach, for Appellee.

(PER CURIAM.) Appellant, Roger Quisenberry, appeals the trial court's entry of a Final Judgment, which assessed attorneys' fees and costs in favor of Appellee, Mandy Baldwin. On appeal, Appellant asserts that the trial court's entry of final judgment—and several orders leading up to such—are void, as they allegedly deprived Appellant of procedural due process. We hold that this Court is without jurisdiction to consider the August 9, 2018 "Order Regarding Dismissal" and the August 31, 2018 "Order Denying Plaintiff's Motion for Emergency Hearing on Eviction for New Defendant," as both orders constituted final appealable orders for which Appellant did not timely appeal. However, we hold that the trial court improperly granted final judgment assessing attorneys' fees and costs, requiring reversal as to that order alone.

BACKGROUND

On July 17, 2017, Appellant filed a Complaint for Eviction ("Complaint") against Appellee. After Appellee responded, the court entered an "Order Setting Mandatory Meditation and Rent Determination Hearing on Complaint for Eviction" ("Mediation Order") for August 9, 2019. However, the court did not send the Mediation Order to Appellant's correct mailing address. After Appellant unsurprisingly failed to appear for mediation, the trial court entered an "Order Regarding Dismissal" ("Dismissal Order"), where it dismissed the case without prejudice for Appellant's failure to prosecute and directed the Clerk to close the case file. The Dismissal Order, too, was sent to Appellant's incorrect mailing address.

Appellee subsequently filed a Motion to Tax Attorney's Fees and Costs ("Fee Motion").[1] Appellant thereafter filed an emergency motion on August 30, 2018, seeking the eviction of an unknown tenant. Despite its seemingly unrelated nature, Appellant briefly stated in his motion that he did not receive any court papers nor any notice of the August 9, 2018 mediation hearing. However, on August 31, 2018, the trial court issued an "Order Denying Plaintiff's Motion for Emergency Hearing on Eviction for New Defendant" ("Order Denying Emergency Motion") and once more sent the order to an incorrect mailing address for Appellant.

Several months later, on January 2, 2019, Appellee filed a Notice of Special Set Hearing, notifying Appellant that she scheduled her Fee Motion to be heard on January 16, 2019. Appellee filed another Notice of Special Set Hearing, stating that she was scheduling her Fee Motion to be heard on February 12, 2019.[2] On February 12, 2019, the court entered an order resetting the evidentiary hearing on Appellee's Fee Motion to March 6, 2019. This Order was also sent to Appellant's incorrect address.

The evidentiary hearing on the Fee Motion took place on March 6, 2019, and—after Appellant failed to show—the trial court entered an Order on Defendant's Motion to Tax Attorney's Fees and Cost[s]" ("Fee Order"), granting Appellee entitlement to $4,515.00 in attorney's and expert fees. Importantly, the Fee Order was the first Order the trial court sent to Appellant's correct mailing address. Shortly thereafter, on March 12, 2019, the trial court entered a Final Judgment against Appellant, awarding Appellee $4,515.00 in attorney's fees and costs at an interest rate of 4.75% per year. (R. at 34-35.) On March 22, 2019, the court amended the interest rate in the Final Judgment. Appellant thereafter timely filed a Notice of Appeal on April 11, 2019, seeking review of the Final Judgment.

ANALYSIS

On Appeal, Appellant asserts the following orders are void: (1) the August 9, 2019 Dismissal Order; (2) the August 31, 2019 Order Denying Emergency Motion; and (3) the Final Judgment. Appellant asserts these orders were entered without notice, which deprived him of due process. We review whether an order or judgment is void under a de novo standard of review. *Vercosa v. Fields*, 174 So. 3d 550, 552 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1979b]; *Sanchez v. Sanchez*, 285 So. 3d 969, 972 n.4 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2759a].

1. Prior Orders

We first address Appellant's argument that the Final Judgment is void because the orders upon which it is based were entered without due process. Pursuant to Florida Rule of Appellate Procedure 9.110(b), an appellant must file a notice of appeal within thirty (30) days "of rendition of the order to be reviewed." Fla. R. App. P. 9.110(b). "Multiple final orders may be reviewed by a single notice, if the notice is timely filed *as to each such order*." Fla. R. App. P. 9.110(h) (emphasis added). "[A] late-filed appeal is not the appropriate procedure to seek relief from . . . a void order." *Nogales v. Countrywide Home Loans, Inc.*, 100 So. 3d 1161, 1163 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2296b]. "[T]he time to file [an] appeal is not extended even if the rendered order is actually void ab initio." *Id.*

Here, Appellant seeks to collaterally attack several orders outside of the jurisdictional time limit. Although the appeal of the Final Judgment itself is timely, the Dismissal Order, which dismissed the case without prejudice and closed the case file, was a final order that ended all judicial labor and could have been appealed. *See Delgado v. J. Byrons, Inc.*, 877 So. 2d 822, 823 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D1594b] ("If the effect of the order is to dismiss the case . . . the language 'without prejudice' would not affect the finality of the order."). Moreover, the Order Denying Emergency Motion, whether characterized as a motion for rehearing or a motion for relief from judgment, also constituted a final appealable order. Therefore, because Appellant did not appeal either the Dismissal or the Order Denying Emergency Motion, we hold that we are without jurisdiction to consider either order.

However, we note that Appellant is not without recourse as to those orders. "The failure to file . . . an appeal does not prevent the aggrieved party from seeking collateral relief from an order that is void ab initio by an authorized motion in an authorized court." *Nogales*, 100 So. 3d at 1162. A party seeking relief from a void order may file a rule 1.540 motion with the lower court. *See De La Osa v. Wells Fargo Bank, N.A.*, 208 So. 3d 259, 264-65 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D2771a]. As Appellee concedes in her Answer Brief, "[c]ollateral attacks on void judgments must be carried out in the trial court via a Rule 1.540(b)(4) motion." Thus, we hold that Appellant may challenge the validity of the Dismissal Order and the "Order Denying

Plaintiff's Motion for Emergency Hearing on Eviction for New Defendant" through a rule 1.540(b)(4) motion in the court below.[3]

2. Final Judgment

Appellant also asserts the Final Judgment itself was entered without notice. In Florida, a party is entitled to notice and an opportunity to be heard when damages are unliquidated, and "[a] judgment entered without such notice and opportunity to be heard is void." *Vercosa v. Fields*, 174 So. 3d 550, 552 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1979b]. "A final judgment is void where the notice of hearing that resulted in the judgment was sent to an *incorrect address* and, as a result, the defendant failed to receive notice." *Greisel v. Gregg*, 733 So. 2d 1119, 1121 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D1330a] (emphasis in original). "While proof of mailing normally raises a rebuttable presumption that the mailed item was received, no such presumption arises when there is no evidence that the mailed item was sent to the *correct* address." *Ciolli v. City of Palm Bay,* 59 So. 3d 295, 297 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D795a] (emphasis in original).

Here, on February 12, 2019, the court entered an Order Re-Setting Hearing on Defendant's Motion for Attorney's Fees, setting an evidentiary hearing for March 6, 2019. (R. at 90-91.) The order, however, was sent to an incorrect mailing address for Appellant. Because the Order contained error on its face, as it was sent to Appellant's incorrect mailing address, we hold that the trial court's entry of Final Judgment must be reversed.[4]

Although Appellee argues that Appellant was present at both the February 12 , 2019 and March 6, 2019 hearings, we note that this Court previously relinquished jurisdiction to consider Appellant's rule 1.540(a) motion, and, if necessary, to allow the parties to prepare a statement of evidence concerning Appellant's presence at both hearings. Yet, after the trial court denied the rule 1.540(a) motion below, Appellee filed a notice with this Court stating the issue stands fully briefed and ripe for resolution. Because the only evidence before this Court is an order which is demonstrably incorrect—containing both an incorrect service address for Appellant as well as reference to counsel that Appellant did not have—we find that Appellee has waived the issue and that reversal is appropriate as to the Final Judgment alone.

CONCLUSION

Accordingly, we **REVERSE** the trial court's entry of Final Judgment, which assessed attorney's fees and costs in favor of Appellee and **REMAND** to the trial court for proceedings consistent with this Opinion. Because we reverse the entry of Final Judgment, we conditionally **GRANT** Appellant's Motion for Attorney's Fees & Costs filed pursuant to sections 83.48 and 57.105(7), Florida Statutes, contingent upon Appellant prevailing in the trial court below, and **DENY** Appellee's Motion to Tax Appellate Fees & Costs. (GOODMAN, J., KEYSER, and CURLEY, JJ., concur.)

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[1]At all times, Appellee sent her motions to Appellant's correct mailing address.

[2]Despite filing an Amended Motion two days earlier, the Notice of Special Set Hearing refers to the original Motion to Tax Attorney's Fees and Costs.

[3]We are cognizant that Appellant sought relief in the lower court pursuant to a rule 1.540(a) motion, and note that this Court previously relinquished jurisdiction for the trial court to consider such motion. However, the trial court ultimately denied the motion. Although we do not reach the propriety of the trial court's decision, we note that Appellant may still seek appropriate relief in the trial court below following the issuance of this Opinion. We further note that Appellant's June 22, 2020 "Motion to Vacate the Trial Court Order Denying Relief under Rule 1.540, Alternatively for Certiorari Relief Quashing the Order," in which Appellant seeks to invoke this Court's appellate jurisdiction to review the trial court's denial of the rule 1.540(a) motion under his initial Notice of Appeal, is inappropriate.

[4]We also note that the trial court's February 12, 2019 order stated that "[b]oth Plaintiff's counsel and Defendant were present." This language appears to be in error, as Appellant—the Plaintiff below—was apparently not represented by counsel until April of 2019.

* * *

Criminal law—Driving under influence—Evidence—Statements of defendant—Accident report privilege—Trial court properly suppressed statements defendant made to officers during accident investigation—However, trial court erred in suppressing statements made by other driver and passenger that identified defendant as driver of vehicle that rear-ended their vehicle, as these statements were not barred by accident report privilege—Officer's failure to give *Miranda* warnings when switching from accident investigation to DUI investigation does not require suppression of defendant's nontestimonial performance of field sobriety exercises—Officer's failure to give *Miranda* warnings or read implied consent warning before asking defendant to submit to breath test does not require suppression of breath test results—Exclusionary rule is inapplicable where there is no evidence that defendant was coerced into making any statements

STATE OF FLORIDA, Appellant, v. ORVILLE WILLIAMS, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No.:19-33AC10A. L.T. Case No. 16-3081MU10A. July 29, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Kim Mollica, Judge. Counsel: Nicole Bloom, for Appellant. Justin Berlin, for Appellee.

OPINION

(ANDREW SIEGEL, J.) **THIS CAUSE** comes before the Court, sitting in its appellate capacity, upon Appellant's timely appeal of the trial court's grant of Appellee's motion to suppress. Having considered Appellant's Initial Brief, Appellee's Answer Brief, the trial court record, and applicable law, this Court finds as follows:

Mr. Sawano Petit-Homme was stopped at a red light when Appellee rear-ended his vehicle. Mr. Petit-Homme's passenger, Mr. Herve Mompoint, also identified Appellee as the driver of the car that rear-ended the vehicle he was in. Deputy Eric Strzalkowski of the Broward Sheriff's Office responded to the scene to investigate the accident. When Deputy Strzalkwoski made contact with Appellee, he noticed that Appellee had to steady himself up against the car, passed his driver's license in his wallet a few times before producing it, provided the wrong zip code, and had slurred speech. Deputy Strzalkowski did not read *Miranda*[1] warnings to Appellee.

Detective Steven Serphos responded to the scene of a traffic crash. He made contact with Appellee and observed Appellee had bloodshot, watery eyes, an odor of alcohol on his breath, and slurred speech. At that point, Detective Serphos told Appellee that the accident investigation was over and he was beginning a DUI investigation. However, Detective Serphos did not read Appellee *Miranda* warnings. He asked Defendant to perform field sobriety exercises. Based on Appellee's performance on those exercises, Detective Serphos believed Appellee had been driving under the influence and placed Appellee under arrest. He transported Appellee to the breath alcohol testing facility. Appellee consented to providing a breath sample. Detective Serphos did not read Implied Consent to Appellee. He testified that the department's policy and procedure is to read Implied Consent only if the arrestee refuses to provide a breath sample.

Prior to the hearing, Appellant conceded that Appellee's statements to Detective Serphos must be suppressed because the detective did not read *Miranda* warnings when he switched from an accident investigation to a DUI investigation, as required by law. *See State v. Marshall*, 695 So. 2d 686 (Fla. 1997) [22 Fla. L. Weekly S308b]. The trial court suppressed Mr. Petit-Homme and Mr. Mompoint's identification of Appellee as the driver based on the accident report privilege. The trial court also ruled that Detective Serphos' observations of Appellee and the results of the breath test should be suppressed because Detective Serphos failed to read Appellee *Miranda* warnings. In doing so, the court relied on *State v. Kerrigan*, 14 Fla. L. Weekly Supp. 103a (Fla. 17th Cir. Cty. Ct. October 10, 2006), which is a 17th Judicial Circuit County Court order. The trial court rejected *State v. Whelan*, 728 So.

2d 807 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D640b] and found that *Kerrigan* controlled.[2] The court in *Whelan* held that *Miranda* warnings are not required before the administration of field sobriety exercises.

"[A] trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness, and the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling." *Pagan v. State,* 830 So. 2d 792, 806 (Fla. 2002) [27 Fla. L. Weekly S299a]. The trial court's ruling should not be disturbed on appeal absent an abuse of discretion. *Kavantzas v. State*, 93 So. 3d 447, 448 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D1717a]. However, the application of the law to the facts is reviewed *de novo*. *See Pagan*, 830 So. 2d at 806.

Although the trial court properly suppressed Appellee's statements to the officers, as stipulated by Appellant during the motion to suppress hearing, the trial court erred in suppressing the statements of identification by Mr. Petit-Homme and Mr. Mompoint, Detective Serphos' observations of Appellee's non-testimonial performance on field sobriety exercises, and Appellee's breath test results.

Section 316.066, Florida Statutes, also known as the Accident Report Privilege, bars an investigating officer from making any use of a defendant's compelled statements made during the accident investigation which would violate the privilege against self-incrimination. *State v. Cino*, 931 So. 2d 164 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D1353a]. "[A] law enforcement officer is not barred by section 316.066(4) from testifying at a criminal trial regarding statements made to him during his traffic investigation by anyone other than the defendant on trial (because doing so would in no way violate the non-defendant declarant's privilege against self-incrimination)." *Id*. at 167-68. The accident report privilege does not act to bar officers from testifying as to statements made by Mr. Petit-Homme and Mr. Mompoint because the privilege would only prevent the officers from testifying as to statements made by Appellee during the course of the accident investigation.

Next, The trial court erred in suppressing Detective Serphos' observations of Appellee's performance on field sobriety exercises.

"[I]f a law enforcement officer gives any indication to a defendant that he or she must respond to questions concerning the investigation of an accident, there must be an express statement by the law enforcement official to the defendant that 'this is now a criminal investigation,' followed immediately by *Miranda* warnings, before any *statement* by the defendant may be admitted." *State v. Marshall*, 695 So. 2d at 686 (citing *State v. Norstrom*, 613 So. 2d 437, 440-441 (Fla. 1993)) (emphasis added). "The sole purpose of the accident report privilege is to protect the privilege against self-incrimination." *State v. Marshall*, 695 So. 2d 719, 722 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1865a], adopted by *State v. Marshall*, 695 So. 2d at 687.

"Whether *Miranda* warnings are required prior to the administration of roadside sobriety tests . . . depends on whether the test is designed to elicit a testimonial, or nontestimonial, response." *State v. Whelan*, 728 So. 2d at 809 (citations omitted). A request that a motorist count or recite the alphabet calls for testimonial evidence for Fifth Amendment purposes and requires *Miranda* warnings. *Id*.

> By contrast, *Miranda* warnings are not required for roadside tests of a driver's physical coordination. That is so because a test of physical coordination generates a nontestimonial response and is not protected by the Fifth Amendment. *See Pennsylvania v. Muniz,* 496 U.S. at 592, 110 S. Ct. 2638; *Allred*, 622 So. 2d 986-87; *Burns*, 661 So. 2d at 846-47. The same logic applies to a test of physical reaction to an outside stimulus, such as the HGN test.

Id. at 810. The court in *Whelan* found that the accident report privilege statute and *Marshall* do not apply to nontestimonial conduct such as the defendant's responses to purely physical roadside tests. *Id*. Furthermore, there is no requirement that an officer warn the motorist of the right to refuse to perform roadside tests. *Id*. at 811.

Although Detective Serphos should have read Appellee *Miranda* warnings when switching from an accident investigation to a DUI investigation, his failure to do so only requires the suppression of all statements and testimonial aspects of the field sobriety exercises. At the hearing, Appellant already stipulated that all statements should be suppressed. However, the failure to give *Miranda* warnings does not require the suppression of Appellee's nontestimonial performance of the field sobriety exercises. Furthermore, Appellee's argument that the field sobriety exercises were compelled fails because Detective Serphos was not required to inform Appellee that he had the right to refuse to perform field sobriety exercises, and there was no evidence of coercion.

The trial court also erred in suppressing Appellee's breath test results. The results of his breath test were nontestimonial evidence. Therefore, Detective Serphos was not required to read *Miranda* warnings before asking Appellant to submit to breath testing. Furthermore, suppression is not warranted even though Detective Serphos did not read Implied Consent. Section 316.1932, Florida Statutes, requires law enforcement officials to read Implied Consent before asking for a breath sample. However, there is no requirement to sanction the State by excluding breath test results merely because the motorist was not informed, prior to testing, of the consequences should testing be refused. *State v. Gunn*, 408 So. 2d 647, 649 (Fla. 4th DCA 1981); *State v. Iaco*, 906 So. 2d 1151, 1153 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1556a]; *State v. Dubiel*, 958 So. 2d 486, 487 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1338a].

Although Detective Serphos should have read Implied Consent, the trial court erred in suppressing the results of the breath test. Suppression is not an appropriate sanction for the detective's failure to read Implied Consent.

Finally, Appellee argues that, notwithstanding Appellant's arguments in its initial brief, the trial court's order should be affirmed because all of the above evidence was fruit of the poisonous tree, pursuant to *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963). Appellee cites a line of cases, all of which concern the Fourth Amendment, and not the Fifth Amendment privilege against self-incrimination. However, the fruit of the poisonous tree doctrine pursuant to *Wong Sun* is not applicable to the mere failure to read *Miranda* warnings.

The failure to give a suspect *Miranda* warnings does not require suppression of the physical fruits of the suspect's unwarned but voluntary statements. *U.S. v. Patane*, 542 U.S. 630, 633, 124 S. Ct. 2620, 159 L.Ed.2d 667 (2004) [17 Fla. L. Weekly Fed. S482a].

> [T]he *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause. The Self-Incrimination Clause, however, is not implicated by the admission into evidence of the physical fruit of a voluntary statement. Accordingly, there is no justification for extending the *Miranda* rule to this context. And just as the Self-Incrimination Clause primarily focuses on the criminal trial, so too does the *Miranda* rule. The *Miranda* rule is not a code of police conduct, and police do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn. For this reason, the exclusionary rule articulated in cases such as *Wong Sun* does not apply.

Id. at 636-637. "[U]nlike unreasonable searches under the Fourth Amendment or actual violations of the Due Process Clause or the Self-Incrimination Clause, there is, with respect to mere failures to warn, nothing to deter." *Id*. at 642. "Introduction of the nontestimonial fruit

of a voluntary statement . . . does not implicate the Self-Incrimination Clause." *Id*. at 643. "[A]lthough it is true that the Court requires the exclusion of the physical proof of actually coerced statements, it must be remembered that statements taken without sufficient *Miranda* warnings are presumed to have been coerced only for certain purposes and then only when necessary to protect the privilege against self-incrimination." *Id*.

Appellee's performance of the purely physical field sobriety exercises and the results of the breath test are not testimonial in nature. *See Whelan*, 728 So. 2d at 810. There is no evidence that Appellee was actually coerced into making any statements. Therefore, the exclusionary rule enunciated in *Wong Sun* does not apply in the instant case.

Furthermore, it is questionable whether the results of the field sobriety exercises and breath test were directly or indirectly obtained as a result of any statements made by Appellee. Appellee rear-ended another car and had watery, bloodshot eyes, slurred speech, and an odor of alcohol emanating from his breath. Based on those facts alone, Detective Serphos had reasonable suspicion to conduct a DUI investigation and ask Appellee to perform field sobriety exercises. Courts have held that similar facts gave rise to reasonable suspicion to conduct a DUI investigation. *See State v. Taylor*, 648 So. 2d 701, 703 (Fla. 1995) [20 Fla. L. Weekly S6b] (officer had reasonable suspicion that the defendant was driving under the influence where the defendant was driving at a high rate of speed, staggered, had slurred speech, bloodshot, watery eyes, and an odor of alcohol); *Origi v. State*, 912 So. 2d 69, 71-72 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a] (officer had reasonable suspicion where the defendant had been driving at a high rate of speed, had bloodshot eyes, and an odor of alcohol).

After Appellee performed field sobriety exercises, Detective Serphos had probable cause to arrest him for DUI even without considering any statements or testimonial aspects of the field sobriety exercises. Factors relevant to determining whether probable cause exists are the odor of alcohol, the defendant's reckless or dangerous operation of a vehicle, slurred speech, lack of balance or dexterity, flushed face, bloodshot eyes, admissions, and poor performance on field sobriety exercises. *State v. Kliphouse*, 771 So. 2d 16, 23 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f]. In the instant case, Appellee dangerously rear-ended another car, had to hold himself up against his car, passed his driver's license in his wallet several times when asked to produce it, had an odor of alcohol on his breath, had bloodshot, watery eyes, exhibited slurred speech, and performed poorly on field sobriety exercises, including those that were purely physical such as the one leg stand and the walk and turn exercises.

Since Deputy Serphos had reasonable suspicion to conduct a DUI investigation and probable cause to arrest Appellee and request a breath sample, the evidence obtained was not directly or indirectly obtained as a result of Appellee's statements. The evidence was not tainted by Appellee's statements or the testimonial aspects of the field sobriety exercises.

However, the trial court properly suppressed Defendant's statements and the testimonial aspects of the field sobriety exercises.

Accordingly, it is

ORDERED AND ADJUDGED that the trial court's ruling granting Appellee's motion to suppress is hereby **REVERSED** in part and **AFFIRMED** in part, and this matter is **REMANDED** to the trial court with directions to proceed in accordance with this opinion. (FEIN and MURPHY, III, JJ., concur.)

[1]*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

[2]The trial court found that *Kerrigan*, 14 Fla. L. Weekly Supp. 103a, controlled over *Whelan*. However, *Kerrigan* is a county court order whereas *Whelan* is a Third District Court of Appeal decision, which is binding on all Florida trial courts in the absence of an interdistrict conflict. *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992).

* * *

Insurance—Personal injury protection—Coverage—PIP policy that is silent as to whether policy benefits are stackable is ambiguous and must be construed in favor of coverage and against insurer—Trial court erred in relying on extrinsic evidence of PIP statute to give meaning to policy terms and conclude that policy is not ambiguous

SEA SPINE ORTHOPEDIC INSTITUTE, LLC, a/a/o Carmen Charriez, Appellant, v. LIBERTY MUTUAL INSURANCE COMPANY, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE17-013776 (AP). L.T. Case No. CONO16-006781. May 1, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; John D. Fry, Judge. Counsel: Chad A. Barr, Law Office of Chad A. Barr, P.A., Altamonte Springs, for Appellant. Antonio D. Morin, Akerman LLP, Miami, for Appellee.

[Lower court order at 25 Fla. L. Weekly Supp. 489a]

OPINION

Sea Spine Orthopedic Institute, LLC (Sea Spine) appeals an order of the county court granting Liberty Mutual Insurance Company's (Liberty Mutual) Cross-Motion for Declaratory Relief. Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the order of the county court is hereby **REVERSED**, as set forth below:

In the proceedings below, Sea Spine filed a complaint for declaratory relief against Liberty Mutual requesting that the county court determine the amount of coverage available under an insurance policy. Therein, Sea Spine averred that "[d]efendant's policy of insurance is vague and ambiguous as to the amount of coverage available under its Personal Injury Protection (PIP) Coverage." (R. 16). Specifically, the parties disagreed as to whether the subject policy was limited to a total of $12,500 or $10,000, the amount paid out by Liberty Mutual. On February 6, 2017, Sea Spine filed its Motion for Summary Judgment Regarding Petitioner's Petition for Declaratory Relief (Motion). On May 2, 2017, Liberty Mutual filed a Cross-Motion for Declaratory Relief (Cross-Motion). The county court denied Sea Spine's Motion and granted Liberty Mutual's Cross-Motion, entering an order memorializing its findings on June 30, 2017.

As to the interpretation of insurance contracts, the law is well settled.

> 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. Further, in order for an exclusion or limitation in a policy to be enforceable, the insurer must clearly and unambiguously draft a policy provision to achieve that result. Policy language is considered to be ambiguous if the language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage. Ambiguous insurance policy exclusions are construed against the drafter and in favor of the insured.

Allstate Ins. Co. v. Orthopedic Specialists, 212 So. 3d 973, 975-76 (Fla. 2017) [42 Fla. L. Weekly S38a] (internal punctuation and citations omitted). Applying the rules of insurance contract interpretation, this Court determines that the terms of Liberty Mutual's policy are ambiguous. Specifically, the policy is silent as to whether the benefits listed in the policy are stackable. This Court's determination is buttressed by Liberty Mutual counsel's testimony, which indicates that, pursuant to the policy, emergency medical condition (EMC) and accidental death benefits *are* stackable while EMC and bodily injury benefits *are not* stackable, without explanation as to why. (R. 337-339). Indeed, the subject policy is silent on this issue. Where a policy is silent as to a particular issue (e.g. whether policy benefits are stackable or not) this creates an ambiguity in the insurance contract.

See Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29 (Fla. 2000) [25 Fla. L. Weekly S211a] (determining that if Auto-Owners intended to exclude or limit its liability coverage no matter how many of its vehicles were involved in an accident, it was incumbent upon Auto-Owners to do so unambiguously). Because the policy is ambiguous, the county court was bound to construe the contract in favor of coverage and strictly against the insurer. *See Washington Nat'l Ins. Corp. v. Ruderman,* 117 So. 3d 943 (Fla. 2013) [38 Fla. L. Weekly S511a].

Rather, in rendering its decision, the county court improperly relied on extrinsic evidence, namely Florida's Personal Injury Protection (PIP) statute, to make meaning of the policy terms. (R. 328; 347-348). *See Ruderman,* 117 So. 3d at 949 (explaining that Florida law does not require that resort must be made to consideration of extrinsic evidence before an insurance policy is found to be ambiguous and construed against the insurer). The fact that Liberty Mutual's policy incorporated, by reference, Florida's PIP statute, does not work to ameliorate the ambiguity created by the schedule of benefits. This exact argument was rejected by the Supreme Court of Florida in *Geico General Insurance Company v. Virtual Imaging Services, Inc. See Virtual Imaging,* 141 So. 3d 147, 159 (Fla. 2013) [38 Fla. L. Weekly S517a] (explaining that because the Medicare fee schedules contained in the PIP statute merely represent an *option* for insurers, rather than a *requirement* for insurers, "neither the insured nor the provider knows without the policy providing notice by electing the Medicare fee schedules, that the insurer will limit reimbursements."). Similarly, in the instant matter, the fact that the PIP statute is incorporated into the subject policy did not put Sea Spine on notice of Liberty Mutual's intent to cap benefits at $10,000 upon a determination of an EMC.

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

* * *

STATE OF FLORIDA, Appellant, v. JOSHUA MENGHI, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-38AC10A. L.T. Case No. 18-4946MU10A. July 24, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Judge Evans. Counsel: William Direnzo, for Appellant. Nicole Bloom, Office of the State Attorney, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record on appeal, and the applicable law, we hereby **AFFIRM** the Defendant's judgment and sentence. (SIEGEL, MURPHY and FEIN, JJ., concur.)

* * *

DIANA PALACIO, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 17-47AC10A. L.T. Case No. 15-028554MU10A. July 24, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Mardi Levey Cohen. Counsel: Lisa S. Lawlor, for Appellant. Nicole Bloom, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered Appellant's Initial Brief, Appellee's Answer Brief, Appellant's Reply Brief, and the applicable law, we hereby **AFFIRM** the trial court. (SIEGEL, A., MURPHY, and FEIN, JJ., concur.)

* * *

ALLISON WEILER, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 16-29AC10A. L.T. Case No. 14-01245MM10A. July 24, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Judge Kathleen McHugh. Counsel: Lisa Lawlor, Office of the Public Defender, for Appellant. Nicole Bloom, Office of the State Attorney, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record on appeal, and the applicable law, we hereby **AFFIRM** the Defendant's judgment and sentence. (SIEGEL, MURPHY, and FEIN, JJ., concur.)

* * *

Criminal law—Appeals—*Anders* appeal

JESUS MARIA FALU, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-00024-AC-01. L.T. Case No. A9W8PUE. July 21, 2020.

ANDERS II

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

* * *

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CIRCUIT COURTS—ORIGINAL

ELIZABETH MARMOL, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. Circuit Court, 13th Judicial Circuit in and for Hillsborough County, Circuit Civil Division. Case No. 20-CA-003943, Division E. August 11, 2020. Gregory P. Holder, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. John Mollaghan, McFarlane Law, Coral Springs, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO STRIKE AFFIDAVIT OF LISA ROBISON FILED BY DEFENDANT

THIS CAUSE having come on to be considered upon the Plaintiff's Motion to Strike Affidavit of Lisa Robison Filed by Defendant, heard by the Court on Tuesday, August 11, 2020. Counsel for both the Plaintiff and Defendant attended via WebEx and presented extensive argument. The Court having received the argument of counsel and reviewed the entire court file, it is,

ORDERED AND ADJUDGED that the Plaintiff's Motion to Strike Affidavit of Lisa Robison is DENIED. The Court finds Ms. Robison competent with respect to the statements within her affidavit and the Plaintiff's objections go more to the weight, if any, to be afforded these statements rather than the admissibility.

* * *

Insurance—Personal injury protection—Jurisdiction—Circuit court

ELIZABETH MARMOL, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. Circuit Court, 13th Judicial Circuit in and for Hillsborough County, Circuit Civil Division. Case No. 20-CA-003943, Division E. September 11, 2020. Gregory P. Holder, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. William John McFarlane III, McFarlane & Dolan, Coral Springs, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO TRANSFER TO COUNTY COURT

THIS CAUSE came before the Court on September 10, 2020, upon Plaintiff's Motion to Transfer to County Court. Present before the Court were counsel for both the Plaintiff and Defendant. This Court having heard the argument of Counsel, reviewed the motion, court file, and being otherwise duly advised in the premises, it is:

ORDERED and ADJUDGED that the Plaintiff's Motion to Transfer to County Court is GRANTED. Counsel for the Plaintiff, Timothy Patrick, announced upon this record that his client waives any claims for property damage within this case. Thus, the only issue remaining for consideration by this Court is the PIP claim which, by contract and case law, cannot reach the jurisdictional limit of the Circuit Court. Thus, jurisdiction is proper before the County Court and this matter is ORDERED transferred to County Court and returned to the previously assigned division.

* * *

Insurance—Declaratory actions—Complaint seeking advisory opinion on appropriateness of rescission of policy after policy was rescinded dismissed for lack of jurisdiction and for failure to state cause of action

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. TIFFANY JUWANA PRITCHETT, ALEX LAMAR HAMLER, ROCHELLE YVETTE WATSON, SHANISE LASHA CLACK, NEHEMIAH PRITCHETT, TALLAHASSEE MEDICAL CENTER INC., d/b/a CAPITAL REGIONAL MEDICAL CENTER, UNIVERSITY PHYSICAL MEDICINE, INC., NICHOLAS W. BELLETTO D.C., P.A., PARAGON EMERGENCY SERVICES, LLC, NOVA ORTHO AND SPINE, PLLC, STAND-UP MRI OF TALLAHASSEE, P.A., and GEICO INDEMNITY COMPANY, Defendant. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2019-CA-007525. July 22, 2020. Bruce R. Anderson, Jr., Judge. Counsel: William J. McFarlane, Coral Springs, for Plaintiff. William S. England, Chad Barr Law, Altamonte Springs, for Defendant.

ORDER ON DEFENDANT TIFFANY JUWANA PRITCHETT'S MOTION TO DISMISS

THIS MATTER came before the Court on Defendant, Tiffany Juwana Pritchett's ("Defendant") Motion to Dismiss, and being considered by the Court and otherwise being fully advised of the premises; it is hereby **ORDERED AND ADJUDGED** that:

1. Defendant's *Motion to Dismiss Plaintiff's Complaint for Declaratory Judgment* is hereby **Granted in part and Denied in part**.

2. The Court denies Defendant's Motion to Dismiss on the basis of venue, without prejudice.

3. The Court grants Defendant's Motion to Dismiss on the basis of jurisdiction and failure to state a cause of action without prejudice. The Complaint fails to set forth a jurisdictional allegation that would properly place this matter before this Court. The Court finds that the Plaintiff's complaint, in effect, seeks an advisory opinion regarding the appropriateness of Plaintiff's rescission of the policy of insurance after the policy was unilaterally rescinded by Plaintiff.

4. Plaintiff shall have thirty (30) days from July 14, 2020 to file an Amended Complaint. If Plaintiff files an Amended Complaint, Defendant shall have thirty (30) days from service to respond to Plaintiff's Amended Complaint.

* * *

Consumer law—Credit agreement—Affirmative defenses—Summary judgment is granted as to affirmative defenses alleging res judicata and inapplicability of holder rule—Prior federal class action based on alleged violations of Truth in Lending Act does not preclude member of class from bringing individual claims that are not identical to claims previously litigated—Defendant's purported unilateral amendment of holder provision in contract it drafted is void and unenforceable—Jury trial waiver that plaintiff had no opportunity to negotiate and which was inconspicuously placed in contract in small print is void as against public policy

DEREK DUNN and MILDRED DUNN, Plaintiff, v. WATER EQUIPMENT TECHNOLOGIES, INC. and INDEPENDENT SAVINGS PLAN COMPANY d/b/a ISPC, Defendants. Circuit Court, 6th Judicial Circuit in and for Pasco County. Case No. 51-2017-CA-001664WS/H. August 6, 2020. Declan P. Mansfield, Judge. Counsel: William C. Bielecky, William C. Bielecky, P.A., Tallahassee; and Craig E. Rothburd, Craig E. Rothburd, P.A., Tampa, for Plaintiff. Murray B. Silverstein and Brian R. Cummings, Greenspoon Marder, P.A., Tampa, for Defendant.

ORDER

THIS MATTER came before this Court August 4, 2020 on the Plaintiff's Motion for Summary Judgment on various affirmative defenses filed by the Defendant and, based upon the Court's review of the written submissions and memorandum from both sides, oral argument by counsel for both sides and consideration of applicable case law finds as follows:

1. As to the defense of res judicata or collateral estoppel as contained in affirmative defense numbers 2, 3 and 4: The question posed is whether the prior Federal Court Class Action precludes any class member involved in that case (and this Plaintiff was a member of that class) from bringing any individual claim against I.S.P.C.? A Motion for Summary Judgment was brought by the defense in 2019 in this case and was denied by this Court on August 27, 2019. The prior class action, *Lankhorst v. I.S.P.C.*, 39 F.Supp 3d 1359, was based on alleged violations of the Federal Truth in Lending Act (TILA). The Federal Court found in favor of the defense ruling that there was no security interest under the TILA's definition of "security interest" in real property. Under *Fortner v. Thomas*, 983 F.2d 1024, (11th Circuit 1993) claims there were not *actually* litigated or

determined are not barred by res judicata or collateral estoppel. The class action notice in Lankhorst did not provide notice to any of its members that their individual claims, such as in this case, would be precluded. Therefore, to rule otherwise would be a deprivation of their due process rights. Further, of the four elements required for res judicata, the parties disagree only as to the identity of the cause of action. It is clear from a review of the current claims that they are not the same as previously litigated.

2. Affirmative defense #8 - "Holder Rule" does it apply to this matter before the Court? Paragraph 28 of the original contract contains the following language:

> 28. NOTICE - Any holder of this Consumer Credit Agreement is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof. Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder.

This was not a negotiated item, rather this was a form contract drafted by the Defendant and, once included, it cannot argue that it does not apply. The defense has submitted that it unilaterally modified the contract terms and the Plaintiff failed to object. However, this very same issue was previously argued while this case was pending in the Fifteenth Judicial Circuit before the Honorable Donald Hatele, Circuit Court Judge. On May 18, 2016, Judge Hatele found this modification to be void and unenforceable. This Court finds no reason to disturb the prior ruling in this case. This Court points out that the notice of amendment/modification was sent out by the Plaintiff directly to the Defendants in a clear violation of 4.4-2 FL Rules of Professional Conduct. Whether or not the parties refer to this clause as the "Holder Rule" the Defendant will not be allowed to disavow its own terms of the contract it drew up and enforced. The argument of whether or not it is a credit card issue is of no value or weight. The contract terms will be applied.

3. Affirmative defense #5 - Does the Plaintiff lack standing to assert any claim arising out of the Assurance of Voluntary Compliance (AVC) entered into by the Defendant and the State of Florida on or about March 4, 2010. This is a factual matter and standing, or lack thereof, may be asserted until conclusively established by the Plaintiff in this matter.

4. Waiver of Jury Trial; the waiver clause is contained in Paragraph 23 "Failure to Pay" which is an almost 5 inch small print paragraph at the second to last sentence of said paragraph. A fundamental constitutional right to resolve issues whether Federal or State is the right to a jury trial.

There are certain factors which Courts have used over the years to determine if a jury trial waiver was knowingly, voluntarily and intelligently entered. Was the provision conspicuous? What was the experience level of the parties to the contract? Were the terms negotiable? Was the waiving party represented by counsel?

When evaluating each of these factors individually, and as a whole, it is clear the Plaintiff had no opportunity to negotiate these terms, were not represented by counsel and the placement of the waiver was so inconspicuous as to reflect a conscious desire of the Defendant to hide and inconspicuous as to reflect a conscious desire of the Defendant to hide and obscure the Plaintiff's fundamental right to a jury trial. This Court will not allow this type of conduct to stand and strikes this waiver as void, unenforceable and against public policy.

WHEREFORE, the Court grants the Plaintiff's Motion for Summary Judgment as to the Defendant's 2, 3, 4 and 8 affirmative defenses with prejudice. The Motion for Summary Judgment as to the Defendant's 5th affirmative defense is denied without prejudice. The waiver of jury trial is struck as void and unenforceable.

* * *

Insurance—Automobile—Personal injury protection—Application—Misrepresentations—Materiality—Regular operator of insured vehicle—Policy was properly rescinded, and therefore void ab initio, based on insured's failure to disclose son as regular operator of insured vehicle

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. RAFAEL ANGEL RODRIGUEZ SR., RAFAEL ANGEL RODRIGUEZ RIVERA, and LAURA MAE HUGHES, Defendant(s). Circuit Court, 7th Judicial Circuit in and for Volusia County. Case No. 2019 11784 CIDL. July 22, 2020. Randell H. Rowe III, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Rafael Angel Rodriguez Sr., Pro-Se, for Defendant.

ORDER ON PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AS TO DEFENDNANT, RAFAEL ANGEL RODRIGUEZ SR.

THIS CAUSE having come before this Court at the hearing on July 13, 2020, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendant, RAFAEL ANGEL RODRIGUEZ SR., and the Court having considered the same, it is hereupon,

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

Factual Background

Plaintiff, Direct General Insurance Company brought the instant Declaratory Action against the insured, Rafael Angel Rodriguez Sr., regarding the policy rescission as a result of the insured's material misrepresentation on the application for insurance dated March 9, 2019. Plaintiff rescinded the policy of insurance on the basis that Rafael Angel Rodriguez Sr. failed to disclose his son, Rafael Angel Rodriguez Rivera, as a regular operator of the insured vehicle on the application for insurance, and had he disclosed this information the Plaintiff would not have issued the policy on the same terms, namely Plaintiff would have charged a higher premium to issue the policy.

Mr. Rafael Angel Rodriguez Sr. initially completed an application for a policy of automobile insurance from Direct General Insurance Company on March 9, 2019. Mr. Rafael Angel Rodriguez Sr. failed to disclose his son, Rafael Angel Rodriguez Rivera, as a regular operator of the insured vehicle on the application for insurance when completing the following section of the application in the Applicant's Statement on page 4:

> "I have reported on this Application all persons age 15 and older who reside with me, whether or not they are licensed to operate a vehicle. I have also reported all regular operators of my vehicle(s)"

In addition, the insured, Mr. Rafael Angel Rodriguez Sr., signed the Application for Insurance, which provides in pertinent part on page 5 as follows:

> "I hereby acknowledge that I have read and understood all the questions, statements, and information set forth in the application, including this Applicant Statements. I hereby represent that my answers and all information provided by me or on my behalf contained in this application is accurate and complete."

Following the May 16, 2019 motor vehicle accident, an Examination Under Oath was taken of the Defendant, Rafael Angel Rodriguez Sr., on August 21, 2019 wherein Rafael Angel Rodriguez Sr. disclosed to Plaintiff that his son, Rafael Angel Rodriguez Rivera, was a regular operator of the insured vehicle at the time of the application for insurance on March 9, 2019. Specifically, Rafael Angel Rodriguez Sr. provided the following sworn testimony at his Examination Under Oath in pertinent part as follows:

> Q: So, how many vehicles do you currently have in your possession?
>
> A: Right now?

Q: Yes.
A: Only one.
Q: And which vehicle is that?
A: The Honda Civic.
Q: Okay. And that was the vehicle that was in the accident; correct?
A: Yes. Well—
Q: And you are the owner of the vehicle?
A: Yes.
Q: And who drives that car on a regular basis?
A: Me and my son.
Q: Okay. And where is the car kept? Is it kept at your current address or another location?
A: No. At the 1068 Saxon Boulevard.
Q: Do you still have the Hyundai Sonata?
A: No. I don't have that one no more.
Q: Okay. Now, on March 9th, 2019, when you filled out the application of insurance for the current policy period, did you notify the agent that your son lived with you?
A: He wasn't living with me.
Q: Okay. Where was he living?
A: 1688 Cedro Avenue, Deltona, Florida 32738.
Q: Thank you. And did your son have the Honda Civic with him at that address?
A: Yes.
Q: And did you tell the agent that the Honda Civic was being garaged at 1688 Cedro Avenue?
A: No.
See pages 8-10 of the transcript from the Examination Under Oath of Rafael Angel Rodriguez Sr., ***(emphasis added).***

Plaintiff determined that had Rafael Angel Rodriguez Sr. provided the proper information at the time of the insurance application then Plaintiff would have been charged a higher premium rate. Therefore, Direct General Insurance Company declared the policy void *ab initio* due to material misrepresentation and returned the paid premiums to Rafael Angel Rodriguez Sr. Due to the policy being declared void *ab initio* the Plaintiff denied coverage for the subject motor vehicle accident.

Pursuant to the policy of insurance issued to Rafael Angel Rodriguez Sr., Direct General Insurance Company may void the insurance policy as follows:

FRAUD AND MISREPRESENTATION

The statements made by **you** in any application for insurance or policy change are deemed **your** representations. A misrepresentation; omission; concealment of fact; or incorrect statement may prevent recovery under this policy if:

1. The misrepresentation; omission; concealment; or statement is fraudulent or is material either to the acceptance of the risk or to the hazard assumed by **us**; or

2. Had **we** known the facts, we in good faith would not have:
   a. Issued the policy;
   b. Issued the policy at the same premium rate;
   c. Issued the policy with the limits shown;
   d. Issued this policy with these terms and conditions; or
   e. Provided the coverage with respect to the hazard resulting in the accident or loss.

See page 9 of Florida Amendatory Endorsement, FL028A (01-13) (emphasis in original).

Further, Florida Statute § 627.409(1) provides:

(1) Any statement or description made by or on behalf of an insured or annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and not a warranty. Except as provided in subsection (3), ***a misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only if any of the following apply*:**

(a) The misrepresentation, omission, concealment, or statement is fraudulent or is material to the acceptance of the risk or to the hazard assumed by the insurer.

(b) ***If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith*** would not have issued the policy or contract, ***would not have issued it at the same premium rate,*** would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.

(emphasis added).

At the July 13, 2020 hearing on Plaintiff, Direct General Insurance Company's Motion for Final Summary Judgment against the Defendant, Rafael Angel Rodriguez Sr., the Plaintiff, Direct General Insurance Company argued in their summary judgment that, as both the statute and the binding appellate decisions state, materiality of the risk is determined by the insurer, not the insured. *See Fla. Stat. 627.409.* As the Fla. Supreme Court ruled "[t]he statute recognizes the principals of law that a contract issued on a mutual mistake of fact is subject to being voided and defines the circumstances for the application of this principle. This Court cannot grant [**10] an exception to a statute nor can we construe an unambiguous statute different from its plain meaning." *Continental Assurance Co. v. Carroll,* 485 So. 2d 406, 409, (Fla. 1986). Therefore, the insurer determines materiality. Additionally, as an insurer rates risks based on the likelihood of a future event, such as an accident, then the insurer may treat any regular operator of the insured vehicle as a potential risk. Therefore, to ensure both parties enter the contract with full understanding, the Plaintiff is entitled to all information that Plaintiff deems necessary to determine the risk. Additionally, the Legislature allows an insurer to rescind for a material misrepresentation, regardless of the insured's intent, and thus the Legislature clearly burdened the applicant with the duty to fully disclose all requested information. *See United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (3rd DCA 2009) [34 Fla. L. Weekly D1578a]. It was the Plaintiff's position was that Plaintiff properly rescinded the policy at issue based on an unlisted regular operator of the insured vehicle as the terms were unambiguous within the application.

Analysis Regarding Whether the Undisclosed Regular Operator was Material

The Court ruled that the question of materiality is considered from the perspective of the insurer and therefore the insured's failure to disclose his son, Rafael Angel Rodriguez Rivera, as a regular operator of the insured vehicle was a material misrepresentation. Further, the Court found that "[a] material misrepresentation in an application for insurance, whether or not made with knowledge of its correctness or untruth, will nullify *any policy* issued and is an absolute defense to enforcement of the policy." *United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (3rd DCA 2009) [34 Fla. L. Weekly D1578a]. The Court ruled that the failure to disclose a household member that would have caused the insurer to issue the policy at a higher rate is sufficient to support a rescission. *See Privilege Underwriters Reciprocal Exch. v. Clark,* 174 So. 3d 1028, 1031 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1810a]. Additionally, the Court found that as Defendant failed to provide testimony to contradict Plaintiff's claim that the disclosure would have caused Plaintiff to issue the policy at a higher premium rate, then Plaintiff was entitled to rescind. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen,* 999 F.2d 1532 (1993).

Additionally, the Court found that the affiant, Lisa Robison, provided sworn testimony to knowledge of the application for insurance and administration of the underwriting guidelines for the insurance policy issued to Rafael Angel Rodriguez Sr., and could

claim personal knowledge from a review of the records, therefore, Plaintiff's deponent satisfied the threshold to satisfy the business records exception. *See Nationstar Mortg., LLC v. Berdecia,* 169 So. 3d 209, 213 [40 Fla. L. Weekly D1502a]. Consequently, Plaintiff established without contrary evidence that the misrepresentation was material, as set forth in the Affidavit of Lisa Robison.

Conclusion

This Court finds that the Plaintiff, Direct General Insurance Company's application for insurance unambiguously required Defendant, Rafael Angel Rodriguez Sr., to disclose his son, Rafael Angel Rodriguez Rivera, as a regular operator of the insured vehicle on the application for insurance, that Plaintiff provided the required testimony to establish said that Defendant, Rafael Angel Rodriguez Sr.'s failure to disclose his son, Rafael Angel Rodriguez Rivera, as a regular operator of the insured vehicle on the application for insurance was a material misrepresentation because Plaintiff would not have issued the policy on the same terms, and thus Plaintiff properly rescinded the subject policy of insurance. Had the insured, Rafael Angel Rodriguez Sr., disclosed his son, Rafael Angel Rodriguez Rivera, as a regular operator of the insured vehicle on the application for insurance, there would have been an increase to the policy premium. Due to Rafael Angel Rodriguez Sr.'s material misrepresentation on the application for insurance dated March 9, 2019, Direct General Insurance Company rescinded the insurance policy void ab initio pursuant to Florida Statute § 627.409 and the terms of the insurance policy. Consequently, Plaintiff properly denied coverage for the loss at issue.

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

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

b. This Court ***hereby enters final judgment*** for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendant, RAFAEL ANGEL RODRIGUEZ SR.;

c. The Defendant, RAFAEL ANGEL RODRIGUEZ SR., was provided notice of the hearing on July 13, 2020, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendant, RAFAEL ANGEL RODRIGUEZ SR. and failed to appear at the hearing. In addition, the Defendant, RAFAEL ANGEL RODRIGUEZ SR. has not filed any documents or record evidence in response to the Plaintiff's Motion for Final Summary Judgment. Also, the Defendant, RAFAEL ANGEL RODRIGUEZ SR., was defaulted by the Court for not responding to the Amended Complaint for Declaratory Judgment.

d. The Court finds that the facts alleged by the Plaintiff, DIRECT GENERAL INSURANCE COMPANY, in its Complaint for Declaratory Judgment, in the Affidavit of Lisa Robison, and in the sworn testimony set forth in the Examination Under Oath of RAFAEL ANGEL RODRIGUEZ SR. (filed with the Court on May 31, 2020) are not in dispute, which are as follows:

i. The Defendant, RAFAEL ANGEL RODRIGUEZ SR., failed to disclose his son, RAFAEL ANGEL RODRIGUEZ RIVERA, as a regular operator of the insured vehicle(s) at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # FLPAXXXXX5787, issued by DIRECT GENERAL INSURANCE COMPANY;

ii. There is no insurance coverage for the named insured, RAFAEL ANGEL RODRIGUEZ SR., for any bodily injury liability, property damage liability, accidental death or personal injury protection coverage, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX5787;

iii. The material misrepresentation of Defendant, RAFAEL ANGEL RODRIGUEZ SR. on the application for insurance, occurred prior to any Assignment of any personal injury protection ("PIP") Benefits to any medical provider, doctor and/or medical entity, under the policy of insurance, bearing policy # FLPAXXXXX5787, issued by DIRECT GENERAL INSURANCE COMPANY;

iv. Since the policy of insurance issued to the Defendant, RAFAEL ANGEL RODRIGUEZ SR., bearing policy # FLPAXXXXX5787, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from RAFAEL ANGEL RODRIGUEZ SR. to any medical provider, medical facility and/or doctor is void;

v. Since the policy of insurance issued to the Defendant, RAFAEL ANGEL RODRIGUEZ SR., bearing policy # FLPAXXXXX5787, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from RAFAEL ANGEL RODRIGUEZ RIVERA to any medical provider, medical facility and/or doctor is void;

vi. There is no insurance coverage for RAFAEL ANGEL RODRIGUEZ RIVERA for any bodily injury liability, property damage liability, accidental death or personal injury protection coverage, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX5787;

vii. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend or indemnify the insured, RAFAEL ANGEL RODRIGUEZ SR., for any claims made under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX5787;

viii. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend or indemnify RAFAEL ANGEL RODRIGUEZ RIVERA for any claims made under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX5787;

ix. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify the insured, RAFAEL ANGEL RODRIGUEZ SR., for any bodily injury liability claim for LAURA MAE HUGHES for the motor vehicle accident of May 16, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX5787;

x. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify RAFAEL ANGEL RODRIGUEZ RIVERA for any bodily injury liability claim for LAURA MAE HUGHES for the motor vehicle accident of May 16, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX5787;

xi. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify the insured, RAFAEL ANGEL RODRIGUEZ SR., for any property damage liability claim for LAURA MAE HUGHES for the motor vehicle accident of May 16, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX5787;

xii. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify RAFAEL ANGEL RODRIGUEZ RIVERA for any property damage liability claim for LAURA MAE HUGHES for the motor vehicle accident of May 16, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX5787;

xiii. There is no personal injury protection ("PIP") insurance coverage for RAFAEL ANGEL RODRIGUEZ RIVERA for the motor vehicle accident which occurred on May 16, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX5787;

xiv. There is no bodily injury liability insurance coverage for LAURA MAE HUGHES for the motor vehicle accident which occurred on May 16, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX5787;

xv. There is no property damage liability insurance coverage for LAURA MAE HUGHES for the motor vehicle accident which occurred on May 16, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX5787;

xvi. The Defendant, RAFAEL ANGEL RODRIGUEZ SR., is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5787, for the May 16, 2019 motor vehicle accident;

xvii. The Defendant, RAFAEL ANGEL RODRIGUEZ RIVERA, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5787, for the May 16, 2019 motor vehicle accident;

xiii. The Defendant, LAURA MAE HUGHES, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX5787, for the May 16, 2019 motor vehicle accident;

xix. There is no insurance coverage for the motor vehicle accident which occurred on May 16, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX5787;

xx. There is no personal injury protection ("PIP") insurance coverage for the motor vehicle accident which occurred on May 16, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX5787;

xxi. There is no bodily injury liability coverage for the motor vehicle accident which occurred on May 16, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX5787;

xxii. There is no property damage liability coverage for the motor vehicle accident which occurred on May 16, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX5787;

xxiii. There is no accidental death insurance coverage for the motor vehicle accident which occurred on May 16, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX5787;

xxiv. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # FLPAXXXXX5787, is rescinded and is void *ab initio.*

* * *

Insurance—Automobile—Personal injury protection—Application—Misrepresentations—Materiality—Garage address—Evidence—Examination under oath is admissible under exception to hearsay rule applicable to admission by party and statement by opposing party—Policy was properly rescinded, and therefore void ab initio, based on insured's failure to disclose correct garaging address of insured vehicle

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. ROBERT LEE PETERSON, ROSE ANN TUCKER and ARIEL VERNEE TUCKER, Defendants. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2020-CA-329. August 10, 2020. John Marshall Kest, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Rose Ann Tucker, Melbourne, and Ariel Vernee Tucker, Orlando, pro se, Defendants.

ORDER ON PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AS TO DEFENDANTS, ROSE ANN TUCKER AND ARIEL VERNEE TUCKER

THIS CAUSE having come before this Court at the hearing on July 31, 2020, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendants, ROSE ANN TUCKER AND ARIEL VERNEE TUCKER, and the Court having considered the same, it is hereupon,

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

Factual Background

Plaintiff, Direct General Insurance Company brought the instant Declaratory Action against the named insured, Robert Lee Peterson, and the Defendants, Rose Ann Tucker and Ariel Vernee Tucker, regarding the policy rescission as a result of the insured, Mr. Peterson's material misrepresentation on the renewal application for insurance dated September 16, 2017. Plaintiff rescinded the policy of insurance on the basis that Robert Lee Peterson failed to disclose that the insured vehicle would be garaged at 4708 Carmel St., Orlando, FL 32808 rather than at the policy garaging address of 1351 S State Road 545, Winter Garden, FL 34787, at the time of policy renewal on September 26, 2017, and had he disclosed this information the Plaintiff would not have issued the policy on the same terms, namely Plaintiff would have charged a higher premium to issue the policy.

Mr. Robert Lee Peterson completed a renewal application for a policy of automobile insurance from Direct General Insurance Company on September 16, 2017. Mr. Robert Lee Peterson failed to disclose that the insured vehicle would be garaged at 4708 Carmel St., Orlando, FL 32808 rather than at the policy garaging address of 1351 S State Road 545, Winter Garden, FL 34787, when completing the renewal application for insurance. In addition, the insured, Mr. Robert Lee Peterson, signed the application on page 4 of the application for insurance, which provides in pertinent part as follows:

> "I acknowledge that all regular operators of my vehicle(s) have been reported to the Company. I ALSO ACKNOWLEDGE THAT ALL PERSONS AGES 14 AND OLDER WHO LIVE WITH ME HAVE BEEN REPORTED TO THE COMPANY. I further acknowledge and agree that I will report to the company any person who becomes a regular operator of my insured vehicle(s) or who become residents of my household during the term of the policy within thirty (30) days of such occurrence. I have reported any business use or commercial use of my vehicle to the company. **I acknowledge that my principle residence/place of vehicle garaging is in the state set forth herein at least ten (10) months each year**. I hereby authorize the Company to order the transfer of any vehicle, which is the subject of a loss under any policy issued by the Company, to a location where storage costs will be reduced if the vehicle is disabled. . .
>
> . . .I hereby acknowledge that I have read and understood all the questions, statements, and information set forth in the application, including this Applicant Statements. I hereby represent that my answers and all information provided by me or on my behalf contained in this application is accurate and complete."

Following the June 29, 2019 motor vehicle accident, an Examination Under Oath (EUO) was taken of the Defendant, Robert Lee Peterson, on August 12, 2019, wherein Mr. Peterson disclosed under oath to Plaintiff that at the time of the renewal application for insurance the insured vehicle was garaged at 4708 Carmel St., Orlando, FL 32808 rather than the policy garaging address of 1351 S State Road 545, Winter Garden, FL 34787. Plaintiff determined that had Robert Lee Peterson provided the proper information at the time of the renewal application for insurance dated September 16, 2017, then Robert Lee Peterson would have been charged a higher premium rate. Therefore, Direct General Insurance Company declared the policy void *ab initio* due to material misrepresentation and returned the paid premiums to Robert Lee Peterson. Due to the policy being declared void *ab initio* the Plaintiff denied coverage for the subject motor vehicle accident.

On August 12, 2019 during the Examination Under Oath of Defendant, Robert Lee Peterson, he provided sworn testimony admitting that at the time of the renewal application for insurance dated September 16, 2017, the insured vehicle was garaged at 4708

Carmel St., Orlando, FL 32808 rather than the policy garaging address of 1351 S State Road 545, Winter Garden, FL 34787, as follows:

Q: And can you just read me the address that is on your driver's license?

A: 4708 Cannel Street.

Q: And is that your current place of residence?

A: Yes.

Q: And how long have your resided at this address?

A: Three years, I think, three to four years.

See pages 5-6 of the transcript of the EUO of Robert Lee Peterson.

Q: 1351 South State Road 545, Winter Garden, Florida. Was that -

A: That was my address before this one.

Q: Okay. And so when was the last time you resided at that address?

A: I think it was 2000—I think it was 2012 or 2013.

Q: Okay. Did you ever notify Direct General that your address changed?

A: No, I didn't.

See page 11 of the transcript of the EUO of Robert Lee Peterson.

Counsel for the Plaintiff represented to the Court that the statements made by Robert Lee Peterson at his Examination Under Oath are admissible based on the Florida Rules of Evidence and Florida Statute § 90.803(18). Specifically, the statements made by Robert Lee Peterson at his Examination Under Oath are admissible as an exception to hearsay as an admission and/or statement by an opposing party.

Plaintiff, Direct General Insurance Company, argued in their summary judgment that, as both the statute and the binding appellate decisions state, materiality of the risk is determined by the insurer, not the insured. *See Fla. Stat. 627.409.* As the Fla. Supreme Court ruled "[t]he statute recognizes the principals of law that a contract issued on a mutual mistake of fact is subject to being voided and defines the circumstances for the application of this principle. This Court cannot grant [**10] an exception to a statute nor can we construe an unambiguous statute different from its plain meaning." *Continental Assurance Co. v. Carroll,* 485 So. 2d 406, 409, (FLA 1986). Therefore, the insurer determines materiality. Therefore, to ensure both parties enter the contract with full understanding, the Plaintiff is entitled to all information that Plaintiff deems necessary to determine the risk. Additionally, the Legislature allows an insurer to rescind for a material misrepresentation, regardless of the insured's intent, and thus the Legislature clearly burdened the applicant with the duty to fully disclose all requested information. *See United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (3rd DCA 2009) [34 Fla. L. Weekly D1578a]. It was the Plaintiff's position that Plaintiff properly rescinded the policy at issue based on the failure to disclose the correct garaging address for the insured vehicle as the terms were unambiguous within the application.

Pursuant to the policy of insurance issued to Robert Lee Peterson, Direct General Insurance Company may void the insurance policy as follows:

FRAUD AND MISREPRESENTATION

The statements made by **you** in any application for insurance or policy change are deemed **your** representations. A misrepresentation; omission; concealment of fact; or incorrect statement may prevent recovery under this policy if:

1. The misrepresentation; omission; concealment; or statement is fraudulent or is material either to the acceptance of the risk or to the hazard assumed by **us**; or

2. Had **we** known the facts, we in good faith would not have:

a. Issued the policy;

b. Issued the policy at the same premium rate;

c. Issued the policy with the limits shown;

d. Issued this policy with these terms and conditions; or

e. Provided the coverage-with respect to the hazard resulting in the accident or loss.

Further, Florida Statute § 627.409(1) provides:

(1) Any statement or description made by or on behalf of an insured or annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and not a warranty. Except as provided in subsection (3), ***a misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only if any of the following apply***:

(a) The misrepresentation, omission, concealment, or statement is fraudulent or is material to the acceptance of the risk or to the hazard assumed by the insurer.

(b) ***If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith*** would not have issued the policy or contract, ***would not have issued it at the same premium rate,*** would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.

On May 20, 2020, this Court executed an Order granting Default Final Judgment against the Defendant, Robert Lee Peterson, confirming the material misrepresentation at the time of the application for insurance dated September 16, 2017. Further, on May 29, 2020, this Honorable Court executed a Final Judgment against the Defendant, Robert Lee Peterson, and in favor of the Plaintiff, Direct General Insurance Company.

Analysis Regarding Whether the Failure to Disclose the Correct Garaging Address for the Insured Vehicle on the Renewal Application for Insurance was Material

The Court ruled that the question of materiality is considered from the perspective of the insurer. The Court found that "(a] material misrepresentation in an application for insurance, whether or not made with knowledge of its correctness or untruth, will nullify *any policy* issued and is an absolute defense to enforcement of the policy." *United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (3rd DCA 2009) [34 Fla. L. Weekly D1578a]. The Court ruled that the failure to disclose the correct garaging address for the insured vehicle that would have caused the insurer to issue the policy at a higher rate is sufficient to support a rescission. *See Privilege Underwriters Reciprocal Exch. v. Clark,* 174 So. 3d 1028, 1031 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1810a]. Additionally, the Court found that as Defendants, Rose Ann Tucker and Ariel Vernee Tucker failed to provide testimony to contradict Plaintiff's claim that the disclosure would have caused Plaintiff to issue the policy at a higher premium rate, then Plaintiff was entitled to rescind. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen,* 999 F.2d 1532 (1993).

Additionally, the Court found that the affiant, Lisa Robison, provided sworn testimony to knowledge of the application for insurance and administration of the underwriting guidelines for the insurance policy issued to Robert Lee Peterson, and could claim personal knowledge from a review of the records, therefore, Plaintiff's affiant, Ms. Robison, satisfied the threshold to satisfy the business records exception. *See Nationstar Mortg., LLC v. Berdecia,* 169 So. 3d 209, 213 [40 Fla. L. Weekly D1502a]. Consequently, Plaintiff established without contrary evidence that the misrepresentation was material, as set forth in the Affidavit of Lisa Robison.

Analysis Regarding Whether the Statements at the Examination Under Oath (EUO) of Robert Lee Peterson are Admissible Evidence for Summary Judgment

The Court agreed with the Plaintiff, Direct General Insurance Company's position that the statements provided by Robert Lee

Peterson at his Examination Under Oath (EUO) on August 12, 2019 are admissible under the exception to the hearsay rule applicable to an admission by a party and as a statement by an opposing party. In addition, an unsworn recorded statement of the insured is also admissible under the exception to the hearsay rule applicable to an admission by a party and as a statement by an opposing party.

The Miami-Dade Circuit Court, Appellate Division, ruled in *Star Casualty Ins. Co. v. Eduardo J. Garrido D.C., P.A., a/a/o Huegette D. Garay,* that an examination under oath is admissible under the exception to hearsay rule applicable to admission by a party, and ruled that the trial court erred by holding the examination under oath transcript was inadmissible and improper summary judgment evidence. *See Star Casualty Ins. Co. v. Eduardo J. Garrido D.C., P.A., a/a/o Huegette D. Garay,* 25 Fla. L. Weekly Supp. 502a (Fla. 11th Cir. Ct. October 3, 2017).

The insured's examination under oath (EUO) transcript is admissible and proper summary judgment evidence. Although an EUO transcript is not an affidavit or deposition, it holds the same evidentiary value and fits under "other materials as would be admissible in evidence" under Florida Rule of Civil Procedure 1.510(c). *See Star Casualty Ins. Co.,* 25 Fla. L. Weekly Supp. 502a (Fla. 11th Cir. Ct. October 3, 2017). Although an EUO transcript is hearsay, it is admissible under the party admission hearsay exception [§ 90.803(18), Fla. Stat. (2014)]. *Smith v. Fortune Ins. Co.*, 44 So. 2d 821, 823 (Fla 1st DCA 1981); *Millennium Diagnostic Imaging Ctr. a/a/o Alejandro Gonzalez v. Allstate Prop. Cas. Ins. Co*., 14 Fla. L. Weekly Supp. 84a (Fla. 11th Cir. Ct. June 21, 2016) and *cert. denied,* 2017 WL 2561208 (Fla. 3d DCA May 25, 2017) (without opposition) (same issue) (both the instant insured's and Francisco Garay's EUO testimony was determined to be admissible to support a motion for summary judgment for material misrepresentation citing section 90.803(18), Florida Statutes, *Smith* and *Gonzalez*).

Therefore, the Court finds that the Examination Under Oath (EUO) transcript of Robert Lee Peterson is admissible and proper summary judgment evidence.

Conclusion

This Court finds that the Plaintiff, Direct General Insurance Company's renewal application for insurance dated September 16, 2017, unambiguously required Defendant, Robert Lee Peterson, to disclose that the insured vehicle was garaged at 4708 Carmel St., Orlando, FL 32808 rather than the policy garaging address of 1351 S State Road 545, Winter Garden, FL 34787, that Plaintiff provided the required testimony to establish said that Defendant, Robert Lee Peterson's failure to disclose the correct garaging address for the insured vehicle was a material misrepresentation because Plaintiff would not have issued the policy on the same terms, and thus Plaintiff properly rescinded the subject policy of insurance. Consequently, Plaintiff properly denied coverage for the loss at issue.

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

a. Plaintiff, Direct General Insurance Company's Motion for Summary Judgment is hereby **GRANTED**;

b. This Court ***hereby enters final judgment*** for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendants, ROSE ANN TUCKER AND ARIEL VERNEE TUCKER;

c. The Court finds that the facts alleged by the Plaintiff, DIRECT GENERAL INSURANCE COMPANY, in its Complaint for Declaratory Judgment and in the Affidavit of Lisa Robison, are not in dispute, which are as follows:

i. The Defendant, ROBERT LEE PETERSON, failed to disclose the insured vehicle was garaged at 4708 Carmel St., Orlando, FL 32808 rather than the policy garaging address of 1351 S State Road 545, Winter Garden, FL 34787 at the time of the renewal application for insurance dated September 16, 2017, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # FLPA399508064, issued by DIRECT GENERAL INSURANCE COMPANY;

ii. There is no insurance coverage for the named insured, ROBERT LEE PETERSON for any accidental death coverage, property damage liability coverage, bodily injury liability coverage, comprehensive coverage, collision coverage or personal injury protection coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

iii. There is no insurance coverage for ROSE ANN TUCKER for any accidental death coverage, property damage liability coverage, bodily injury liability coverage, comprehensive coverage, collision coverage or personal injury protection coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

iv. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, ROBERT LEE PETERSON, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

v. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify ROSE ANN TUCKER for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

vi. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ROBERT LEE PETERSON for any bodily injury claim for ARIEL VERNEE TUCKER arising from the accident of June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

vii. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ROSE ANN TUCKER for any bodily injury claim for ARIEL VERNEE TUCKER arising from the accident of June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

viii. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ROBERT LEE PETERSON for any bodily injury claim for Xanareiia A Howard (minor) arising from the accident of June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

ix. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ROSE ANN TUCKER for any bodily injury claim for Xanareiia A Howard (minor) arising from the accident of June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

x. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ROBERT LEE PETERSON for any bodily injury claim for Jurnee Peterson (minor) arising from the accident of June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xi. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ROSE ANN TUCKER for any bodily injury claim for Jurnee Peterson (minor) arising from the accident of June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xii. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ROBERT LEE PETERSON for any bodily injury claim for Mitzi Lynn Cruz arising from the accident of June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xiii. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ROSE ANN TUCKER for any bodily injury claim for Mitzi Lynn Cruz arising from the accident of June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xiv. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ROBERT LEE PETERSON for any property damage claim for Mitzi Lynn Cruz arising from the accident of June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xv. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ROSE ANN TUCKER for any property damage claim for Mitzi Lynn Cruz arising from the accident of June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xvi. There is no personal injury protection ("PIP") insurance coverage for ROSE ANN TUCKER for the accident which occurred on June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xvii. There is no personal injury protection ("PIP") insurance coverage for ARIEL VERNEE TUCKER for the accident which occurred on June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xviii. There is no personal injury protection ("PIP") insurance coverage for Xanareiia A. howard, a minor, for the accident which occurred on June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xix. There is no personal injury protection ("PIP") insurance coverage for Jurnee Peterson, a minor, for the accident which occurred on June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xx. There is no insurance coverage for any property damage claim for Mitzi Lynn Cruz for the accident which occurred on June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xxi. There is no insurance coverage for any bodily injury claim for ARIEL VERNEE TUCKER for the accident which occurred on June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xxii. There is no insurance coverage for any bodily injury claim for Xanareiia A Howard (minor) for the accident which occurred on June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xxiii. There is no insurance coverage for any bodily injury claim for Jurnee Peterson (minor) for the accident which occurred on June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xxiv. There is no insurance coverage for any bodily injury claim for Mitzi Lynn Cruz for the accident which occurred on June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xxv. There is no comprehensive insurance coverage for ROBERT LEE PETERSON for the accident which occurred on June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xxvi. There is no collision insurance coverage for ROBERT LEE PETERSON for the accident which occurred on June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # F LA DXXXXX9342;

xxvii. There is no obligation to provide Personal Injury Protection benefits coverage to Central Florida Medical & Chiropractic Center Inc., d/b/a Sterling Medical Group for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xxviii. There is no obligation to provide Personal Injury Protection benefits coverage to Adventist Health System/Sunbelt, Inc., d/b/a Adventhealth Winter Park for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on June 29, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xix. The Defendant, ROBERT LEE PETERSON, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342, for the June 29, 2019 accident;

xxx. The Defendant, ROSE ANN TUCKER, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342, for the June 29, 2019 accident;

xxxi. The Defendant, ARIEL VERNEE TUCKER, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342, for the June 29, 2019 accident;

xxxii. Xanareiia A Howard (minor) is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342, for the June 29, 2019 accident;

xxxiii. Jurnee Peterson (minor) is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342, for the June 29, 2019 accident;

xxxiv. Mitzi Lynn Cruz is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342, for the June 29, 2019 accident;

xxxv. Central Florida Medical & Chiropractic Center Inc., d/b/a Sterling Medical Group is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342, for the June 29, 2019 accident;

xxxvi. Adventist Health System/Sunbelt, Inc., d/b/a Adventhealth Winter Park is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342, for the June 29, 2019 accident;

xxxvii. There is no insurance coverage for the motor vehicle accident which occurred on June 29, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xxxviii. There is no personal injury protection ("PIP") insurance coverage for the accident which occurred on June 29, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xxxix. There is no accidental death insurance coverage for the accident which occurred on June 29, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xl. There is no property damage liability coverage for the accident which occurred on June 29, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xli. There is no bodily injury liability coverage for the accident which occurred on June 29, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xlii. There is no comprehensive insurance coverage for the accident which occurred on June 29, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xliii. There is no collision insurance coverage for the accident which occurred on June 29, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLADXXXXX9342;

xliv. Since the policy of insurance issued to the Defendant, ROBERT LEE PETERSON, bearing policy # FLADXXXXX9342, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from ARIEL VERNEE TUCKER to Central Florida Medical & Chiropractic Center Inc., d/b/a Sterling Medical Group is void;

xlv. Since the policy of insurance issued to the Defendant, ROBERT LEE PETERSON, bearing policy # FLADXXXXX9342, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from ARIEL VERNEE TUCKER to Adventist Health System/Sunbelt, Inc., d/b/a Adventhealth Winter Park is void.

xlvi. Since the policy of insurance issued to the Defendant, ROBERT LEE PETERSON, bearing policy # FLADXXXXX9342, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from ARIEL VERNEE TUCKER to any medical provider, medical facility and/or doctor is void;

xlvii. Since the policy of insurance issued to the Defendant, ROBERT LEE PETERSON, bearing policy # FLADXXXXX9342, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from ROSE ANN TUCKER to any medical provider, medical facility and/or doctor is void;

xlviii. Since the policy of insurance issued to the Defendant, ROBERT LEE PETERSON, bearing policy # FLADXXXXX9342, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from Xanareiia A. Howard, a minor, to any medical provider, medical facility and/or doctor is void;

xlix. Since the policy of insurance issued to the Defendant, ROBERT LEE PETERSON, bearing policy # FLADXXXXX9342, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from Jurnee Peterson, a minor, to any medical provider, medical facility and/or doctor is void;

l. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # FLADXXXXX9342, is rescinded and is void *ab initio*.

* * *

Insurance—Automobile—Personal injury protection—Application—Misrepresentations—Materiality—Business use—Evidence—Examination under oath is admissible under exception to hearsay rule applicable to admission by party and statement by opposing party—Policy was properly rescinded, and therefore void ab initio, based on misrepresentation on policy application regarding use of vehicle for business purposes or commercial use for ridesharing services

IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, Plaintiff, v. ERNESTO RAMON TORRES CELORIO, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-022936-CA-01, Section CA22. July 30, 2020. Beatrice Butchko, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Christopher Kasper, Ovadia Law Group, P.A., Boca Raton, for Defendant.

ORDER ON PLAINTIFF, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AS TO DEFENDANT, ERNESTO RAMON TORRES CELORIO

THIS CAUSE having come before this Court at the hearing on July 29, 2020, on the Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendant, ERNESTO RAMON TORRES CELORIO, and the Court having considered the same, it is hereupon,

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

Factual Background

Plaintiff, Imperial Fire and Casualty Insurance Company brought the instant Declaratory Action against the insured, Ernesto Ramon Torres Celorio, regarding the policy rescission as a result of the insured's material misrepresentation on the application for insurance dated December 1, 2018. Plaintiff rescinded the policy of insurance on the basis that Ernesto Ramon Torres Celorio failed to disclose that the insured vehicle was being used for business purposes or commercial use for ridesharing, such as Uber or Lyft, at the time of policy inception and had he disclosed this information the Plaintiff would not have assumed the risk nor issued the policy due to the unacceptable risk.

Mr. Ernesto Ramon Torres Celorio completed an application for a policy of automobile insurance from Imperial Fire and Casualty Insurance Company on December 1, 2018. Mr. Ernesto Ramon Torres Celorio failed to disclose that the insured vehicle was being used for business purposes or commercial use for ridesharing, such as Uber or Lyft, when completing the application for insurance. Specifically, Mr. Ernesto Ramon Torres Celorio answered "No" to question #13 on page 4 of 7 on the application as follows:

> "Are any vehicles used for delivery, the pickup of goods, or any other commercial purpose (examples include, but are not limited to, Uber, Lyft, pizza, newspaper or mail delivery), or emergency response type vehicles or vehicles used for emergency response proposed?"

In addition, the insured, Mr. Ernesto Ramon Torres Celorio, signed the application on page 5 of the application for insurance, which provides in pertinent part as follows:

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

Following the March 3, 2019 motor vehicle accident, an Examination Under Oath (EUO) was taken of the Defendant, Ernesto Ramon Torres Celorio, on April 15, 2019, wherein Mr. Ernesto Ramon Torres Celorio disclosed under oath to Plaintiff that he was using the insured vehicle to provide services through Uber and Lyft for the past year and half to two years. The application for insurance was completed approximately four and half months prior to the Examination Under Oath. Plaintiff determined that had Ernesto Ramon Torres Celorio provided the proper information at the time of the insurance application dated December 1, 2018, then Plaintiff would not have assumed the risk nor issued the insurance policy. Therefore, Imperial Fire and Casualty Insurance Company declared the policy void *ab initio* due to material misrepresentation and returned the paid premiums to Ernesto Ramon Torres Celorio. Due to the policy being declared void *ab initio*

the Plaintiff denied coverage for the subject motor vehicle accident.

On April 15, 2019 during the Examination Under Oath of Defendant, Ernesto Ramon Torres Celorio, he provided sworn testimony admitting that both he and his wife had used the insured vehicle for the delivery purposes of Uber and Lyft as follows:

Question: "Has the Hyundai—Has your vehicle ever been used for Uber?

ERNESTO RAMON TORRES CELORIO's Answer: Yes. The Accent, yes.

Question: Has any vehicle ever been used for delivery purposes?

ERNESTO RAMON TORRES CELORIO's Answer: For Uber?

Question: Any type of delivery. Food, any merchandise, deliveries.

ERNESTO RAMON TORRES CELORIO's Answer: Yes. Food, yes, with Uber.

Question: Have any of your vehicles ever been used for Lyft?

ERNESTO RAMON TORRES CELORIO's Answer: Yes.

Question: How long have you both worked for Uber?

ERNESTO RAMON TORRES CELORIO's Answer: A year and some; two years. Well, it has been on our taxes twice, but its been a year and a half."

See page 18 of the transcript of the EUO of Ernesto Ramon Torres Celorio.

Counsel for the Defendant, Ernesto Ramon Torres Celorio, argued that the Examination Under Oath testimony is inadmissible because the Carrier uses the Examination Under Oath as an investigative tool. In addition, counsel for the Defendant, Ernesto Ramon Torres Celorio, argued that the testimony provided by Ernesto Ramon Torres Celorio at his EUO was not clear as to whether Ernesto Ramon Torres Celorio was using the insured vehicle at the time of the application for insurance on December 1, 2018.

In response, counsel for the Plaintiff represented to the Court that the statements made by Ernesto Ramon Torres Celorio at his Examination Under Oath are admissible based on the Florida Rules of Evidence and Florida Statute § 90.803(18). Specifically, the statements made by Ernesto Ramon Torres Celorio at his Examination Under Oath are admissible as an exception to hearsay as a statement by an opposing party.

Plaintiff, Imperial Fire and Casualty Insurance Company, argued in their summary judgment that, as both the statute and the binding appellate decisions state, materiality of the risk is determined by the insurer, not the insured. *See Fla. Stat. 627.409.* As the Fla. Supreme Court ruled "[t]he statute recognizes the principals of law that a contract issued on a mutual mistake of fact is subject to being voided and defines the circumstances for the application of this principle. This Court cannot grant [**10] an exception to a statute nor can we construe an unambiguous statute different from its plain meaning."

Continental Assurance Co. v. Carroll, 485 So. 2d 406, 409, (Fla. 1986). Therefore, the insurer determines materiality. Additionally, as an insurer rates risks based on the likelihood of a future event, such as an accident, then the insurer may treat any resident/household member as a potential risk. For example, a resident relative may be covered under an automobile insurance policy if struck by a vehicle whilst walking, and thus an insurer must determine rates accordingly. *See Travelers Ins. Co. v. Furlan*, 408 So.2d 767 (Fla. 5th DCA 1982). Therefore, to ensure both parties enter the contract with full understanding, the Plaintiff is entitled to all information that Plaintiff deems necessary to determine the risk. Additionally, the Legislature allows an insurer to rescind for a material misrepresentation, regardless of the insured's intent, and thus the Legislature clearly burdened the applicant with the duty to fully disclose all requested information. *See United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (Fla. 3rd DCA 2009) [34 Fla. L. Weekly D1578a]. It was the Plaintiff's position that Plaintiff properly rescinded the policy at issue based on the failure to disclose that the insured vehicle was being used for ridesharing services through Uber and Lyfy as the terms were unambiguous within the application.

Pursuant to the policy of insurance issued to Ernesto Ramon Torres Celorio, Imperial Fire and Casualty Insurance Company may void the insurance policy as follows:

MISREPRESENTATION AND FRAUD

This policy was issued in reliance on the information provided on "**your**" insurance application. "**We**" may void coverage under this policy if "**you**" or an insured person have made incorrect statements or representations to "**us**" with regard to any material fact or circumstance, or concealed or misrepresented any material fact or circumstance, or engaged in fraudulent conduct, at the time application was made or at any time during the policy period.

"**We**" may void this policy or deny coverage for an accident or loss if "**you**" or any other person making a claim under this policy has concealed or misrepresented any material fact or circumstance, or engaged in fraudulent conduct, in connection with the presentation or settlement of a claim.

"**We**" may void this policy for fraud or misrepresentation even after the occurrence of an accident or loss. This means that "**we**" will not be liable for any claims or damages, which would otherwise be covered.

See Page 21 of the Imperial Fire and Casualty Insurance Company insurance policy.

Further, Florida Statute § 627.409(1) provides:

(1) Any statement or description made by or on behalf of an insured or annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and not a warranty. Except as provided in subsection (3), ***a misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only if any of the following apply***:

(a) The misrepresentation, omission, concealment, or statement is fraudulent or is material to the acceptance of the risk or to the hazard assumed by the insurer.

(b) ***If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith*** would not have issued the policy or contract, ***would not have issued it at the same premium rate***, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.

Analysis Regarding Whether the Undisclosed Business Purposes or Commercial Use (Uber/Lyft) was Material

The Court ruled that the question of materiality is considered from the perspective of the insurer. The Court found that "[a] material misrepresentation in an application for insurance, whether or not made with knowledge of its correctness or untruth, will nullify *any policy* issued and is an absolute defense to enforcement of the policy." *United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (Fla. 3rd DCA 2009) [34 Fla. L. Weekly D1578a]. The Court ruled that the failure to disclose the business or commercial use of the insured vehicle (Uber/Lyft) that would have resulted in a denial of the application due to the unacceptable risk is sufficient to support a rescission. *See Privilege Underwriters Reciprocal Exch. v. Clark,* 174 So. 3d 1028, 1031 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1810a]. Additionally, the Court found that as Defendant failed to provide testimony to contradict Plaintiff's claim that the disclosure would have caused Plaintiff to not accept the risk nor issue the policy, then Plaintiff was entitled to rescind. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen*, 999 F.2d 1532 (Fla. 1993).

Additionally, the Court found that the affiant, Sharon Dowell,

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

Analysis Regarding Whether the Statements at the Examination Under Oath (EUO) of Ernesto Ramon Torres Celorio are Admissible Evidence for Summary Judgment

The Court agreed with the Plaintiff, Imperial Fire and Casualty Insurance Company's position that the statements provided by Ernesto Ramon Torres Celorio at his Examination Under Oath (EUO) on April 15, 2019 are admissible under the exception to the hearsay rule applicable to an admission by a party and as a statement by an opposing party. In addition, an unsworn recorded statement of the insured is also admissible under the exception to the hearsay rule applicable to an admission by a party and as a statement by an opposing party.

The Miami-Dade Circuit Court, Appellate Division, ruled in *Star Casualty Ins. Co. v. Eduardo J. Garrido D.C., P.A., a/a/o Huegette D. Garay*, that an examination under oath is admissible under the exception to hearsay rule applicable to admission by a party, and ruled that the trial court erred by holding the examination under oath transcript was inadmissible and improper summary judgment evidence. *See Star Casualty Ins. Co. v. Eduardo J. Garrido D.C., P.A., a/a/o Huegette D. Garay*, 25 Fla. L. Weekly Supp. 502a (Fla. 11th Cir. Ct. October 3, 2017).

The insured's examination under oath (EUO) transcript is admissible and proper summary judgment evidence. Although an EUO transcript is not an affidavit or deposition, it holds the same evidentiary value and fits under "other materials as would be admissible in evidence" under Florida Rule of Civil Procedure 1.510(c). *See Star Casualty Ins. Co.,* 25 Fla. L. Weekly Supp. 502a (Fla. 11th Cir. Ct. October 3, 2017). Although an EUO transcript is hearsay, it is admissible under the party admission hearsay exception [§ 90.803(18), Fla. Stat. (2014)]. *Smith v. Fortune Ins. Co.*, 44 So. 2d 821, 823 (Fla. 1st DCA 1981); *Millennium Diagnostic Imaging Ctr. a/a/o Alejandro Gonzalez v. Allstate Prop. & Cas. Ins. Co.*, 14 Fla. L. Weekly Supp. 84a (Fla. 11th Cir. Ct. June 21, 2016) and *cert. denied*, 2017 WL 2561208 (Fla. 3d DCA May 25, 2017) (without opposition) (same issue) (both the instant insured's and Francisco Garay's EUO testimony was determined to be admissible to support a motion for summary judgment for material misrepresentation citing section 90.803(18), Florida Statutes, *Smith* and *Gonzalez*).

Therefore, the Court finds that the Examination Under Oath (EUO) transcript of Ernesto Ramon Torres Celorio is admissible and proper summary judgment evidence.

Conclusion

This Court finds that the Plaintiff, Imperial Fire and Casualty Insurance Company's application for insurance unambiguously required Defendant, Ernesto Ramon Torres Celorio, to disclose that the insured vehicle was being used for business purposes or commercial use for ridesharing, such as Uber or Lyft, at the time of policy inception, that Plaintiff provided the required testimony to establish said that Defendant, Ernesto Ramon Torres Celorio's failure to disclose that the insured vehicle was being used for business purposes or commercial use for ridesharing, such as Uber or Lyft, at the time of policy inception was a material misrepresentation because Plaintiff would not have assumed the risk nor issued the policy, and thus Plaintiff properly rescinded the subject policy of insurance. Consequently, Plaintiff properly denied coverage for the loss at issue.

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

a. Plaintiff, Imperial Fire and Casualty Insurance Company's Motion for Summary Judgment is hereby **GRANTED**;

b. This Court ***hereby enters final judgment*** for Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, and against the Defendant, ERNESTO RAMON TORRES CELORIO;

c. The Court finds that the facts alleged by the Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, in its Complaint for Declaratory Judgment and in the Affidavit of Sharon Dowell, are not in dispute, which are as follows:

d. The Defendant, ERNESTO RAMON TORRES CELORIO, failed to disclose that the insured vehicle(s) was utilized for ridesharing (Uber/Lyft) at the time of the application for insurance dated December 1, 2018, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # XXXXXX2416, issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY;

e. Before the rescission of the insurance policy, bearing policy # XXXXXX2416, the policy of insurance provided the following coverages: bodily injury liability, property damage liability, personal injury protection coverage, rental reimbursement, collision and comprehensive coverage (indicated as "other than collision" on the Declarations Pages);

f. There is no insurance coverage for the named insured, ERNESTO RAMON TORRES CELORIO for any property damage liability, personal injury protection coverages, bodily injury liability, rental reimbursement, collision or comprehensive insurance coverages, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

g. There is no insurance coverage for YUSLAIMYS CARIDAD RODRIGUEZ HERRERA for any property damage liability, personal injury protection coverages, bodily injury liability, rental reimbursement, collision or comprehensive insurance coverages, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

h. The Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, ERNESTO RAMON TORRES CELORIO, for any claims made under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

i. The Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, has no duty to defend and/or indemnify YUSLAIMYS CARIDAD RODRIGUEZ HERRERA for any claims made under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

j. Since the policy of insurance issued to the Defendant, ERNESTO RAMON TORRES CELORIO, bearing policy # XXXXXX2416, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from YUSLAIMYS CARIDAD RODRIGUEZ to any medical provider, medical facility and/or doctor is void;

k. The Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, has no duty to defend and/or indemnify ERNESTO RAMON TORRES CELORIO for the bodily injury claim for ALEXANDER VERGARA arising from the motor vehicle accident of March 3, 2019, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

l. The Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, has no duty to defend and/or indemnify ERNESTO RAMON TORRES CELORIO for the bodily injury claim for YUSLAIMYS CARIDAD RODRIGUEZ HERRERA arising from the motor vehicle accident of March 3, 2019, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

m. The Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, has no duty to defend and/or indemnify ERNESTO RAMON TORRES CELORIO for the property damage claim for STEPHANIE AILEEN SOLER arising from the motor vehicle accident of March 3, 2019, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

n. The Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, has no duty to defend and/or indemnify YUSLAIMYS CARIDAD RODRIGUEZ HERRERA for the property damage claim for STEPHANIE AILEEN SOLER arising from the motor vehicle accident of March 3, 2019, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

o. There is no personal injury protection ("PIP") insurance coverage for YUSLAIMYS CARIDAD RODRIGUEZ HERRERA for the motor vehicle accident which occurred on March 3, 2019, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

p. There is no rental reimbursement insurance coverage for ERNESTO RAMON TORRES CELORIO for the motor vehicle accident which occurred on March 3, 2019, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

q. There is no collision insurance coverage for ERNESTO RAMON TORRES CELORIO for the motor vehicle accident which occurred on March 3, 2019, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

r. There is no collision insurance coverage for HYUNDAI CAPITAL AMERICA, INC. for the motor vehicle accident which occurred on March 3, 2019, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

s. There is no obligation to provide Personal Injury Protection benefits coverage to SUNSET RADIOLOGY INC. for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on March 3, 2019, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

t. Since the policy of insurance issued to the Defendant, ERNESTO RAMON TORRES CELORIO, bearing policy # XXXXXX2416, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from YUSLAIMYS CARIDAD RODRIGUEZ to SUNSET RADIOLOGY INC. is void;

u. There is no obligation to provide Personal Injury Protection benefits coverage to FRIEDMAN CHIROPRACTIC CENTER, P.A. for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on March 3, 2019, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

v. Since the policy of insurance issued to the Defendant, ERNESTO RAMON TORRES CELORIO, bearing policy # XXXXXX2416, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from YUSLAIMYS CARIDAD RODRIGUEZ to FRIEDMAN CHIROPRACTIC CENTER, P.A. is void;

w. There is no bodily injury liability insurance coverage for ALEXANDER VERGARA for the motor vehicle accident which occurred on March 3, 2019, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

x. There is no property damage liability insurance coverage for STEPHANIE AILEEN SOLER for the motor vehicle accident which occurred on March 3, 2019, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

y. The Defendant, ERNESTO RAMON TORRES CELORIO, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416, for the March 3, 2019 motor vehicle accident;

z. The Defendant, YUSLAIMYS CARIDAD RODRIGUEZ HERRERA, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416, for the March 3, 2019 motor vehicle accident;

aa. The Defendant, SUNSET RADIOLOGY INC., is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416, for the March 3, 2019 motor vehicle accident;

ab. The Defendant, FRIEDMAN CHIROPRACTIC CENTER, P.A., is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416, for the March 3, 2019 motor vehicle accident;

ac. The Defendant, ALEXANDER VERGARA, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416, for the March 3, 2019 motor vehicle accident;

ad. The Defendant, STEPHANIE AILEEN SOLER, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416, for the March 3, 2019 motor vehicle accident;

ae. The Defendant, HYUNDAI CAPITAL AMERICA, INC., is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416, for the March 3, 2019 motor vehicle accident;

af. The Defendant, GEICO GENERAL INSURANCE COMPANY, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416, for the March 3, 2019 motor vehicle accident;

ag. Since IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY is not obligated to provide any coverages or indemnity to any of the potential claimants, Defendant, GEICO GENERAL INSURANCE COMPANY shall have no rights of subrogation against IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416, for the March 3, 2019 motor vehicle accident;

ah. There is no insurance coverage for the motor vehicle accident which occurred on March 3, 2019, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

ai. There is no personal injury protection ("PIP") insurance coverage for the motor vehicle accident which occurred on March 3, 2019, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

aj. There is no property damage liability coverage for the motor vehicle accident which occurred on March 3, 2019, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

ak. There is no collision coverage for the motor vehicle accident which occurred on March 3, 2019, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

al. There is no comprehensive coverage for the motor vehicle accident which occurred on March 3, 2019, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

am. There is no rental reimbursement coverage for the motor vehicle accident which occurred on March 3, 2019, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

an. There is no bodily injury liability coverage for the motor vehicle accident which occurred on March 3, 2019, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX2416;

ao. The IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY Policy of Insurance, bearing policy # XXXXXX2416, is rescinded and is void ab initio.

* * *

Insurance—Venue—Forum selection clause—Motion for reconsideration of predecessor judge's denial of motion to dismiss based on mandatory forum selection clause is denied—Predecessor judge did not commit clear legal error or abuse discretion in finding that compelling reason exists not to enforce clause where enforcement would send claims against one insurer in multi-party litigation to New York, resulting in inconsistent and simultaneous interstate litigation

DEAUVILLE HOTEL PROPERTY LLC, Plaintiff, v. ENDURANCE AMERICAN SPECIALTY INSURANCE COMPANY, et. al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-016336-CA-01, Section CA43. May 27, 2020. Michael Hanzman, Judge. Counsel: Meghan C. Moore and Michael E. Iles, Weisbrod Matteis & Copley, PLLC, Fort Lauderdale; Bruce S. Rogow and Tara A. Campion, Bruce S. Rogow, P.A., Ft. Lauderdale; and Gonzalo Dorta and Matias R. Dorta, Law Office of Gonzalo A. Dorta, P.A., Coral Gables, for Plaintiff. Kevin C. Schumacher and Kevin M. Corona, Cole, Scott & Kissane, P.A., Miami; Schuyler A. Smith, Lowell P. Karr, and Bradley A. Silverman, Hamilton Miller & Birthisel, Miami; Mia Jamila Pintard and Mitchell Silver, Conroy Simberg (Co-Counsel), West Palm Beach; William D. Wilson and Brooke O. Turetzky, Mound Cotton Wollan & Greengrass LLP, Fort Lauderdale; Melissa M. Sims and Judith Beth Goldstein, Coral Gables; and Taylor L. Davis, Jane Warring, and Pamela Young-Wynn, Clyde & Co. US LLP, Atlanta, GA, for Defendants.

ORDER DENYING FIRST SPECIALTY INSURANCE CORPORATION'S MOTION FOR RECONSIDERATION

I. **INTRODUCTION**

Defendant, First Specialty Insurance Corporation ("First Specialty"), moves for reconsideration of the Court's predecessor's oral ruling denying its motion to dismiss based upon an admittedly "mandatory" forum selection clause contained in the parties' insurance contract.[1] First Specialty insists that the Court's predecessor committed clear legal error in finding that a "compelling reason" exists not to enforce this provision; that "compelling reason" being that "enforcement of the clause would lead to multiple lawsuits, a splitting of causes of action, and the potential for conflicting results in different courts, including inconsistent and simultaneous interstate litigation." Dec. 11, 2019 Tr p. 67. According to First Specialty, this ruling was clear error because: (a) there is no "compelling reason" exception to the "explicit rule on enforcement of mandatory forum selection clauses" recognized by "any Florida Supreme Court or Third DCA case law," Mot. pp. 9-10; and (b) even if "the notion of a compelling reason" exception was viable, the Court's predecessor erred in finding a "compelling reason" to deny enforcement present here.

As this Court has pointed out before, it should hesitate to undo the work of another judge, as the "the rotation of judges from one division to another should not be an opportunity to revisit the predecessor's rulings." *Gemini Inv'rs III, L.P. v. Nunez*, 78 So. 3d 94, 97 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D240a]. For this reason, the Court "is loath to—and has rarely—revisited rulings of a predecessor Judge. But it has done so when convinced that a prior ruling—particularly one of *pure* law—was clearly incorrect." *S. Florida Stadium, LLC v. Alberici Constructors, Inc.*, 28 Fla. L. Weekly Supp. 37a (Fla. 11 Jud. Cir. Ct. Jan. 22, 2020) (Hanzman, J); *Teva Trading Ltd., v. Banif Financial Services, Inc.*, 23 Fla. L. Weekly Supp, 1009e (Fla. 11 Jud. Cir. Ct. March 8, 2016) (Hanzman, J); *Carol A. Adams, Et. Al., v. Surf House Condominium Association, Inc.*, 26 Fla. L. Weekly Supp. 638a (Fla. 11 Jud. Cir. Ct. Oct. 16, 2018) (Hanzman, J). In this case, however, the Court cannot conclude that its predecessor committed clear error for two reasons.

First, despite First Specialty's insistence to the contrary, our intermediary appellate courts, including the Third District, permit trial courts to deny enforcement of a mandatory forum selection clause based upon "compelling reasons." While First Specialty may believe that such an "exception" to the general rule of enforcement is contrary to Florida Supreme Court precedent, this basis to deny enforcement has been explicitly recognized by intermediate appellate precedent, including a decision out of the Third District. This Court, like its predecessor, is bound by that precedent.

Second, this "compelling reason" exception is an inherently imprecise metric and applying it therefore involves discretion. What one court finds to be a "compelling reason" to deny enforcement may not be "compelling" to another, and the question is obviously fact intensive. Factors bearing on the question would include such things as: (a) how many separate cases would enforcement of the clause generate; (b) how many third parties will (or may) suffer prejudice if the clause is enforced; (c) what is the likelihood of inconsistent results in more than one court if the clause is enforced; (d) what degree of prejudice will the party resisting enforcement likely suffer if compelled to litigate in multiple forums; (e) how many common questions of law or fact would have to be litigated in multiple forums; and (f) how much would the judiciary (*i.e.*, taxpayers) be burdened by requiring that multiple courts address claims that, as a practical matter, should be litigated together in a single proceeding. These are just some of the factors that must be evaluated in deciding whether a "compelling reason" exists to deny enforcement of a mandatory forum selection clause. And weighing those factors undoubtedly involves an exercise of discretion.

For these reasons, this Court cannot conclude that its predecessor committed clear legal error (or abused her discretion) in denying First Specialty's motion to dismiss. It follows that First Specialty's Motion for Reconsideration must be denied.

II. **THE PENDING CLAIMS AND DEFENSES**

Plaintiff, Deauville Hotel Property, LLC ("Deauville"), brings this action to recover damages allegedly caused to its hotel by a fire. Deauville claims that this fire resulted from the negligence of contractors that worked on the property: Defendants Trane U.S. Inc., Tirone Electric Inc., and Edd Helms Air Conditioning, Inc. Deauville

has also named as Defendants three insurers that it claims provided coverage for this loss—a primary insurer and the two excess carriers: Defendants Endurance American Specialty Insurance Company (primary), First Specialty Insurance Corporation (first layer of excess), and Great American Insurance Company of NY (second layer of excess).

Through their answers, the contractor Defendants have denied liability, claiming that they were not the "proximate cause" of the loss, and that whatever loss occurred resulted from wear and tear, economic waste, natural causes, or negligence on the part of others, including Plaintiff. *See, e.g.*, Edd Helms Answer and Affirm. Defenses dated July 9, 2019; Tirone Electric's Answer and Affirm. Defenses dated Nov. 8, 2019; Trane U.S. Inc.'s Answer and Affirm. Defenses dated Jan. 19, 2020. Suffice it to say, material issues raised by the pleadings include: (a) what actually caused this loss; (b) which entity is wholly or partially responsible for that occurrence; (c) were there other contributing causes; and (d) was Deauville itself at fault.

As for the insurer Defendants, each have claimed that the incident that took place on the property was not a fire at all, and that "exclusions" from coverage are triggered for some of the same reasons the contractor Defendants disclaim liability (*i.e.*, wear and tear, natural causes, etc.). *See, e.g.*, Endurance American's Fist Amended Answer and Affirm. Defenses dated Nov. 18, 2019; Great American's Answer and Affirm. Defenses dated Sept. 20, 2019. The insurer Defendants also raise other defenses similar to those advanced by the contractor Defendants. And the excess policies are, with limited exceptions, "following form" contracts which adopt the terms and conditions of the primary insurer's policy. For that reason, most (if not all) of the coverage/exclusion issues raised by each carrier are similar, if not the same. *See, e.g., CNL Hotels & Resorts, Inc. v. Houston Cas. Co.*, 505 F. Supp. 2d 1317 (M.D. Fla. 2007).

Without belaboring the point, it is apparent that: (a) the claims and defenses advanced by the parties raise common issues of both law and fact that will have to be adjudicated; (b) that discovery will be overlapping; and (c) *significant* party, third party and judicial labor will be conserved if *all* the claims and defenses are litigated together in one forum. And absent First Specialties' forum selection clause, no rational judge would ever consider "sending" Plaintiff's claim against one insurer to another forum *unless* it were compelled to do so due to an absence of personal jurisdiction. So the question then is whether precedent mandates that the Plaintiff's claim against First Specialty be sent to New York, while this Court adjudicates all the other claims and defenses. In other words, does the parties' private agreement trump the obvious benefits that the parties, third parties and the court system itself will realize if these claims are efficiently litigated in one place? The answer is no.

III. **ANALYSIS**

At the outset, the Court begins by noting that it is a strong enforcer of private contracts. This Court, sitting both as an associate appellate and circuit judge, has written, time and time again, that "contracts are voluntary undertakings, and contracting parties are free to bargain for—and specify—the terms and conditions of their agreement." *Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc.*, 145 So.3d 989, 993 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1871a]; *City of Pompano Beach v. Beatty*, 222 So. 3d 598, 600 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1556a]; *Sky Bell Asset Mgmt., LLC And Sky Bell Select, L.P., v. National Union Fire Ins. Co. of Pittsburgh, P.A.,* 23 Fla. L. Weekly Supp. 535a (11 Jud. Cir., Dec. 17, 2015); *DePrince v. Starboard,* 23 Fla. L. Weekly Supp. 1022a (11 Jud. Cir., April 7, 2016); *JDJ of Miami, Inc., v. Valdez, et. al.*, 23 Fla. L. Weekly Supp. 1026a (11 Jud. Cir., March 23, 2016); *Regalia Beach Developers, LLC, v. MVW Mgmt. LLC,* 24 Fla. L. Weekly Supp. 286a (11Jud. Cir., June 30, 2016). And when parties bargain for the terms of their contract, it is not the Court's prerogative to "substitute [its] judgment for that of the parties in order to relieve one from an alleged hardship of an { "pageset": "Sd82532fe0d3311d99830b5efa1ded32a", "pageNumber": "31" }improvident bargain." *Int'l Expositions, Inc. v. City of Miami Beach*, 274 So. 2d 29, 30-31 (Fla. 3d DCA 1973). Rather, the Court's task is "to enforce the contract as plainly written." *Okeechobee Resorts, L.L.C., supra* at 993; *Gulliver Sch., Inc. v. Snay*, 137 So. 3d 1045, 1047 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D457a].

A mandatory forum selection clause is nothing more than a contract or, more accurately speaking, a "contract within a contract." The "contract" between Deauville and First Specialty clearly and unequivocally provides that:

> The parties irrevocably submit to the exclusive jurisdiction of the Courts of the State of New York, and to the extent permitted by law the parties expressly waive all rights to challenge or otherwise limit such jurisdiction.

This type of forum selection clause "enhance(s) contractual and economic predictability, while conserving judicial resources and benefitting commercial entities as well as consumers." *Am. Online, Inc. v. Booker*, 781 So. 2d 423, 424-25 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D386a].

Deauville does not contest the fact that this provision is "mandatory" and enforceable pursuant to binding Supreme Court of Florida precedent: *Manrique v. Fabbri*, 493 So. 2d 437 (Fla. 1986). In *Manrique,* our Supreme Court held "that forum selection clauses should be enforced in the absence of a showing that enforcement would be unreasonable or unjust." *Id.* at 440. While the Court did not attempt to identify all circumstances where enforcement would (or could) be "unreasonable" or "unjust," it commented that:

> It should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.

Id. at 440 fn. 4.

Although footnote 4 suggests that a forum selection clause *must* always be enforced *unless* the party resisting enforcement would, "for practical purposes," be "deprived of [their day] in court," *Manrique* was a two party case and, for that reason, our Supreme Court had no occasion to address the question of whether enforcement can be denied if, in *multi-party* litigation, *substantial* party, third party and judicial resources would be squandered by enforcing this type of private covenant. Furthermore, the *Manrique* court adopted the reasoning enunciated by the U.S. Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the decision relied upon by the Fourth District in *Mar. Ltd. P'ship v. Greenman Advert. Associates, Inc.*, 455 So. 2d 1121 (Fla. 4th DCA 1984), which allows a court to deny enforcement of a forum selection clause if: (1) the forum was chosen because of one party's overwhelming bargain power; *or* (2) enforcement would contravene public policy; *or* (3) the purpose of the agreement was to transfer a local dispute to a remote and alien forum in order to inconvenience one or both parties. That is the actual standard our Supreme Court approved of in *Manrique*, and that standard is, without doubt, more flexible than one mandating, in *every* type of case, a showing that enforcement would completely deprive the resisting party of "their day in court."

Needless to say, in this Court's view *Manrique* sends a mixed message. If footnote 4 is actually the showing that must, in *all* cases, be met (*i.e.*, enforcement would deprive the resisting party of their day in court) the analysis is simple and Plaintiff's claims against First Specialty should be sent to New York, as that jurisdiction obviously

would provide a forum to litigate Deauville's claims and First Specialty's defenses. Stated differently, enforcing the forum selection clause would not deprive Deauville of its "day in court." On the other hand, if the standard is a bit more flexible, as articulated by *Zapata* and *Mar. Ltd.,* (the two decisions *Manrique* approved of) then a court can, as a matter of public policy, refuse to enforce private forum selection clauses based upon "compelling [policy] reasons," including practical considerations.

The question of which of these two markedly different standards must be applied is often academic because, as was the case in *Manrique*, most cases addressing the enforceability of a forum selection clause involve what are (or essentially are) two-party disputes. As it is difficult to envision "compelling reasons" to deny enforcement in *this* scenario our intermediary appellate courts, including the Third District, have predictably and routinely enforced mandatory forum selection clauses in such cases, even in circumstances where the chosen forum may not provide the "remedy" that would be available here. *See, e.g., Am. Online, Inc. v. Booker*, 781 So. 2d 423, 424 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D386a] (enforcing mandatory forum selection clause even though chosen forum—Virginia—had "no mechanism" for class actions); *Land O'Sun Mgmt. Corp. v. Commerce & Indus. Ins. Co.*, 961 So. 2d 1078, 1080 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1787a] (enforcing forum selection clause contained in environmental insurance policy, as "[t]he contracting parties have the right to demand that the litigation occur in the contractually selected forum"); *Powers v. Melick*, 211 So. 3d 122 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D288b] (relying on *Manrique* in enforcing mandatory venue clause); *Signtronix, Inc. v. Annabelle's Interiors, Inc.*, 260 So. 3d 1186 (Fla. 1st DCA 2018) [44 Fla. L. Weekly D151b] (enforcing agreement to submit all disputes to the "Courts of the State of California"); *Corsec, S.L. v. VMC Intern. Franchising, LLC*, 909 So. 2d 945, 946 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D1942b] (enforcing agreement to submit disputes to "the courts and tribunals of the capital City of Madrid"); *Reyes v. Claria Life & Health Ins. Co.*, 190 So. 3d 154 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D685b] (enforcing mandatory forum selection clause requiring that disputes be submitted to binding arbitration in the State of Delaware).[2]

Conversely, in those rare two-party cases where enforcement would result in a "splitting of the claim," *and* in multi-party cases where enforcement would result in duplicative effort and expense, a risk of inconsistent results, and the taxing of resources in multiple jurisdictions, our intermediary appellate courts have uniformly said that enforcement may be denied for "compelling reasons." *See, e.g., Girdley Const. Co. v. Architectural Exteriors, Inc.*, 517 So. 2d 137, 138 (Fla. 5th DCA 1987) (refusing to enforce mandatory venue provision in two party case where ". . . such a transfer would result in multiple suits and a splitting of causes of action"); *Mason v. Homes By Whitaker, Inc.*, 971 So. 2d 1029, 1030 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D210b] (refusing to enforce mandatory venue clause in order to "avoid multiple lawsuits, minimize judicial labor, reduce the expenses to the parties and avoid inconsistent results," because lien foreclosure could only be brought in Clay County—not the specified forum—Marion County—and thus enforcing clause would split the claim); *Love's Window & Door Installation, Inc. v. Acousti Eng'g Co.*, 147 So. 3d 1064, 1065 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1963a] (refusing enforcement of mandatory forum selection clause in "complex litigation" regarding a construction project, as "compelling reasons" existed not to enforce clause, including "avoiding multiple lawsuits, minimizing judicial labor, reducing the expenses to the parties, and avoiding inconsistent results"); *McWane, Inc. v. Water Mgmt. Services, Inc.*, 967 So. 2d 1006, 1007 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2598a] (refusing to enforce forum selection provision in multi-party litigation, "when it appears that enforcement of the provision will lead to multiple lawsuits, a splitting of the causes of action, and the potential for conflicting results in different courts"); *Dore v. Roten*, 911 So. 2d 218, 220 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2273a] (refusing enforcement of mandatory forum selection clause in cases against multiple defendants arising out of the same incident, recognizing that "enforcing this venue provision would result in multiple lawsuits, split the causes of action, and create the potential for conflicting results in Florida and Michigan"); *Carlson-Se. Corp. v. Geolithic, Inc.*, 530 So. 2d 1069, 1072 (Fla. 1st DCA 1988) (denying motion to enforce mandatory venue clause where result of enforcement would be "that multiple suits will be filed and enforcement of a venue provision could generate conflicting results in different courts").

In its motion for reconsideration, First Specialty says that this "compelling reason" exception finds "no support in Florida Supreme Court of (sic) Third DCA case law. . . ." Mot. p. 2. That is incorrect. In *Am. Safety Cas. Ins. Co. v. Mijares Holding Co., LLC*, 76 So. 3d 1089, 1092 (Fla. 3d DCA 2011) [37 Fla. L. Weekly D36a], our appellate court cited *McWane* with approval and made clear that: "we agree that inconsistent and simultaneous interstate litigation is an applicable compelling reason" to deny enforcement of a mandatory forum provision. While it is true, as First Specialty points out, that the Third District found "compelling reasons" to deny enforcement of the contract absent "in [that] case," there can be no dispute that the court again "agree[d] that inconsistent and simultaneous interstate litigation is an applicable compelling reason" to deny enforcement. The court therefore expressly embraced the "compelling reason" exception adopted by its sister courts. And even if the Third District had not *expressly* approved of this "exception," this Court would be bound by the decisions of those other appellate courts that uniformly have, so long as the Third District had not *expressly* rejected it. *See Pardo v. State,* 596 So. 2d 665, 666 (Fla. 1992) (". . . in the absence of inter-district conflict, district court decisions bind all Florida trial courts").[3]

In this Court's view, our intermediary appellate courts are correct in holding that when "compelling reasons" exist, a trial court can (and should) deny enforcement of a mandatory forum selection clause. While parties undeniably have a "right to control their litigation destinies by bargaining for the ability to litigate in a specific forum," *Am. Online,*781 So. 2d at 425, this "private" bargain should yield when enforcing it would place an *undue* burden on the parties, third parties and the judiciary. When enforcement of a private contract would result in a single dispute being litigated in multiple jurisdictions, thereby forcing two courts to deal with a case that could (and should) be litigated in one forum, and would cause the parties (and possibly third parties) to expend *substantial* resources duplicating discovery and litigating the same (or substantially similar) claims in multiple jurisdictions, a "private" forum selection clause should give way for the public good. But this Court's views on the subject are irrelevant because our appellate courts have said just that, and this Court—like its predecessor—is bound by those *uniform* appellate decisions.[4]

IV. CONCLUSION

The Court recognizes that forum selection provisions serve a valuable purpose, as they provide contractual and economic predictability by dispelling any "confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum. . ." *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991). The Court also recognizes that, as a general rule, parties "have the right to control their litigation destinies" *Am. Online,* 781 So. 2d at 425, and that "[w]hatever inconvenience" a contracting party would suffer by being compelled to litigate in its agreed upon forum was "clearly

foreseeable at the time of contracting." The *M/S Bremen,* 407 U.S. at 18. But appellate precedent affords trial courts the discretion to deny enforcement of these covenants when necessary to prevent disputes arising out of a common nucleus of operative facts from being simultaneously litigated in more than one jurisdiction, thereby causing unnecessary expense to the parties (and third parties), and over-taxing our judiciary.

In this case, the Court's predecessor applied the "compelling reason" exception to enforcement embraced by our appellate courts and concluded, as a matter of *discretion*, that this "mandatory" clause must give way in the public interest. This Court cannot say that decision was "clear" legal error, or that it was an abuse of discretion. *See, e.g.*, *Castillo v. Castillo*, 59 So. 3d 221 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D616c] (a discretionary decision of a trial court will only be reversed on appeal if "no reasonable judge would have decided as this one did"); *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980) (discretion is abused ". . . when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court").

For the foregoing reasons, First Specialty's Motion for Reconsideration is **DENIED**.

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[1]The parties agree that the operative clause here is "mandatory." *See, e.g., Shoppes Ltd. P'ship v. Conn*, 829 So. 2d 356 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D2378a] (discussing the difference between "mandatory" and "permissive" forum selection clauses).

[2]Other jurisdictions also routinely enforce these clauses in two-party (or essentially two-party) disputes. *See, e.g., Saye v. First Specialty Insurance Co.,* 2015 U.S. Dist. Lexis 50243 (E.D. N. Y. 2015) (Gleeson, J) (enforcing forum selection clause in dispute brought by insured against First Specialty and brokerage firm that sold policy); *Al Copeland Inv., LLC v. First Specialty Ins. Corp.,* 2017 WL 2831689 (E.D. La. June 29, 2017), aff'd by 884 F.3d 540 (5th Cir. 2018) (affirming trial court's grant of First Specialty's motion to dismiss based on forum selection clause); *Chandler Mgmt. Corp. v. First Specialty Ins. Corp.*, 2013 WL 7158111 (Tex. Dist. 1st Apr. 30, 2013); *Deeba v. First Specialty Ins. Corp.,* 2014 WL 4852268 (W.D. Okla. Sept. 29, 2014) (granting First Specialty's motion to dismiss based on forum selection clause).

[3]First Specialty also contends that Plaintiff, in the forum selection clause, waived "any objections to the clause's enforcement." Reply Memo p. 2. That is not exactly true. What Plaintiff "waived" was its right "to challenge or otherwise limit [NY] jurisdiction," not its right to argue that the forum selection clause should not be enforced on public policy grounds. But it makes no difference. If "compelling reasons" not to enforce the forum selection clause itself are present, those "compelling reasons" also support not "enforcing" a party's "waiver" of any right to contest that clause.

[4]The Court notes that this is not the only context in which Florida courts will refuse to enforce a "private" contract based upon "compelling" public policy grounds. *See Ronnie Suggs Dpm v. Podiatry Ins. Co.*, No. 3:09cv260-MCR/MD, 2009 U.S. Dist. LEXIS 145821 (N.D. Fla. Oct. 21, 2009) ("Florida courts generally enforce choice-of-law provisions in contracts absent a compelling public policy reason not to"); *Nahar v. Nahar*, 656 So. 2d 225 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1356a] (exception to general rule barring enforcement of interlocutory foreign court orders may be based on "compelling public policy reasons").

* * *

Contracts—Purchase and sale agreement—Warranties—Action alleging breach of contract and breach of express and implied warranties brought against sellers and contractor by plaintiff who entered into agreement, and amended agreements, for purchase of real property and "build-to-suit" construction of building intended to be used for warehouse and distribution purposes, which building was to be completed in compliance with certain specifications, including those mandating proper sealing of concrete floor—Conditions precedent—Sellers' motion to dismiss all claims against them because plaintiff failed to allege that it exhausted any and all remedies, including litigation remedies, it may have had against insurers or third parties, including contractor, is denied, as nothing in PSA obligated plaintiff to exhaust litigation remedies against third parties prior to bringing suit against sellers—Moreover, claims against sellers and contractor are for all intents and purposes identical, and requiring litigation in separate suits would not only waste judicial resources, but create potential for conflicting results—Implied warranties—Dismissal of count against sellers alleging breach of implied warranties of merchantability and fitness for particular purpose is appropriate where parties' agreement expressly and conspicuously disclaimed these implied warranties—Jury trial—Because parties' agreement contained express waiver of any right to jury trial, motion to strike jury trial demand is granted—Limitation of damages—Whether plaintiff is entitled to pursue certain claims which were first made after the "Outside Claim Date" not appropriately decided on motion to dismiss under circumstances

PRICESMART, INC., Plaintiff, v. SECTION 31 HOLDINGS, LLC, et al, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-036164-CA-01, Section CA43. July 27, 2020. Michael Hanzman, Judge. Counsel: Eleanor T. Barnett and Michael Azre, Waldman Barnett, P.L., Coconut Grove, for Plaintiff. Matan A. Scheier and Thomas A. Oglesby, Cole, Scott & Kissane, P.A., Miami, for Defendant Marcobay Construction, Inc. Victor M. Diaz, VM Diaz & Partners, LLC, Miami Beach; and Albert E. Blair, Hollywood, for Defendants Section 31 Holdings, LLC and FGL Property Company, LLC.

ORDER ON MOTION TO DISMISS

I. INTRODUCTION

Before the Court is Defendants' Section 31 Holdings, LLC and FGL Property Company's Motion to Dismiss Plaintiff's Amended Complaint. Upon careful consideration of the parties' written submissions, and after entertaining oral argument, the Court enters this Order denying the Motion, except as to Count IV.

II. FACTS AS PLED

Plaintiff, PriceSmart, Inc., ("Plaintiff' or "PriceSmart") brings this action against Defendants, Section 31 Holdings LLC ("Section 31"), FGL Property Company ("FGL") and Marcobay Construction, Inc. ("Marcobay"), advancing claims arising out of a March 2016 "Purchase and Sale Agreement" ("PSA") which obligated Section 31, as seller, to: (a) convey to PriceSmart, as buyer, certain real property; and (b) "Build-to-Suit" on that property an "approximately 322,494 rentable square foot building." PSA p. 1. PriceSmart, which is alleged to be "the largest operator of membership warehouse clubs in Central America, the Caribbean and Colombia. . .," Amended Complaint ("AC") ¶ 8, intended to use the completed facility "for warehouse and distribution purposes." PSA p. 1.

According to the allegations of the Amended Complaint, which at this stage of the proceedings must be taken as true, *see, e.g., Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc.,* 842 So. 2d 204 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D847a], PriceSmart—via a "Site Plan" and "Work Letter" incorporated into the PSA—"insisted that the flooring of the warehouse be smooth, hard, and free of cracks, by requiring Section 31 to ensure that the 'Base Building Work' for the structure include a 'warehouse floor' sealed with 'Ashford [F]ormula or equivalent' . . . a chemical treatment that densifies concrete, creating a harder and more durable surface that resists dust and cracking." AC in ¶¶ 16-17. Through Section 5(a)(xii) of the PSA, Section 31 represented and warranted that the building would be "completed in conformity with" the specifications set forth in the Base Building Final Plans and Specifications, including those mandating the proper sealing of the floor, and also represented and warranted that the building would be delivered "free from defects in materials or workmanship. . ." PSA p 18.

In order to comply with its obligations under the PSA, Section 31 retained Marcobay as the general contractor charged with constructing/delivering the building "in accordance with PriceSmart's specifications and suitable for PriceSmart's intended purposes." AC ¶¶ 24-27. Marcobay agreed that it would: (a) exercise "diligent skill and judgment"; (b) "perform and Work in any [sic] expeditious and economical manner. . ."; and (c) follow "the best modern practices observed by general contractors working on comparable projects in the area and in accordance with the Contract Documents." May 9,

2016 AIA Standard Form Agreement, Section 3. The "Contract Documents"—which Marcobay obligated itself to conform to—also incorporated the warranties and representations made by Section 31 in the PSA. AC ¶ 29.

While Section 31 contractually delegated to Marcobay its duty to construct the "Build-to-Suit" structure, it was obligated to "cooperate with Buyer (PriceSmart) . . . to cause the Contractor (Marcobay) to satisfy its Warranty Obligations. . .," and agreed that if the Contractor failed "to satisfy its Warranty Obligations in a timely manner to the Buyer's [PriceSmart] commercially reasonable satisfaction with respect to any Defect, Seller [Section 31] shall, at its sole cost and expense, promptly cause any such Defect to be corrected. . ." PSA 7(b)(ii). This warranty survived "Closing and delivery of the Deed" to the property. PSA p. 27.

On December 26, 2016, "Marcobay issued a General Contractor's Warranty to both Section 31 and PriceSmart, guarantying 'that all workmanship and/or materials installed [at Building #9 at Flagler Station III] complies with all specific requirements of the Contract Documents' and insuring" Section 31 and PriceSmart "against all defects in materials and/or workmanship for a period of one (1) year from January 12, 2017," the date Marcobay finished construction. AC ¶¶ 37-38.[1] On January 19, 2017, "FGL made a Guaranty" of Section 31's Surviving Obligations in favor of PriceSmart. AC ¶ 39.

On January 27, 2017, PriceSmart "closed on its purchase of the Property containing its new warehouse and distribution center." AC ¶ 41. At closing, Section 31 issued a "Bill of Sale" which, among other things, "transferred to PriceSmart Marcobay's warranty obligations" and, "No the extent assignable," all of its other "rights with regard to the guaranties and warranties relating to the warehouse." AC ¶ 42. Within a few months thereafter, "PriceSmart began to notice cracks in the warehouse's concrete slab flooring." AC ¶ 43. On August 24, 2017 PriceSmart placed Section 31 and Marcobay on notice of these alleged defects. AC ¶¶ 45-46. Four days later, George Garber ("Garber"), a concrete floor consultant, "conducted an on-site inspection on Marcobay's behalf." AC ¶ 46.

On September 19, 2017, Section 31 delivered to Marcobay a formal notice of "Warranty Claims," acknowledging that PriceSmart was a direct beneficiary of Marcobay's warranty obligation, noting Marcobay's obligation to indemnify Section 31 against any claims by PriceSmart, and requesting that Marcobay provide a "written action plan" for the "prompt resolution of the problems that PriceSmart had identified." AC ¶ 48. Shortly thereafter, PriceSmart requested that Section 31 share a "copy of Garber's report" and otherwise to do whatever it could "to speed up the process of allowing the parties to agree upon an acceptable resolution" of the problems involving the slab. AC ¶ 49. PriceSmart also retained its own expert, Allen Face ("Face"), to inspect the "cracks affecting the warehouse floor," AC ¶ 50, and on October 30, 2017 it "provided Section 31 and FGL with a copy of the report that Face prepared after his inspection." AC ¶ 51. Approximately ten (10) days later, Garber finalized his report "providing Marcobay with his recommendations for floor repairs . . . ." AC ¶ 53.

During the balance of 2017 the parties attempted to "negotiate a way for Section 31 and Marcobay to rectify the problems affecting the warehouse," AC ¶ 54, and on January 8, 2018 Marcobay sent PriceSmart a document extending the duration the General Contractor's Warranty with regard to the "Slab Repairs," and guarantying those repairs for an "additional year after their completion." AC ¶ 55. Marcobay then "attempted to complete the repairs in accordance with Garber's recommendations, AC ¶ 57, but abandoned the work after "identifying more problems." AC ¶ 58. Garber then "returned to conduct an evaluation of the deteriorating conditions" and issued a "second report" recommending "additional testing to determine the underlying cause of the problem." AC ¶¶ 58-60.

Pursuant to section 5(c) of the PSA, Section 31's representations and warranties (including the post-closing covenants set for in section 7(b)) survived "only for a period of one (1) year from the Closing date"—defined as the "Outside Claim Date." PSA p. 22. After the passage of the "Outside Claim Date," PriceSmart was required to "rely solely on the Third Party Warranties . . . pertaining to the Property with respect to any and all matters. . . excluding only matters detailed in a Noticed Claim received by [Section 31] prior to the Outside Claim Date," PSA pp. 22-23, "with it being understood and agreed that [PriceSmart] shall not be permitted to commence any additional claims or modify any claims raised in a Noticed Claim after the Outside Claim Date." PSA p. 23. The parties, however, entered into a series of amendments to the PSA, eventually extending the Outside Claim Date to December 31, 2019. *See, e.g.,* "Seventh Amendment to Purchase and Sale Agreement" dated September 9, 2019. Those amendments extended the Outside Claim Date with respect to "Slab Repairs," leaving the Outside Claim Date intact but for this limited exception. FGL joined in each amendment.

PriceSmart alleges that despite repeated demands made, Section 31 and Marcobay have refused to remedy the defects in the slab and that "the cracks affecting the floor of PriceSmart's warehouse [continue] to grow in size and number." AC ¶ 68. As a result, PriceSmart filed this action against Section 31 on December 13, 2019, "prior to the Outside Claim Date," and on February 6, 2020 "sent Marcobay a Notice of Claim Pursuant to Chapter 558, Florida Statute." AC ¶ 72.[2]

III. **THE CLAIMS**

PriceSmart advances six (6) substantive claims: Count I pleads a "Breach of Contract," seeking damages as "a direct result of Section 31's failure to deliver a defect-free warehouse and to perform its obligations under the Purchase Agreement " AC ¶ 90; Count II alleges that FGL breached its "Guaranty" by "failing to cure Section 31's defaults under the Purchase Agreement as they relate to the defective concrete slab floor." AC ¶ 98; Count III pleads a claim for "Breach of Contract Against Marcobay," alleging a breach of the Construction Agreement and, in particular, Marcobay's warranty that its work would "conform to the requirements of the Contract Documents" and "be free from defects." AC ¶ 103; Count IV alleges a Breach of Implied Warranty Against Section 31; Count V alleges a "Breach of Warranty" (express warranty) against Marcobay; and Count VI sounds in "Negligence against Marcobay."

IV. **THE MOTION TO DISMISS**

a. **The Claims in their Entirety.**

Section 31 and FGL first insist that the claims leveled against them should be dismissed in their entirety because PriceSmart has failed to allege that it has satisfied "a contractual condition precedent to filing suit"; namely, the supposed "condition" that PriceSmart exhaust any and all remedies it may have against any insurer(s) or third parties, including Marcobay. MTD pp. 1-2. Section 3l relies upon section 5(d) of the PSA, which provides:

> Any claim under this Section 5 alleging a breach of a representation or warranty, as well as any claim made to enforce the terms of Section 7)(b) or Section 7(d) or any other term that expressly survives the Closing shall be effective and valid only if made in writing (specifying in reasonable detail the nature of the claim and the factual and legal basis for any such claim, and the provisions of this Agreement upon which such claim is made) against the other Party on or prior to the Outside Claim Date. Notwithstanding anything in this Agreement to the contrary, (1) *in no event shall any claim be made by either Party against the other Party after the Closing unless and until the aggregate dollar amount of the damages incurred exceeds Fifty Thousand and 00/100 Dollars ($50,000.00), after considering any recovery that such Party actually obtains from any title or other insurance coverage*

> *or other remedies, if any, that such Party may have in connection with such claims (such amount, the "Basket Amount")*, but any claim exceeding the Basket Amount for which a Party is liable shall be paid in full from the first dollar of loss, and (2) the maximum aggregate amount available to either Party on account of any breach of any representation, warranty, covenant or other obligation that survives the Closing shall not exceed five percent (5%) of the Purchase price, in the aggregate, under this Agreement (the "CAP") provided, further bad faith or fraud shall not be subject to the Basket Amount or the Cap (the foregoing, the "Unlimited Liability Matters").

See PSA ¶ 5(d) (emphasis added).[3]

Based upon this provision FGL then highlights section 2.2 of its Guaranty, which "irrevocably and unconditionally" guarantees the payment of "Guaranteed Obligation as and when the same shall be payable pursuant to the PSA," *see* Guaranty section 2.2, and says it also may not be sued until section 5(d)'s "condition" to bringing a claim against its principal, Section 31, is satisfied. MTD pp. 2-3. The Court rejects Defendants' contention that this suit is "premature," and that PriceSmart is obligated to exhaust litigation remedies against unidentified insurers and/or Marcobay prior to initiating litigation against Section 31 and FGL.

First, as a matter of contract construction, nothing in section 5(d) of the PSA obligates PriceSmart to exhaust any "litigation" remedies against any third parties, including Marcobay, prior to bringing suit against Section 31 and FGL. Section 5(d), read literally, merely precludes any "claim" being made by either party against the other unless and until the aggregate dollar of damages incurred exceeds $50,000.00, after considering any recovery from insurers or other remedies. The "claim" referred to is the process of placing the other party on notice of a default/breach in accordance with the procedures set forth in section 5 of the PSA, *not* litigation. Put another way, compliance with the PSA's claim protocol is not an express condition precedent to filing a lawsuit. *Compare, Blum v. Deutsche Bank Tr. Co.,* 159 So. 3d 920, 920 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D574c] ("[n]either Borrower nor Lender" may commence "any judicial action" until notice of breach is delivered and other party is afforded a reasonable period to cure).

Further, even assuming a lawsuit were considered a "claim" for purposes of section 5(d), reading the provision to preclude a party from making a "claim" or filing a "lawsuit" *prior* to exhausting litigation against insurers or third parties would create an irremediable repugnancy between this clause and the requirement of the PSA mandating that a claim *must* be made no later than one year from closing (*i.e.,* the Outside Claim Date) or be forever foreclosed. Such an interpretation also would, as a practical matter, nullify Section 31's obligation to "promptly cause any . . . Defect" in Marcobay's work to be "corrected," as Section 31 could simply sit back and force PriceSmart to litigate its claim against Marcobay before being called upon to honor this obligation.

In interpreting a contract the Court must consider its terms "in conjunction with one another so as to give reasonable meaning and effect to all of the provisions," *Aucilla Area Solid Waste Admin. v. Madison County,* 890 So. 2d 415, 416-17 (Fla. 1st DCA 2004) [30 Fla. L. Weekly D56a], and "in a manner that does not render any provision of the contract meaningless." *Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n, Inc.,* 169 So. 3d 197, 203 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1496a]. The provisions of a contract must be read "harmoniously in order to give effect to all portions thereof." *Lowe v. Winter Park Condo. Ltd. P'ship,* 66 So. 3d 1019, 1021 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D1522a].

Considering section 5 of the PSA "as a whole," *Super Cars of Miami, LLC v. Jacques Bermon Webster,* 45 Fla. L. Weekly D556a (Fla. 3d DCA Mar. 11, 2020), it is clear—at least to this Court—that section 5(d) was intended to obligate the parties to first look to their own "title or other insurance coverages" and make claims against the other party if—and only if—they reasonably believed that at least $50,000.00 in damages would remain after that insurance was exhausted—a provision similar to an insurance deductible. Nothing about this provision obligated PriceSmart to exhaust litigation claims against Marcobay prior to filing suit against Section 31 and/or FGL, and if Section 31 wanted to impose such a condition it could have (and should have) simply said so in plain English, making it clear that: "PriceSmart, prior to filing any suit against Section 31, must exhaust all remedies, including those available in litigation, against Marcobay." It did not do so, or even come close.

The bottom line is that section 5(d) does not, in the Court's view, obligate a party to fully litigate any potential claim against any possible third party, including Marcobay, *prior* to filing suit against the other party; an unpenned condition that could not possibly be satisfied without running afoul of other contract provisions.[4]

Finally, even *if* the parties' agreement expressly and unambiguously obligated PriceSmart to exhaust litigation against Marcobay (or other third parties) as a condition precedent to filing suit against Section 31, that *private* bargain would not be binding upon this Court, and this Court would not honor it for a simple reason: enforcement of that *private* covenant would force this Court to expend valuable judicial resources (*i.e.,* its time and taxpayer money) litigating the exact same claims/defenses twice. Aside from squandering limited judicial resources, enforcement of such a covenant also would create a potential for conflicting results.

As this Court has written—time and time again—"contracts are voluntary undertakings, and contracting parties are free to bargain for—and specify—the terms and conditions of their agreement." *Okeechobee Resorts, LLC v. E Z Cash Pawn, Inc.,* 145 So.3d 989, 993 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1871a]; *City of Pompano Beach v. Beatty,* 222 So. 3d 598, 600 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1556a]; *Sky Bell Asset Mgmt., LLC and Sky Bell Select, L.P., v. National Union Fire Ins. Co. of Pittsburgh, P.A.,* 23 Fla. L. Weekly Supp. 535a (11th Jud. Cir., Dec. 17, 2015); *DePrince v. Starboard,* 23 Fla. L Weekly Supp. 1022a (11th Jud. Cir., April 7, 2016). But as the Court recently pointed out in a factually different but legally analogous context, a "private bargain should yield when enforcing it would place an *undue* burden on the parties, third parties and the judiciary." *Deauville Hotel Property LLC v. Endurance American Specialty Insurance Company*, case number 2019-16331, May 17, 2020 Order (refusing to enforce a mandatory forum selection clause when enforcement would result in a single dispute having to be litigated in multiple forums) [28 Fla. L. Weekly Supp. 491a]. When enforcement of a private contract would result in a single dispute involving inextricably intertwined claims and defenses being litigated multiple times, thereby: (a) causing the parties (and possibly third parties) to expend *substantial* resources duplicating discovery and relitigating the same (or substantially similar) claims/defenses; and (b) cause a court to waste its limited resources presiding over the same claims more than once, that private bargain must give way.

Section 31 and FGL, through their "interpretation" of section 5(d) of the PSA (and section 2.2 of the Guaranty), insist that this Court must require that PriceSmart litigate its entire case against Marcobay, and then litigate the exact same claims seeking the exact same damages against them if, and only if, PriceSmart has in excess of $50,000.00 in damages remaining upon the conclusion of that litigation. If the jury in case number one (1)—*PriceSmart v. Marcobay*—finds that the floor was defective, and that the warranties/representations contained within the operative contracts were breached, and if Marcobay does not fully compensate PriceSmart (or comes up more than $50,000.00 short) a second lawsuit would then

have to be filed against Section 31 and FGL, forcing PriceSmart (and more importantly this Court) to fully litigate the same issues again. Conversely, if the fact finder in case number one (1) concluded that no warranties/representations were breached, and the floor was delivered as bargained for, PriceSmart would still have the legal right to bring the exact same claims again in case number two (2)—*PriceSmart v. Section 31 and FGL*—and relitigate the entire case. *See*, *e.g., Zikofsky v. Mktg. 10, Inc.,* 904 So. 2d 520, 525 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1343a] (doctrine of *res judicata* and collateral estoppel do not apply absent "a mutuality of parties"); *Pumphrey v. Dep't of Children & Families,* 292 So. 3d 1264, 1266 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D799a] (for the doctrines of *res judicata* or collateral estoppel to bar a later claim, "the parties in the two proceedings must be identical").

This inefficient process Defendants propose also presents the possibility of conflicting results, as the fact finder in each case could render completely opposite verdicts on liability, damages, or both. And on top of that, Defendants claim to be contractually indemnified by Marcobay against any liability arising out of its work. So what happens if the first trial results in a verdict in Marcobay's favor? PriceSmart then brings its claims against Section 31 and FGL and, in response, Section 31 seeks indemnification from Marcobay, dragging it right back into case number two (2), and thereby forcing it to defend against the exact same claims it prevailed on in case number one (1).

PriceSmart's claims against Section 31, FGL, and Marcobay are for all intents and purposes identical: the same legal issues will be presented; the same discovery will have to be taken; the same motions will have to be addressed; and the same claims and defenses will have to be tried. No rational court would ever sever these claims, thereby squandering judicial and party resources and risking inconsistent results. So even assuming section 5(d) is read to mean what Section 31 and FGL say it means, and the *parties* to the PSA obligated themselves not to sue one another until they have exhausted any and all other available remedies, including any remedy they might have against Marcobay, the Court, as a matter of compelling public policy, declines Defendants' generous offer to preside over the same dispute twice. This case is not a motion picture, and the Court has no interest in watching a sequel. *See, e.g., Mason v. Homes by Whitaker, Inc.,* 971 So. 2d 1029 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D210b] (refusing to enforce mandatory venue clause in order to "avoid multiple lawsuits, minimize judicial labor, reduce the expenses to the parties and avoid inconsistent results"); *Ronnie Suggs Dpm v. Podiatry Ins. Co.,* No. 3:09cv260-MCR/MD, 2009 U.S. Dist. LEXIS 145821 (N.D. Fla. Oct. 21, 2009) (Florida courts may refuse to enforce choice of law provisions based on compelling public policy); *Nahar v. Nahar,* 656 So. 2d 225, 228 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1356a] (exception to general rule barring enforcement of interlocutory foreign court orders may be barred on "compelling public policy reasons"); *Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co.,* 86 N.Y.2d 685, 695, 660 N.E.2d 415 (1995) (freedom of contract generally prevails in an arm's length transaction between sophisticated parties, and contracts should be enforced "in the absence of countervailing public policy concerns . . .").

b. **Count IV—Breach of Implied Warranty.**

Section 31 and FGL alternatively seek dismissal of Count IV, pointing out that the "PSA conspicuously and expressly disclaims both the implied warranty of merchantability and implied warranty of fitness for a particular purpose." The Court agrees. *See, e.g., Xerographic Supplies Corp. v. Hertz Commercial Leasing Corp.,* 386 So. 2d 299 (Fla. 3d DCA 1980) (finding warranty disclaiming implied warranties of merchantability of fitness for a particular purpose in all capital letters to be conspicuous and valid); *Desandolo v. F & C Tractor & Equip. Co.,* 211 So. 2d 576, 577-78 (Fla. 4th DCA 1968) ("express disclaimer in the written contract between the plaintiff-seller and defendant-buyer is valid and precludes liability of the plaintiff on the basis of an implied warranty of fitness or merchantability"); *Belle Plaza Condo. Ass'n, Inc. v. B.C.E. Dev., Inc.,* 543 So. 2d 239, 240 (Fla. 3d DCA 1989) (trial court correctly dismissed claim for breach of express warranty based upon "a bold and conspicuous disclaimer [of] any and all express or implied warranties").

Here, the parties' exhaustive written contracts detail all representations/warranties made by Section 31 and Marcobay regarding the building to be delivered, including all parts thereof (*i.e.*, the floor). The parties bargained for those precise representations/warranties, and Section 31 expressly disclaimed any others. The operative contracts also carefully allocate the parties' respective risks by defining the remedies available in the event of a default. The parties will be held to their bargain, and PriceSmart's claims will be judged against the *express* terms of the written agreements defining the parties' rights and obligations. *See, e.g., Hesson v. Walmsley Const. Co.,* 422 So. 2d 943, 946 (Fla. 2d DCA 1982) ("we know of no reason why parties to a contract cannot mutually agree on the reallocation of risks. . . if the disclaimer is in clear and unambiguous . . .").

V. **MOTION TO STRIKE JURY TRIAL DEMAND**

Section 31's "Motion to Strike Jury Trial Demand" is well taken, as PriceSmart concedes that each party to the PSA expressly waived "any right it may have to a trial by jury." PSA ¶ 34.

VI. **REQUEST TO LIMIT DAMAGES**

The Court rejects Defendants' request that it enter an Order, on a motion to dismiss, limiting Plaintiff's claims. The "claims" PriceSmart will be entitled to pursue and present to the trier of fact will be dictated by the terms and conditions of their written agreements, *as amended,* and this Court will not, at the motion to dismiss stage, adjudicate whether any claims Plaintiff has alleged are proscribed by the PSA because they were first made after the Outside Claim Date. At this point it appears to the Court that all of Plaintiff's claims involve "Slab Repairs" and therefore fall comfortably within the amendments extending the PSA's "Outside Claim Date." But Defendants are free to argue otherwise as part of their defense on the merits.

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

1. Defendants' Motion to Dismiss Plaintiff's claims in their entirety is **DENIED**.

2. Count IV of Plaintiff's Complaint, asserting a claim for Breach of Implied Warranty, is **DISMISSED** with prejudice.

3. Plaintiff's Demand for Jury trial is stricken.

4. Defendants' request to limit the scope of Plaintiff's claims is **DENIED** without prejudice; and

5. Defendants shall file their Answer and Affirmative Defenses, together with any compulsory counterclaims and cross-claims, within twenty (20) days of this Order.

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[1]The AC alleges that this Contractor's Warranty insured "Section 3 land Marcobay" AC ¶ 37. The Court assumes this allegation is in error and that the warranty ran in favor of Section 31 and PriceSmart.

[2]PriceSmart later filed an amended complaint adding Marcobay as a Defendant.

[3]The claim PriceSmart asserts would not implicate any "title" insurance and neither party has suggested that any "other insurance coverage" PriceSmart had secured would be implicated here. What Defendants actually claim is that PriceSmart is obligated to pursue "other remedies" it may have against unidentified third parties and, most importantly, Marcobay, and exhaust those claims through litigation prior to making a claim against Section 31/FGL.

[4]The Court notes that Section 31 and FGL actually accepted the claim made by PriceSmart, even though they now insist that such a claim was not permitted to be made at all until litigation against Marcobay was exhausted. Thus, leading up to the litigation, neither Section 31 nor FGL stood on the interpretation of section 5(d) now advanced. Moreover, while Section 3 1 on the one hand argues that the claim is "premature" because PriceSmart is required to litigate its claim against Marcobay first, it also asks the Court to dismiss damage claims made after the "Outside Claim Date" to the extent they are beyond the scope of the PSA's amendments; amendments that would not have

been necessary at all if a claim could not even be made prior to PriceSmart exhausting remedies against Marcobay.

* * *

Real property—Quiet title—Mortgage lien—Statute of repose—Where more than five years have passed since date of maturity of mortgage lien, lien is extinguished by statute of repose and is unenforceable—Plaintiff is adjudged to have good fee simple title to property, which is cleared of cloud on title

NORMA GIOCONDA BATTAGLIA, Plaintiff, v. MARTBO ENTERPRISES INC., Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-001632-CA-01, Section CA02. April 28, 2020. Alan Fine, Judge. Counsel: Jacqueline C. Ledón, Ledon Law, P.A., Miami Shores; and Alejandra Aguilera, The Aguilera Law Center, P.A., Miami, for Plaintiff. Maria L. Larrabure, Sanchez Vadillo, LLP, Doral, for Defendant.

FINAL JUDGMENT

THIS CAUSE came before the Court upon Plaintiff Norma Gioconda Battaglia's Motion for the Entry of a Final Judgment as to her Amended Complaint to Quiet Title, and pursuant to the Court's October 23, 2019, Order Granting Plaintiff's Motion for Summary Judgment and the Court's November 19, 2019, Order Granting Rehearing[2] in Part and Denying in Part, it is, therefore;

ORDERED AND ADJUDGED that:

1. The $50,000 balloon mortgage dated August 2, 2005, in favor of Defendant Martbro Enterprises, Inc., recorded in the Miami Dade County Public Records at book 23711, page 3695 (the "Mortgage"), clouds and slanders title to the real property at issue located in Miami-Dade County, Florida at 9191 Fontainebleau Boulevard, #309, Miami, Florida 33172-6303, with the legal description: THE OAKVIEW CONDO NO 5 UNIT 309 BLDG 3 UNDIV 0.0107911% INT IN COMMON ELEMENTS OFF REC 17274-4700 OR 17536-1951 0297 1 and folio number 30-3054-095-0870 (the "Property"),

2. The maturity date is readily ascertainable on the face of the Mortgage: "[t]his loan shall be Case No: 2018-001632-CA-01 Page 1 of 4 Filing # 105449817 E-Filed 03/25/2020 09:19:58 PM payable in full on August 1, 2010."

3. Accordingly, the Mortgage lien terminates five years from the date of maturity. Fla. Stat. § 95.281(1)(a) (Statute of Repose). See also *Deutsche Bank Trust Co. v. Beauvais*, 188 So. 3d 938, 953 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D933b].

4. Because more than five years have passed since the date of maturity, the Mortgage lien is extinguished by the statute of repose and unenforceable as a matter of law. *Houck Corp. v. New River, Ltd.*, 900 So. 2d 601, 603 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D387a] (internal citations omitted) (explaining that the statute of repose "provides a substantive right to be free from liability after the established time period [and t]hus . . . prevents the cause of action from arising after its time limitation. The purpose of a statute of repose is to set a definitive time limitation on a valid cause of action").

5. The Mortgage is hereby removed as a cloud on the title to the Property. Fla. Stat. §65.061(4).

6. All claims, rights, title, or interest of Defendant Martbro Enterprises, Inc. and those parties claiming by, through, under or against it are forever quieted and confirmed in Plaintiff Norma Gioconda Battaglia. *Id.*

7. Defendant Martbro Enterprises, Inc. and all parties claiming by, through, under, or against it are perpetually enjoined from asserting any rights, title, claims, or interest in and to the Property. *Id.*

8. Plaintiff Norma Gioconda Battaglia is adjudged to have a good fee simple title to the Property which is hereby cleared of cloud. *Id.*

9. The Mortgage is discharged of record from or against the Property.

10. The Court retains jurisdiction to determine Plaintiff's entitlement to, and the amount of (if any), her attorneys' fees and costs, and to enter such orders as may be necessary to enforce this Final Judgment.

11. Defendant shall take nothing by this suit and go hence without day. (The November 19, 2019, Order treats Defendant's Motion for Rehearing as a Motion for Reconsideration.)

* * *

Counties—Mask ordinance—Constitutionality—Emergency motion for temporary injunction enjoining enforcement of mask ordinance is denied where plaintiffs have failed to show by competent substantial evidence that they have substantial likelihood of success on merits of constitutional challenge to ordinance or that public interest would be served by enjoining enforcement of ordinance—Neither constitutional right to privacy, right to refuse medical treatment, nor right to individual autonomy over medical health is infringed by ordinance's mandate to wear face covering in public unless person has medical condition that makes wearing mask unsafe—Ordinance is not unconstitutionally vague—Ordinance has clear rational relationship to legitimate government objective of protecting public health—Fact that masks are unable to completely prevent spread of COVID-19 does not establish that ordinance is arbitrary or irrational—Public interest is not served by enjoining ordinance where potential injury to public outweighs individual right to relief

JOSIE MACHOVEC, CARL HOLME, KAREN HOLME, RACHEL EADE, and ROBERT SPREITZER, Plaintiffs, v. PALM BEACH COUNTY, a political subdivision of the State of Florida, Defendant. Circuit Court, 15th Judicial Circuit in and for Palm Beach County, Civil Division AF. Case No. 2020CA006920AXX. July 27, 2020. John S. Kastrenakes, Judge. Counsel: Louis Leo, IV, Joel Medgebow, Melissa Martz, and Cory Strolla, Coconut Creek, for Plaintiffs. Rachel Fahey and Anaili Cure, West Palm Beach, for Defendant.

ORDER DENYING PLAINTIFF'S VERIFIED EMERGENCY MOTION FOR TEMPORARY INJUNCTION

THIS CAUSE came before the Court on Plaintiffs, Carl Holme, Rachel Eade, and Robert Spreitzer's ("Plaintiffs") Verified Emergency Motion for Temporary Injunction (DE #4) filed June 30, 2020, pursuant to Fla. R. Civ. P. 1.610. The Defendant, Palm Beach County (the "County") filed its Response in Opposition (DE #54) on July 13, 2020, and Plaintiffs filed a Reply (DE # 124) on July 17, 2020. Argument by the parties was heard at a hearing held on July 21, 2020. Having carefully considered Plaintiffs' Motion, the County's Response, Plaintiff's Reply, the evidence presented during the hearing, the applicable law, and being otherwise fully advised in the premises, the Court finds as follows:

A. Procedural and Factual Background.

COVID-19 is a respiratory illness caused by a novel coronavirus that spreads rapidly from person to person and may result in serious illness or death. The threat presented by the worldwide COVID-19 pandemic cannot be seriously disputed. As the Supreme Court of the United States stated over a century ago when addressing claims minimizing the threat of smallpox, "[w]hat everybody knows the court must know." *Jacobson v. Mass.,* 197 U.S. 11, 30 (1905) (approving the government's authority to require smallpox vaccination). Thousands of Floridians have been killed by COVID-19, and many more have been hospitalized.[1] (Def. Ex. "N"). A state of emergency has been declared at all levels of government. (Def. Ex. "A," "B," "C"). As of this date, COVID-19 has killed more than 140,000 Americans nationwide,[2] and there currently is no known cure, no effective treatment, and no vaccine. *S. Bay United Pentecostal Church v. Newsom,* 140 S. Ct. 1613 (2020) [28 Fla. L. Weekly Fed. S395a]. Suffice to say, the COVID-19 pandemic has thrust humankind into an unprecedented global public health crisis. *Gayle v. Meade,* No. 20-21553, 2020 WL 2086482, at *1 (S.D. Fla. Apr. 30, 2020). In addition to presenting a mortal threat, COVID-19 has proven particularly resistant to containment. "People may be infected

but asymptomatic, [and] may unwittingly infect others." *Newsom,* 140 S. Ct. 1613.

It is with this background that the Palm Beach County Board of County Commissioners ("BCC") voted unanimously to enact Emergency Order No. 2020-12 on June 24, 2020. Emergency Order 12 ("the Mask Ordinance") requires the citizens of Palm Beach County to utilize face coverings in the form of masks or plastic face shields while in designated public places. Exceptions to the Mask Ordinance are for children under the age of two years, persons actively engaged in socially distant exercise, persons who have a medical condition that makes wearing a facial covering unsafe, and persons who object based on their religious belief. The Mask Ordinance further allows for temporary removal of a face covering in order to consume food and beverages and to assist hearing impaired persons with lip reading.

Prior to the issuance of the Mask Ordinance, Palm Beach County experienced a sharp increase in the number of COVID-19 cases and attendant deaths. (Def. Ex. "G-3," "H-3," "N-1"). The Mask Ordinance is of temporary and finite duration, subject to a thirty (30) day expiration and review by the BCC. The County determined that Emergency Order 12 was warranted and necessary to combat this deluge of disease and death. Plaintiffs, who are Palm Beach County citizens, contest this Emergency Order as unconstitutional and seek an emergency temporary injunction to enjoin its enforcement.[3]

B. Temporary Injunction Standard.

The extraordinary remedy of a temporary injunction "should be granted sparingly and only after the moving party has alleged and proved facts entitling it to relief." *Hiles v. Auto Bahn Fed'n, Inc.,* 498 So. 2d 997, 998 (Fla. 4th DCA 1986). To obtain a temporary injunction, the movant must establish the following: (1) a substantial likelihood of success on the merits; (2) a lack of an adequate remedy at law; (3) the likelihood of irreparable harm absent the entry of an injunction; and (4) that injunctive relief will serve the public interest. *Gainesville Woman Care, LLC v. State,* 210 So. 3d 1243, 1258 (Fla. 2017) [42 Fla. L. Weekly S183a]. The movant must prove each element with competent, substantial evidence. *State, Dep't of Health v. Bayfront HMA Med Ctr., LLC,* 236 So. 3d 466, 472 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D96a]. If the movant fails to prove one of the requirements, the motion for injunction must be denied. *Id.*

C. Plaintiffs' Position.

Plaintiffs argue they have a substantial likelihood of success on the merits because Emergency Order 12 violates two constitutional rights: their right to privacy pursuant to Article I, Section 23 of the Florida Constitution ("Every natural person as the right to be let alone and free from governmental intrusion into the person's private life. . ."), and their right to due process pursuant to Article I, Section 9 of the Florida Constitution ("No person shall be deprived of life, liberty, or property without due process of law"). As to their right to privacy, Plaintiffs' argue that the requirement to wear a facial covering in public spaces constitutes an impermissible intrusion into their private lives, including an individual's right to refuse "medical treatment." As a result, Plaintiff's claim that "strict scrutiny" of the Mask Ordinance is required, and that the Order should be enjoined because it does not further a compelling state interest using the least intrusive means. *Gainesville Woman Care, LLC,* 210 So. 3d at 1253; *In re T.W., 551* So. 2d 1186, 1193 (Fla. 1989). As to their due process rights, Plaintiffs argue that the Mask Ordinance is vague, arbitrary, and unreasonable, and is not backed by any compelling state interest or facts to support that interest.

Plaintiffs further argue they have no adequate remedy at law because monetary damages are not available for violation of privacy rights. *See Tucker v. Resha,* 634 So. 2d 756 (Fla. 1st DCA 1994), and that they will suffer irreparable harm because the loss of fundamental freedoms, even for a minimal period of time, constitutes irreparable injury. *Gainesville Woman Care, LLC,* 210 So. 3d at 1263 (citing *Elrod v. Burns,* 427 U.S. 347, 373 (1976)). Plaintiffs also point to the fact that the Mask Ordinance is enforceable by law enforcement, and can result in being charged with a second-degree misdemeanor, and fines ranging from $250.00 up to $500.00. Finally, Plaintiffs argue the public interest is served by preventing the placement of undue and unconstitutional burdens on individuals.

Plaintiffs raised additional grounds challenging Emergency Order 12 both in their Amended Complaint and at the hearing, including the County's legal authority to enact the order under Section 252.38, Florida Statutes, whether the Order is inconsistent with general law in violation of Art. VIII, § 1 Fla. Const., and whether the Order violates Plaintiffs' rights to free speech pursuant to Art. I, § 4 Fla. Const. However, because these grounds were not raised in Plaintiffs' Verified Emergency Motion for Temporary Injunction, they will not be addressed by this Order. *See* Fla. R. Civ. P. 1.100(b) (motion must state with particularity the grounds for it); *See Lingelbach's Bavarian Rests., Inc. v. Del Bello,* 467 So. 2d 476, 479 (Fla. 2d DCA 1985) (holding that a motion, not complaint, for injunctive relief is the appropriate mechanism for seeking preliminary injunction); *Nationstar Mortg., Ltd. Liab. Co. v. Weiler,* 227 So. 3d 181, 184 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D1196a] (finding procedural due process rights are violated when court hears and determines matters outside the scope of the pending motion).

D. The County's Position.

The County only disputes Plaintiffs' argument that it has a substantial likelihood of success on the merits and that the public interest is served by refusing to enforce Emergency Order 12.

As to Plaintiffs' likelihood of success on the merits, the County asserts that no constitutional right to privacy has been infringed by the Mask Ordinance because: (a) there is no reasonable expectation of privacy regarding one's physical appearance in public places; (b) there is no reasonable expectation of privacy in one's decision to unwittingly subject others to illness and death, or otherwise do as one pleases in public; and (c) requiring the wearing of facial coverings does not constitute medical treatment or otherwise intrude upon an individual's right to make private medical decisions.

The County further asserts that no right to due process has been infringed because the Mask Ordinance is not vague—individuals are not left to guess about what is required (wear a face covering or face shield), where it is required (places identified in Section 4a-d), or for whom it is required (everyone not falling within an exception in Section 4e). The County also argues due process has not been violated because Emergency Order 12 is not arbitrary since the government has a legitimate interest in protecting public health by stopping the spread of COVID-19, and both the regulation as well as all stated exceptions have a clear rational basis.

Because no constitutional right has been implicated, Plaintiffs argue that this Court should not apply "strict scrutiny" to Emergency Order 12, and must instead review the order using a "rational basis" standard. The County asserts there is a clear rational basis for the Mask Ordinance because facial coverings help reduce the spread of COVID-19, and the Court must defer to this conclusion even if reasonable people can disagree about the effectiveness of the chosen policy.

Finally, the County fugues that Emergency Order 12 would even pass strict scrutiny should that be necessary, because the government's interest in preventing widespread death and injury from COVID-19 is compelling, and the Order is narrowly tailored to advance that interest due to its stated exceptions and the County's decision to enact a mask requirement as opposed to other, more drastic

measures (such as closing public establishments altogether).

E. Legal Analysis.

Plaintiffs have failed to show, by competent substantial evidence, they have a substantial likelihood of success on the merits or that the public interest would be served by enjoining the enforcement of Emergency Order 12. Like the three other Florida courts which have addressed this issue to date, this Court finds no constitutional right is infringed by the Mask Ordinance's mandate to wear a facial covering, and that the requirement to wear such a covering has a clear rational basis based on the protection of public health. *See Green v. Alachua Cty.,* No. 0102020-CA-001249 (Fla. 8th Cir. Ct. May 26, 2020); *Ham v. Alachua Cty. Bd. of Cty. Comm's,* No. 1:20-cv-00111-MW/GRJ (N.D. Fla. May 30, 2020); *Power v. Leon Cty.,* No. 2020-CA-001200 (Fla. 2d Cir. Ct. July 10, 2020).

The duly elected representatives of this county have come to a reasonable and logical conclusion that mandating the wearing of facial coverings best serves their constituents, and neither this Court nor an apparent vocal group of residents has the authority to second guess that policy decision. *See Jacobson v. Mass.,* 197 U.S. 11, 35 (1905); *Newsom,* 140 S. Ct. 1613 (2020) (citing *Jacobson* with approval). This Court is not prepared to find that unelected persons residing or remaining in any city or town where COVID-19 is prevalent, and enjoying the general protection afforded by an organized local government, may nonetheless defy the will of its constituted authorities based solely on their personal disagreement with the manner in which those authorities seek to safeguard the general public. *See Jacobson,* 197 U.S. at 37. To rule otherwise would unravel the very fabric of government in the midst of a global health crisis.

1. Plaintiffs Do Not Have a Substantial Likelihood of Success on the Merits.

Emergency Order 12 does not infringe any cognizable privacy right of individuals in Palm Beach County. Article I, Section 23 of the Florida Constitution does not guarantee against all intrusion into the life of an individual. *City of N. Miami v. Kurtz,* 653 So. 2d 1025, 1027-28 (Fla. 1995) [20 Fla. L. Weekly S170a] (citing *Fla. Bd. of Bar Examiners re Applicant,* 443 So. 2d 71 (Fla. 1983)). There is no reasonable expectation of privacy as to whether one covers their nose and mouth in *public* places, which are the only places to which the Mask Ordinance applies. *Winfield v. Div. of Pari-Mutuel Wagering, Dept. of Bus. Regulation,* 477 So. 2d 544, 547 (Fla. 1985). *See, e.g. Picou v. Gillum,* 874 F.2d 1519, 1521 (11th Cir. 1989) (rejecting a claim that one has a "right to be let alone" from Florida's helmet laws and stating, "[t]here is little that could be termed private in the decision whether to wear safety equipment on the open road."); *Pottinger v. City of Miami,* 810 F. Supp. 1551, 1574 (S.D. Fla.1992) (holding that an individual has no legitimate expectation of privacy in such activities as eating and sleeping in public). Plaintiffs cite to no contrary authority suggesting the existence of their specifically claimed right to privacy in the decision to wear a mask in public.

Emergency Order 12 also does not infringe an individual's right to refuse medical treatment. Plaintiffs cite to the Food and Drug Administration's ("FDA") definition of "medical device" to posit that a mask falls within that definition. Whether a mask is a "medical device" is irrelevant to whether the mandated wearing of one is a prohibited "medical procedure." The Court is not persuaded by Plaintiffs' argument that the wearing of a mask is a medical treatment or medical procedure. Moreover, in the case of uninfected or asymptomatic individuals, merely wearing a mask does not address any medical malady of the wearer. Rather, the covering of one's nose and mouth is designed to safeguard other citizens. A mask is no more a "medical procedure" than putting a Band-Aid on an open wound. It is also not close to being analogous to the consequential or invasive medical procedures at issue in other cases addressing the right to medical privacy, such as decisions involving the termination of pregnancies or life itself. *Gainesville Woman Care, LLC,* 210 So. 3d at 1244; *N. Fla. Women's Health & Counseling Servs., Inc. v. State,* 866 So. 2d 612, 615 (Fla. 2003) [28 Fla. L. Weekly S549a]; *In re T.W.,* 551 So. 2d 1186 (Fla. 1989); *In re Guardianship of Browning,* 568 So. 2d 4, 11 (Fla. 1990). In fact, wearing a mask or face covering is less intrusive than the preventative measure of placing fluoride in drinking water which has been held by this District as not being a medical procedure and being constitutional. *Quiles v. City of Boynton Beach,* 802 So. 2d 397, 399 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2764b].

Second, Emergency Order 12 does not infringe an individual's autonomy over their own medical health because, the moment the wearing of a facial covering *does* implicate the mask wearer's health, they become exempt to the requirement pursuant to Section 4(e)(6) of the Mask Ordinance. This exception vitiates the argument that the Mask Ordinance constitutes government intrusion into Plaintiffs' medical autonomy. If anything, the County's narrowly tailored regulation has wisely left the Plaintiffs' individual medical autonomy intact.

Also, Emergency Order 12 is not unconstitutionally vague. "The standard for testing vagueness under Florida law is whether the statute gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct." *Jones v. Williams Pawn & Gun, Inc.,* 800 So. 2d 267, 270 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2444a]. The Court finds that Plaintiffs are not substantially likely to succeed with any claim that the Mask Ordinance is unconstitutionally vague based on the Court's own reading of the plain language of the Order and the County's common sense responses to the alleged ambiguities.

Emergency Order 12 does not violate due process for being arbitrary, capricious, or discriminatory. "Under substantive due process, the test 'is whether the statute bears a rational relation to a permissible legislative objective that is not discriminatory, arbitrary, capricious, or oppressive.' " *Jackson v. State,* 191 So. 3d 423, 428 (Fla. 2016) [41 Fla. L. Weekly S209a] (internal citation omitted). The Court finds that the Mask Ordinance bears a rational relationship to the legitimate government objective of protecting the public health by preventing the spread of COVID-19. *See Ham v. Alachua Cty. Bd. of Cty. Comm's,* No. 1:20-cv-00111-MW/GRJ (N.D. Fla. May 30, 2020).

Plaintiffs' argument and evidence that facial coverings are unable to completely prevent the spread of COVID-19 cannot establish that Emergency Order 12 is arbitrary or irrational. There may be a healthy public and scientific debate about the precise level of effectiveness of masks to protect the public health in this circumstance. As United States District Judge Walker observed in *Ham, supra,* "[the] Court is not tasked with deciding whether the [Alachua County Emergency Order] at issue is a good idea or bad idea." Further to that point, the Florida Supreme Court observed, in discussing the application and restrictions contained within the Youthful Offender Act promulgated by our Legislature, that

> [c]ourts will not be concerned with whether the particular legislation in question is the most prudent choice, or is a perfect panacea, to cure the ill or achieve the interest intended. If there is a legitimate state interest that the legislation aims to effect, and if the legislation is a reasonably related means to achieve the intended end, it will be upheld.

Jackson, 191 So. 3d at 428.

The fact that the wisdom of a regulation can be disputed does not make it irrational or unreasonable, and this remains particularly true during the uncertain times of the COVID-19 pandemic. *See Xponential Fitness v. Ariz.,* No. CV-20-01310-PHX-DJH, 2020 WL 3971908, at *7 (D. Ariz. July 14, 2020) (stating requirement that a

regulation attempting to stem the spread of COVID-19 be rational does not require it to be either the most effective, or the least restrictive, means to do so); *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer,* No. 20-1581, 2020 WL 3468281, at *3 (6th Cir. June 24, 2020) (same). *See also S. Bay United Pentecostal Church v. Newsom,* 140 S. Ct. 1613 (2020) [28 Fla. L. Weekly Fed. S395a] (stating in the context of a regulation imposing limitations on gatherings of people during the COVID-19 pandemic that, when public officials undertake to act in areas fraught with medical and scientific uncertainties, the latitude given to them must be especially broad).

2. Plaintiffs Have Not Shown the Public Interest is Served by Enjoining Emergency Order 12.

In situations such as these, where the potential injury to the public outweighs an individual's right to relief, the injunction must be denied. *Dragomirecky v. Town of Ponce Inlet,* 882 So. 2d 495, 497 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D2091a]. As set forth above, Plaintiffs have failed to establish that any constitutional right is implicated by the requirement to wear a facial covering in public. There are also ample exceptions to the requirement. What remains is a *de minimus* right entitled to little protection—the right to *not* wear a mask in public spaces.[4] Plaintiffs' minimal inconvenience caused by the Mask Ordinance must be balanced against the general public's right to not be further infected with a deadly virus. It is beyond dispute that the potential injury to the public that would result from enjoining the government's ability to prevent the spread of a presently incurable, deadly, and highly communicable virus far outweighs any individual's right to simply do as they please. *See Green v. Alachua Cty.,* No. 0102020-CA-001249 (Fla. 8th Cir. Ct. May 26, 2020); *Legacy Church, Inc. v. Kunkel,* No. CV 20-0327 JB\SCY, 2020 WL 3963764, at *101 (D.N.M. July 13, 2020) (public's interest in limiting the COVED-19 outbreak in the State outweighs the right to gather for religious services).

F. Conclusion.

The right to be "free from governmental intrusion" does not automatically or completely shield an individual's conduct from regulation. More to the point, constitutional rights and the ideals of limited government do not absolve a citizen from the real-world consequences of their individual choices, or otherwise allow them to wholly shirk their social obligation to their fellow Americans or to society as a whole. This is particularly true when one's individual choices can result in drastic, costly, and sometimes deadly, consequences to others. *See Picou,* 874 F.2d at 1521-22. After all, we do not have a constitutional or protected right to infect others. Regulations which remove an individual's discretion to make such choices are both reasonable and pervasive. *See* § 509.221(8), Fla. Stat. (2019) (prohibiting person with contagious disease from working at a public lodging or food service establishment); § 384.24(1), Fla. Stat. (2019) (making it unlawful to spread sexually transmitted disease through intercourse without the informed consent of the other person); §§ 386.202, 386.204, Fla. Stat. (2019) (prohibiting person from smoking or vaping in enclosed indoor workplaces).

"[There are circumstances in which a public emergency, for instance, a fire, ***the spread of infectious or contagious diseases*** or other potential public calamity, presents an exigent circumstance before which all private rights must immediately give way under the government's police power." *Davis v. City of S. Bay,* 433 So. 2d 1364, 1366 (Fla. 4th DCA 1983) (emphasis added). *See also Jacobson,* 197 U.S. at 29 (". . .in every well-ordered society charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint. . .as the safety of the general public may demand"). The ongoing dire public emergency caused by COVID-19 is precisely the sort of exigent circumstance that justifies governmental intrusion into individual autonomy. Further, the individual choice to not wear a facial covering, in the midst of a pandemic where asymptomatic carriers can unconsciously and unknowingly spread a deadly virus to others, can hardly be characterized as a "private" or "individual" choice.

The County has determined that an individual's decision whether to wear a mask is one of great public concern and grave consequence. In promulgating Emergency Order 12, it has duly utilized its police powers in order to protect the public health. *State Dept. of Agric. & Consumer Servs Div. of Animal Indus. v. Denmark* 366 So. 2d 469, 470 (Fla. 4th DCA 1979) ("It is within the police power of the State to enact laws to prevent the spread of infectious or contagious diseases"). Plaintiffs clearly dispute the merit of that action, but their vigorous desire to debate the efficacy or wisdom of requiring masks does not establish that a constitutional right has been violated, or that the government lacked a rational basis for its action.

As this community tries desperately to navigate the tumultuous seas presented by COVID-19, it is reasonable and logical that our elected officials are throwing the citizens of Palm Beach County a lifeline in an attempt to ameliorate the spread of this deadly, unbridled, and widespread disease. Based on the evidence presented, this Court will not second guess the manner in which a co-equal branch of government sought to discharge its sacred duty to protect the general public. **WHEREFORE**, it is hereby

ORDERED and ADJUDGED that Plaintiffs' Verified Emergency Motion for Temporary Injunction is **DENIED**.

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[1]According to the Center for Disease Control ("CDC") statistics, as of July 21, 2020, there are 369, 834 Floridians with confirmed cases of COVID-19, and 5,206 deaths.

[2]CDC statistics as of July 21, 2020 are that 3,819,139 Americans have tested positive for COVID-19 with 140,630 deaths.

[3]At oral argument, Plaintiffs' counsel discussed the enforcement of a mask requirement at various business establishments. Such actions by private businesses are not directly implicated by this lawsuit. Nevertheless, the Court notes here, as it did during argument on the Motion, that private businesses are free to impose mask requirements so long as they do not implicate enforcement discrimination based on any protected class. In fact, numerous businesses have enacted such a requirement nationwide irrespective of any local or State mandated mask requirement. Other businesses have instituted state-wide mask requirements.

[4]Of course, Plaintiffs' arguments concerning the difficulty in breathing fresh air through a mask are completely refuted by the ability to wear a face shield, a measure provided for by the Mask Ordinance.

* * *

Torts—Attorneys—Legal malpractice—Limitation of actions—Cause of action for transactional legal malpractice based on attorney's drafting of amendment to declaration of condominium that charged $2000 title transfer fee in direct violation of Condominium Act, which limits title transfer fees to $100, accrued and two-year statute of limitations began to run when condominium association was damaged by adverse judgment at conclusion of federal lawsuit—Malpractice suit initiated within two years of settlement of class action brought on behalf of condominium owners forced to pay unlawful fee, but more than two years after conclusion of federal lawsuit, is barred by statute of limitations

THE PINES OF DELRAY NORTH ASSOCIATION, INC., Plaintiffs, v. LAW OFFICES OF JOSHUA G. GERSTIN, P.A., a Florida Professional Association, Defendants. Circuit Court, 15th Judicial Circuit in and for Palm Beach County, Civil Division AF. Case No. 2019CA005510AXX. June 16, 2020. John S. Kastrenakes, Judge. Counsel: Warren R. Trazenfeld, Miami, for Plaintiff. Jaclyn Ann Behar, Sunrise, for Defendant.

OMNIBUS ORDER ON PENDING MOTIONS FOR PARTIAL SUMMARY JUDGMENT ON COUNT 1

THIS CAUSE came on to be heard on competing Motions for Partial Summary Judgment relating to Count 1 of the Second

Amended Complaint charging Defendant Law Offices of Joshua G. Gerstin, P.A., a Professional Association ("Defendant") with Legal Malpractice. Initially, Plaintiff, The Pines of Delray North Association, Inc. ("Plaintiff') brought its Motion for Partial Summary Judgment on Defendant's Second Affirmative Defense-Statute of Limitations (DE #65), on January 28, 2020. Defendant responded in Opposition (DE #55), on January 6, 2020.[1] Plaintiff Replied (DE #123), on May 12, 2020. Subsequently, Defendant filed its Motion for Partial Summary Judgment on Count 1 asserting that the Statute of Limitations period expired when the instant lawsuit was commenced (DE #109), on April 13, 2020. Plaintiff responded in opposition thereto (DE #122), on May 11, 2020. The Court has held multiple hearings on these competing motions. The Court, having carefully reviewed the respective motions and attached exhibits, having reviewed the opposing responses, having reviewed the applicable case law, having heard extensive argument of counsel, and being otherwise fully advised in the premises, finds as follows:

A. Background.

This is a legal malpractice action filed by the Plaintiff, The Pines of Delray North Association, Inc. against its former attorney, Joshua G. Gerstin, P.A. The original complaint was filed April 26, 2019. Plaintiff is a Homeowner's Association charged with the maintenance and operation of The Pines of Delray North, a multi-unit condominium complex. Essentially, Plaintiff claimed they hired Defendant to draft for Board approval an Amendment to the Declaration of Condominium which would add to the purchase price of any condominium sold or leased, a $2,000 non-refundable fee payable to the Association.[2] The 2013 Amendment contained a provision titled "Lease and Transfer of Ownership Fees" which provided in part as follows:

> [t]he Association shall also have the right to charge a non-refundable fee, at an amount determined annually by the Board of Directors or, at the prior year's amount if no such determination is made, upon the sale or transfer of a Unit to a third party or upon the acquisition of a Unit by a mortgagee upon the foreclosure of a mortgage. In conjunction with Florida law, the Board of Directors shall determine the allocation of all funds received pursuant to this paragraph. All fees imposed by this paragraph shall be collectible by the Association in the same manner as an assessment, including the filing of a lien and foreclosure action as well as the imposition of late fees, interest, attorneys' fees and costs. This fee shall run with the land.

The Amendment was approved by the Association on April 30, 2013. Since the fee was made to run with the land, the fee was recoverable by the Association in all actions where there was a transfer of title or ownership, or the granting of a lease.

Subsequently, the United States of America initiated a foreclosure action against a single condominium unit within The Pines of Delray North. They successfully foreclosed on the property and title transferred to the United States. When the United States sought to sell the condominium unit, the Association sought to obtain its $2,000 title transfer fee. Thereupon, the Government filed suit claiming that the fee was unlawful and in direct violation of Section 718.112(2)(i), Florida Statutes, which statute limits fees with title transfers to $100. In United states district Court, the United States was successful in its Motion for Summary Judgment relating to the unlawful fee, and the District Judge concluded that the Association was in direct violation of the Condominium Act with respect to its adoption of this Amendment ("the Federal lawsuit"). That decision was final on July 21, 2015. The Plaintiff was forced to pay to the United States approximately $6,600 representing the unlawful transfer fee, plus fees and costs. Plaintiff, of course, was aware of this adverse decision. *See United States v. Pines of Delray N. Ass'n, Inc.,* 2015 WL 12550916 (S.D. Fla., July 21, 2015).

Thereafter, on April 27, 2018, a condominium owner brought a class action suit against the Association, joining as members of that class all condominium owners who were charged and forced to pay the unlawful condominium transfer fee. *See Richard Kerski on behalf of himself and all others similarly situated v. The Pines of Delray North Association, Inc.,* case number 2018CA005183AXX ("the Kerski lawsuit"). During the pendency of that litigation, the Pines of Delray North association, Inc. settled the case with the Kerski lawsuit plaintiffs for a substantial monetary sum. That action was dismissed with prejudice based on the settlement on or about November 15, 2019.

In earlier related litigation in this case, Plaintiff moved for Partial Summary Judgment relating to the liability of the Defendant. The Court found, after argument and review of the applicable statute, that the Defendant-drafted amendment was in direct violation of a clear and unambiguous statute which prohibited fees in excess of $100. The Court also ruled that the overwhelming evidence established that this was not "an unsettled area of the law." However, the Court reserved ruling on the Statute of Limitations affirmative defense which is now ripe for consideration. *See* DE #59, Order entered January 24, 2020.

B. Legal Issue Presented and Position of Parties.

The parties agree on the above facts. They also agree that the 2-year Statute of Limitations set forth in Section 95.11(4)(a) controls. This lawsuit was initiated within two years of the final settlement of the Kerski lawsuit but outside two years of the final adjudication in the Federal lawsuit.

Plaintiff argues that as a result of Defendant's negligent drafting of the 2013 Amendment, Plaintiff incurred damages from two separate lawsuits—the federal lawsuit in 2015 and the Kerski lawsuit in 2018—each of which constitute discrete causes of action for malpractice that each have their own statute of limitations period. Plaintiff claims that the instant lawsuit, which only seeks damages related to the Kerski lawsuit is timely and that Plaintiff is entitled to the bifurcation of damages procedure set forth in *Larson & Larson, P.A. v. TSE Indus., Inc.,* 22 So. 3d 36 (Fla. 2009) [34 Fla. L. Weekly S591a]. This bifurcation procedure treats the damages suffered in the Kerski lawsuit differently than the damages that accrued when Plaintiff paid the United States of America at the conclusion of the Federal lawsuit.

Defendant, on the other hand, argues that the damages that Plaintiff incurred in the Kerski lawsuit are not discrete from the damages that it incurred from the federal lawsuit, thus there is only one statute of limitations period which began at the conclusion of the federal lawsuit in 2015. Defendant claims that this cause of action seeking damages for legal malpractice for Defendant's drafting of the 2013 Amendment accrued when the United States of America obtained its final judgment against Plaintiff for the 2013 transfer fee, or on July 21, 2015. Defendant further claims that the malpractice alleged here is transactional in nature and that the malpractice action accrued when the Plaintiff was damaged by the Defendant's malpractice when the third party (the United States) obtained judgment for the exact same act that comprised the legal malpractice in the Kerski lawsuit. *See Perez-Abreu, Zamora & De La Fe, P.A. v. Taracido,* 790 So. 2d 1051, 1054 (Fla. 2001) [26 Fla. L. Weekly S492a]; *Throneburg v. Boose, Casey, Ciklin, Lubitz, Martens, McBane & O'Connell,* 659 So. 2d 1134 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1776a]; *Zuckerman v. Ruden, Barnett, McCloskey, Smith, Schuster & Russell, P.A.,* 670 So. 2d 1050 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D615a].

C. Analysis and Discussion of Legal Issue.

This fact pattern presents a unique issue which has not been squarely addressed by previous case law. A cause of action for legal malpractice has three elements: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) the attorney's

negligence was the proximate cause of loss to the client. *Arrowood Indem. Co. v. Conroy, Simberg, Ganon, Krevans, Abel, Lurvey, Morrow & Schefer, P.A.,* 134 So. 3d 1079, 1082 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D128a]; *Kates v. Robinson,* 786 So. 2d 61, 64 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1277a]. In this case, the parties agree that the establishment of the first two elements is not an issue. The issue squarely presented is when the attorney's malpractice proximately caused loss to the client.

The malpractice committed by Defendant in this case is the exact same malpractice decided in the Federal lawsuit adversely to Plaintiff, all of which is related to his drafting of the 2013 Amendment which charged an excessive and unlawful non-refundable transfer fee. The cases relied on by Plaintiff which allow bifurcation of damages relate to litigation malpractice cases. Litigation-related legal malpractice is predicated on errors or omissions that are committed within the course of litigation. *Silvestrone v. Edell,* 721 So. 2d 1173,1175 (Fla. 1998) [23 Fla. L. Weekly S625a]. In other words, where the attorney was hired to represent a client in litigation and then committed malpractice. In those cases, the developed law has permitted a subsequent legal malpractice claim in the same case after the statute of limitations expired for the main action, due to other adverse and collateral consequences to the main judgment, such as fees imposed as a sanction or for attorney's fees. *See Larson & Larson, supra; see also Integrated Broadcast Services, Inc. v. Mitchel,* 931 So. 2d 1073 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1815b]; *R.S.B. Ventures, Inc. v. Berlowitz,* 211 So. 3d 259 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D258a].

In *Larson,* a litigation malpractice case, the Supreme Court of Florida addressed the issue of whether there were two different dates of accrual for the statute of limitations. The underlying judicial proceeding in *Larson* was a patent infringement case wherein the client incurred damages from: (1) the underlying litigation; and (2) the post-trial sanctions. *Id* at 38. The client brought a legal malpractice action against the law firm based on these damages. *Id* at 38-39. The Court adopted a bifurcated approach to the statute of limitations and held that the malpractice action predicated on damages from the underlying litigation had a separate statute of limitations period than the malpractice action predicated on damages from the post-trial sanctions. *Id.* at 46-47. The Court reasoned that it was appropriate to bifurcate the statute of limitations the post-trial sanctions were collateral damages that had no effect on the damages related to the merits of the underlying case. *Id* at 47.

Based on the Court's analysis in *Larson,* it can be inferred that the statute of limitations for a legal malpractice action should only be bifurcated where the client suffers additional damages that are collateral to the damages it suffered by losing on the merits of the underlying case. Effectively, this would mean that *Larson* has no application outside of the context of litigation-related legal malpractice. In this context, it is possible for an attorney to engage in negligence that causes damages from the client losing on the merits of the underlying case which would give rise to a malpractice action. However, it is also possible for the same attorney to engage in additional negligence which causes collateral damages that are unrelated to the underlying merits of the case (i.e. attorney fees/sanction), thus giving rise to a second malpractice action.

In contrast, transactional legal malpractice actions are predicated on errors in prior transactions that cause the client to incur damages from losing on the merits of subsequent litigation. *See Perez-Abreu, Zamora & De La Fe, P.A. v. Taracido,* 790 So. 2d 1051 (Fla. 2001) [26 Fla. L. Weekly S492a] (holding that transactional legal malpractice accrues at the conclusion of subsequent litigation between the client and the third party). Thus, the attorney's negligence in the prior transaction does not have the effect of causing any collateral damages in the subsequent litigation.

The defendant has the better argument here. First and foremost, this is not a litigation malpractice case but a transactional malpractice case. In transactional malpractice cases, the cause of action accrues when the Plaintiff is damaged by the negligent advice. The Court understands that the Plaintiff was far more damaged by the Kerski lawsuit than the Federal lawsuit, but damage is damage. The statute of limitations began to run once the loss is first inflicted, and not when the full extent of damages have been ascertained. *See Larson & Larson, P.A. v. TSE Industries, Inc.,* 22 So. 3d 36, 42 (Fla. 2009) [34 Fla. L. Weekly S591a] (discussing the long-standing principal that the statute of limitations begin once there is "some loss," not when there is a determination of the "full extent" of losses).

In *Taracido, eta v. Perez-Abreu, Zamora & De La Fe, P.A.,* 705 So. 2d 41 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D2752e], *aff'd* 790 So. 2d 1051 (Fla. 2001) [26 Fla. L. Weekly S492a], the Third District discussed the facts of the case and its holding which have import here. In that transactional malpractice case, the plaintiffs claimed that the attorney was negligent in his drafting of contracts for the sale of stocks. In that case, the trial court granted summary judgment predicated on a finding that the statute of limitations began to run when the plaintiffs were served with a third party lawsuit in Federal court claiming that the contracts were invalid. The Third District reversed holding that the cause of action did not accrue until the related third party litigation in United States District Court was decided adversely to Plaintiffs. As stated by Judge Gersten,

> Thus we hold that a cause of action for legal malpractice based upon a prior transaction accrues at the conclusion of subsequent litigation between the client and a third party.

Taracido, supra at 43. Therefore, when the shareholder litigation in United States District Court determined with finality that the attorney-drafted contracts were invalid in the third party shareholder litigation, the cause of action for legal malpractice accrued, because that is when Plaintiffs were damaged. The Supreme Court approved the decision of Judge Gersten in *Perez-Abreu, supra,* 790 So. 2d 1051 (Fla. 2001).

This is exactly what happened here. In the instant case, Plaintiff incurred damages at the conclusion of the Federal lawsuit in 2015. At that point, Plaintiff suffered a loss as a proximate cause of Defendant's negligence, and that is when the cause of action for defendant's legal malpractice accrued. Thereafter, at the conclusion of the Kerski lawsuit in 2018, Plaintiff ascertained a fuller extent of losses it suffered as a result of Defendant's negligence. Accordingly, the statute of limitations for Plaintiff's legal malpractice action in Count 1 began to run in July 2015 when Plaintiff incurred damages at the conclusion of the Federal lawsuit.

Further to the same point, in *Throneburg v. Boose, Casey, Ciklin, Lubitz, Martens, McBane & O'Connell, P.A.,* 659 So. 2d 1134 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1776a], the Fourth District reversed a lower court order dismissing the case based on an alleged violation of the Statute of Limitations. In that case, the attorney was negligent in drafting a condominium declaration, a transactional malpractice claim. However, the District Court ruled that the cause of action did not accrue until the Circuit court in another action involving the same association and another owner established that the amendment was invalid, not at an earlier time when the attorney advised the association that the amendment needed to be changed. That case speaks to the accrual time for the malpractice action to commence when the plaintiff is damaged by a final decision in a related third party litigation regarding the same negligent advice. Here, the Federal lawsuit clearly established by a final judgment in July 2015 that Defendant was negligent in the drafting of the 2013 Amendment and Plaintiff was damaged thereby. *See also Zuckerman v. Ruden, Barnett, McCloskey, Smith, Schuster & Russell, P.A.,* 670 So. 2d 1050

(Fla. 3d DCA 1996) [21 Fla. L. Weekly D615a] (holding in a transactional malpractice case regarding an attorney's negligent drafting of a mortgage on homestead property, cause of action for malpractice does not accrue until related litigation on subsequent foreclosure is decided adversely to plaintiff).

In Plaintiff's Opposition to Defendant's Motion (DE #122, at pp. 4-6), Plaintiff further argued that the statute of limitations should be bifurcated based on the policy consideration raised in *Peat, Marwick Mitchell & Co. v. Lane,* 565 So. 2d 1323 (Fla. 1990). In *Peat, Marwick,* the Supreme Court of Florida addressed the question of whether the statute of limitations for an accounting malpractice action began once the client received a notice of tax deficiency or when the tax court action was final. *Id.* at 1326. The Court ultimately held that the statute of limitations began when the tax court action was final. *Id.* In doing so, the Court observed that if the statute of limitations were to begin when the client received the notice of a tax deficiency, then the client would be forced to bring a malpractice action while simultaneously litigating the underlying tax court action, which would place the client in the "wholly untenable position of having to take directly contrary positions." *Id.* at 1326.

Plaintiff posits that if it were required to sue Defendant for malpractice before the Kerski lawsuit had concluded, it would have been forced to put itself in the "wholly untenable" position described in *Peat, Marwick.* Regardless, the Florida Supreme Court has explicitly rejected this argument in *Larson* stating that:

> *Peat, Marwick* does not articulate a rule that the running of the statute of limitations for professional malpractice is held in abeyance until the conclusion of any collateral litigation in which the client might assert a position inconsistent with the malpractice claim. Such a rule could not be reconciled with the commencement point—"the time the cause of action is discovered or should have been discovered"—established in section 95.11(4)(a).

Larson, 22 So. 3d at 44. In point of fact, Plaintiff brought this lawsuit while the Kerski lawsuit was still pending. Of course, that action is contrary to their "wholly untenable" position argument. Accordingly, the policy consideration articulated in *Peat, Marwick* does not lend any support to the use of bifurcated statute of limitations ini the instant case. **WHEREFORE**, it is hereby

ORDERED and ADJUDGED that Plaintiff The Pines of Delray North Association, Inc.'s Motion for Partial Summary Judgment as to Defendant's Second Affirmative Defense-Statute of Limitations on Count 1 is **DENIED**. It is further

ORDERED and ADJUDGED that Defendant Law Offices of Joshua G. Gerstin's Motion for Summary Judgment on Count 1 based on the running of the Statute of Limitations is **GRANTED**. It is further

ORDERED and ADJUDGED that Count 1 of the Second Amended Complaint is **DISMISSED WITH PREJUDICE**.

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[1]Defendant's Memorandum in opposition pre-dated the actual motion specifically addressing the Statute of Limitations issue because Plaintiff incorporated its Statute of Limitations argument in its first-filed Motion for Summary Judgment-Liability Only as to Count 1(DE #26), on August 15, 2019.

[2]The amount of the fee was initially set at $2,000, but the Amendment provided that the amount of the fee was reviewable each year by the Board of Directors.

* * *

Torts—Medical malpractice—Wrongful death—Presuit requirements—Date wrongful death medical malpractice claim accrues within context of presuit notice requirements is same date it accrues for purposes of applicable statute of limitations and is either date of alleged malpractice, date plaintiff knew or should have known that her injuries were result of medical malpractice, or, at latest, date of decedent's death—Where outcome of healthy mother requiring tracheotomy and use of ventilator following caesarian delivery would convey reasonable possibility of medical malpractice, and evidence demonstrates that decedent was able to communicate and was competent to make medical decisions during her hospitalization, decedent's cause of action accrued during May 2016 hospitalization—Presuit notice provided more than two years after May 2016 failed to satisfy condition precedent to suit

JOHN P. SEILER, as the personal representative of THE ESTATE OF DERLINE DERILUS; OSEE JOSEPH, as parent of DELVON JOSEPH; and DELOURDES TOUSSAINT, as guardian of DAPHENY VALBRUN, the surviving minor children of DERLINE DERILUS, Plaintiffs, v. BAPTIST HEALTH SOUTH FLORIDA d/b/a BETHESDA HOSPITAL EAST; DEBORAH BAUM, M.D.; PULMONARY & SLEEP ASSOCIATES OF SOUTH FLORIDA, P.A.; CRITICAL CARE ASSOCIATES OF SOUTH FLORIDA, LLC; NATHAN MARKWART, D.O.; FERNANDO KELLER, M.D.; PULMONARY SPECIALISTS OF BOYNTON BEACH, INC.; FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES; JOEL BORGELLA, M.D.; OB/GYNS OF FLORIDA PLLC, d/b/a FLORIDA OB/GYN GROUP; AMN HEALTHCARE, INC.; MICHELLE GENNARO; and KEVIN TIPTON, A.R.N.P., Defendants. Circuit Court, 15th Judicial Circuit in and for Palm Beach County, Civil Division AF. Case No. 2018CA008463AXX. May 12, 2020. John S. Kastrenakes, Judge. Counsel: Daniel Harwin, Fort Lauderdale, for Plaintiff. Ronald L. Harrop, Orlando, for Defendant.

FINAL JUDGMENT IN FAVOR OF DEFENDANT FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES

THIS CAUSE having come on to be heard on Defendant, Florida Atlantic University Board of Trustees' ("FAUBOT") Amended Renewed Motion for Summary Judgment (DE #518), filed February 25, 2020, and the Court having carefully reviewed FAUBOT's Motion and attached Exhibits, having considered Plaintiffs' John P. Seiler, as Personal Representative of the Estate of Derline Derilus, *et. al*'s Response (DE #532), filed February 28, 2020, having considered Defendant FAUBOT's Reply Memorandum (DE #538), filed March 5, 2020, having heard extensive argument of counsel on March 16, 2020, having received and reviewed separate proposed Orders from Defendant and Plaintiff, and being otherwise duly advised in the premises, the Court finds as follows:

A. Background.

This is a medical malpractice action filed by the Plaintiff, John P. Seiler, as the Personal Representative of the Estate of Derline Derilus against FAUBOT and others, arising out of the medical care and treatment received by Plaintiff's decedent ("Decedent") during her hospitalization at Bethesda Hospital East ("Bethesda") from May 21, 2016 through May 31, 2016. The Decedent, a healthy thirty three (33) year old female was admitted to Bethesda for a seemingly routine caesarian delivery of a child who had come to term. Unfortunately, after the birth of the healthy child, Plaintiff's decedent suffered debilitating complications which caused her to be admitted to the intensive care unit at Bethesda for which was she was comatose for several days. After regaining consciousness, Plaintiff's decedent was transferred first to Memorial Hospital and then to Florida Hospital where she ultimately died on November 4, 2016. During that extended period of time, the evidence demonstrated that Plaintiff's decedent made numerous important decisions regarding her own care, the care of her child, and executed multiple medical consents in writing.

Plaintiff's Second Amended Complaint alleged claims against numerous healthcare providers. Count 8 of Plaintiff's Second Amended Complaint asserts a claim against FAUBOT based upon the alleged medical negligence of two physicians enrolled in FAUBOT's residency training program. Count 8 alleges that the two FAUBOT residents provided negligent care to Plaintiff's decedent on May 26, 2016, while she was hospitalized in Bethesda's intensive care unit.

FAUBOT is a subdivision of the State of Florida, and Plaintiff's claims against FAUBOT are subject to the limited waiver of sovereign immunity provisions contained in § 768.28, Fla. Stat. Accordingly, Plaintiff was required to comply with the pre-suit notice requirements of section 768.28(6)(a), Fla. Stat., which provide that no action may

be maintained against an agency or subdivision of the state unless the claimant first presents notice of the claim, in writing, to the appropriate state agency ***and*** to the Florida Department of Financial Services.

B. Legal Issue Presented and Position of Parties.

The parties initially dispute, as a matter of law, how to interpret the language of section 768.28(6)(a)(2), specifically the requirement that notice be provided "within 2 years after the claim accrues." The parties admit that there is no case law directly interpreting when "the claim accrues" within the specific context of a 768.28(6)(a)(2) notice for a wrongful death medical malpractice claim. As a result, they dispute how that phrase should be interpreted as a matter of first impression.

Defendant argues that the Court should decide when "the claim accrues" in the same manner as the statute of limitations applicable to medical malpractice, as set forth by Section 95.11(4)(b), Florida Statutes, *Tanner v. Hartog,* 618 So. 2d 177, 182 (Fla. 1993), and importantly, Section 768.28(14). Under that analysis, the cause of action can accrue either before or after the plaintiff's death based on when the malpractice incident occurred and the knowledge of the plaintiff.

On the other hand, Plaintiff argues that the Court should decide when "the claim accrues" without looking at the statute of limitations for medical malpractice actions at all. Instead, it should look only to the fact that Section 95.031 states "A cause of action accrues when the last element constituting the cause of action occurs." As support for this assertion, Plaintiff simply claims that Section 768.28 lacks such discovery rule language and is a different statute. Plaintiff cites to a number of cases that cite to the "after the claim accrues" language in Section 768.28 for support, claiming that none of those cases ever mention a discovery rule. *Exposito v. Pub. Health Tr. Of Miami-Dade Cty., et. al.,*141 So. 3d 663, 667 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1293a]; *Menendez v. N. Broward Hosp. Dist.,* 537 So.2d 89, 90 (Fla. 1988); *Lee v. S. Broward Hosp. Dist.,* 473 So.2d 1322, 1323 (Fla. 4th DCA 1985). At the same time, none of those cases actually deal with the time of accrual for a wrongful death claim, or otherwise support Plaintiff's proposal for how Section 768.28(6)(a)(2) should be interpreted.

C. Analysis and Discussion of Legal Issue.

On this issue, the Defendant has the better argument. Section 768.28 incorporates Section 95.11(4) medical malpractice analysis into its own statute of limitations through Section 768.28(14). Plaintiff's argument requires this Court to conclude that, despite this incorporation within the very same statute, the legislature nonetheless wanted to impose a completely different deadline analysis for the pre-suit notice requirement in Section 768.28(6), which would effectively require a plaintiff to track two different dates when their cause of action accrued. Plaintiff presents no rationale to support this interpretation other than the fact it would save his claim in this instance, where timely pre-suit notice was not provided.

Accordingly, the Court holds that the date "a claim accrues" within context of a 768.28(6)(a)(2) notice for a wrongful death medical malpractice claim is the same as the date it accrues for the applicable statute of limitations, as set forth by Section 95.11(4)(b), Florida Statutes and *Tanner v. Hartog,* 618 So. 2d 177, 182 (Fla. 1993). Therefore, that date is either the date of the alleged medical malpractice, or the date that the Plaintiff knew or should have known that her injuries were the result of medical negligence, or the date of the decedent's death at the latest.

D. Ruling of Court on Facts Established Regarding Statute of Limitations.

Having established the applicable law to determine when the claim accrues under section 768.28(6)(a), the Court must next determine whether there is a genuine issue of material fact as to whether Plaintiff provided timely pre-suit notice to Florida Department of Financial Services. On April 23, 2019, FAUBOT filed a Motion to Dismiss Plaintiffs Second Amended Complaint (DE #359), contending that the Complaint should be dismissed on the grounds that it failed to allege timely compliance with § 768.28(6) pre-suit notice requirements. On July 11, 2019, Plaintiff filed a Response to the Motion to Dismiss citing *Barrier v. JFK Med Ctr., Ltd P'ship,* 169 So. 3d 185, 188-89 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1410a] for the proposition that knowledge of a claim or cause of action cannot be imputed to a person who lacks conscious awareness. During argument on the Motion, counsel for Plaintiff asserted that the decedent remained unconscious from the time of delivery until her death. Based, in large part, on Plaintiff's representation in response to the Motion to Dismiss that the decedent "lacked conscious awareness" from the time she was intubated on May 26, 2016 up until the time of her death on November 4, 2016, the Court denied FAUBOT's Motion to Dismiss.

Subsequently, in support of its Motion for Summary Judgment, FAUBOT has filed numerous medical records and reports concerning Decedent's hospitalization at Memorial Hospital on May 31, 2016 and Decedent's hospitalization at Florida Hospital from September 27, 2016 until her death on November 4, 2016. These medical records indicate that in June, July, August, September and October 2016, Decedent was alert, oriented, following commands, communicating with her healthcare providers and signed at least thirteen (13) medical authorization or consent forms for medical care and treatment.

In further support of its summary judgment motion, FAUBOT also provided evidence of a July 15, 2016 psychological evaluation of Decedent by Juan Espinosa-Paccini, M.D., which indicated that, at that time, the Decedent was "able to verbalize words" notwithstanding her tracheostomy, that the Decedent had no impaired memory, that her insight/judgment was "good," that she had "adequate" decision-making ability and that the decedent was able to give and express informed consent.

Plaintiff's response to the summary judgment motion does not dispute FAUBOT's medical evidence that following her discharge from Bethesda, Decedent was able to communicate and was competent to consent to medical procedures. Notably, Plaintiff does not offer as competing evidence any affidavits or medical records that would place into question the decedent's ability to comprehend that her dire medical situation resulting from a caesarian child delivery from a normal, healthy 33-year-old was reasonably not the result of medical negligence. Rather, Plaintiff contends that there is a genuine disputed issue of fact concerning when Decedent knew, or should have known, that there was a reasonable possibility that her condition was caused by medical negligence.

As stated by the Supreme Court in *Tanner v. Hartog,* 618 So. 2d 177,181 (Fla. 1993), there are circumstances in which the type of injuries, standing alone, "communicate the possibility of medical negligence" such that the statute of limitations begins to run immediately upon discovery of the injuries. The Court finds that this is just such a case. In other words, the Court finds the injury here "speaks for itself" and communicates both the fact of injury and the fact of malpractice, thereby starting the statute of limitations for malpractice once the injury is discovered. *See Baxter v. Northrup,* 128 So. 3d 908, 910 (Fla. 5th DCA 2013) [39 Fla. L. Weekly D4a] (citing to *Cunningham v. Lowery,* 724 So.2d 176, 179 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D157a]).

As alleged in the Second Amended Complaint, Decedent was an otherwise healthy 33-year-old who was admitted to Bethesda for a cesarean delivery on May 21, 2016. Following her discharge from Bethesda on May 31, 2016, Decedent required critical care, was receiving extracorporeal membrane oxygenation ("ECMO") therapy, had received a tracheostomy and was ventilated. This outcome,

following cesarean delivery in a young, healthy patient, would undoubtedly convey a reasonable possibility of medical negligence. Further, Plaintiff's attempt to characterize this outcome as mere respiratory distress is not only surprising, but also is unsupported by the record and cannot serve to create a material issue of fact.

Moreover, this is not a case where medical personnel misled decedent as to her condition, *see Cohen v. Cooper,* 20 So. 3d 453 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2210a] or her condition was a known complication of a caesarian delivery from a healthy mother, *see Baxter v. Northrup,* 128 So. 3d 908, 910 (Fla. 5th DCA 2013) [39 Fla. L. Weekly D4a]. Those situations would create an issue of fact as to when decedent knew, or should have known, that her condition was reasonably the result of medical negligence. Nor is this a case where record evidence gives rise to a conclusion, or factual issue, as to whether there was a delayed discovery of the medical negligence which gave rise to Plaintiff's decedent's dire condition after the delivery of her child that would extend the 2-year Notice requirement past May 2018.[1] In sum, the overwhelming and unrefuted evidence on summary judgment shows that from June through September 2016, Decedent was aware of her injury, and her injury was such that it immediately conveyed the reasonable possibility that medical negligence had occurred. Thus, her cause of action accrued in that time period, and per section 768.28(6)(a), Fla. Stat., she had two years to provide notice of her claim, in writing, to the appropriate state agency and to the Florida Department of Financial Services.

The record establishes that Plaintiff did not provide the mandatory notice to the Florida Department of Financial Services until October 8, 2018. The statutory notice of provisions of section 768.28(6)(a), Fla. Stat., are strictly construed. *See, Levine v. Dade County Sch. Bd,* 442 So. 2d 210, 212 (Fla. 1983). ("Because this subsection is part of the statutory waiver of sovereign immunity, it must be strictly construed."); *Menendez v. North Broward Hosp. Dist.,* 537 So. 2d 89, 91 (Fla. 1988) ("The state's notice of provision is clear and must be strictly construed"); *Maynard v. State Dpt. Of Corrections,* 864 So. 2d 1232-1233, 34 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D303a] ("The pre-suit notice requirement is a condition precedent . . . which serves the purpose of giving the appropriate entities an opportunity to investigate and time to respond. . . and as an aspect of the sovereign immunity waiver, section 768.28(6)(a) notice provision is strictly construed, with strict compliance required"); *Dukanauskas v. Metropolitan Dade County,* 378 So. 2d 74, 76 (Fla. 3rd DCA 1979) (case must be dismissed if time to perform mandatory conditions precedent has elapsed). **WHEREFORE**, it is hereby

ORDERED and ADJUDGED that Plaintiff failed to timely satisfy the condition precedent set forth in Section 768.28(6)(a), and Final Summary Judgment is entered in favor of Defendant, FAUBOT. It is further

ORDERED and ADJUDGED that Plaintiff shall take nothing in this action against FAUBOT, and FAUBOT shall go hence without delay. It is further

ORDERED and ADJUDGED that the Court retains jurisdiction to assess taxable costs.

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[1]FAUBOT submitted evidence that as early as December 2017 Plaintiff was actively pursuing its medical negligence claims for the treatment of Plaintiff's decedent. In fact, in February 2018, Plaintiff mailed notice of its intent to initiate medical negligence claims to the FAU doctors involved in Plaintiff decedent's care, pursuant to Chapter 766. In response, on February 28, 2018, FAUBOT's attorneys acknowledged receipt of the notice to FAUBOT, however, instructed Plaintiff's counsel that they must also notify the State of Florida pursuant to Section 768.28. All of this occurred well within the two (2) year Notice time period, given the allegation that the medical negligence occurred in May 2016.

* * *

Consumer law—Debt collection—Mortgage foreclosure—Florida Consumer Collection Practices Act—Summary judgment entered in favor of lender on borrower's claim that inclusion of charge for attorney's fees from prior unsuccessful foreclosure action in reinstatement letter violates FCCPA by seeking to enforce illegitimate debt—Mortgage contract allowed lender to require borrower seeking reinstatement to pay fees and costs incurred in prior foreclosure action even if lender was unsuccessful in that action—Lender is not entitled to summary judgment based on defense of litigation privilege where there is factual dispute as to whether privilege is applicable—Class actions—Where borrower no longer has valid FCCPA claim against lender, he has no standing to continue case as class representative

US BANK, NATIONAL ASSOCIATION, as Trustee, Successor in interest to BANK OF AMERICA, NATIONAL ASSOCIATION, as Trustee, Successor by Merger to LASALLE BANK NATIONAL ASSOCIATION, as Trustee for MERRILL LYNCH MORTGAGE INVESTORS TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2006-MLN-1, Plaintiff, v. PETER A. COLOMBO, LORI COLOMBO, SEMINOLE LAKES HOMEOWNERS ASSOCIATION, INC., Defendants/Plaintiff-in-Counterclaim, v. US BANK TRUST N.A., as Trustee, etc., and NATIONSTAR MORTGAGE, LLC., Defendants-in-Counterclaim. Circuit Court, 15th Judicial Circuit in and for Palm Beach County, Circuit Civil Division. Case No. 50-2017-CA-000532-XXXX-MBAB. July 21, 2020. Janis Brustares Keyser, Judge. Counsel: Sara F. Holladay-Tobias, Emily Y. Rottmann, Jason R. Bowyer, and R. Locke Beatty, McGuire Woods LLP, Jacksonville, for Plaintiff. Louis M. Silber, Silber & Davis, West Palm Beach; Jack Scarola, Searcy Denny, etc., West Palm Beach; James A. Bonfiglio, Law Offices of James A. Bonfiglio, P.A., Boynton Beach; and Philip M. Burlington, Burlington & Rockenbach, P.A., West Palm Beach, for Defendant/Counterclaimant Peter A. Colombo. Candace C. Solis, Becker & Polikoff, P.A., Miramar, for Seminole Lakes Homeowner's Association, Inc. Raymond L. Robin and Elizabeth A. Izquierdo, Keller Landsberg, P.A., Fort Lauderdale; and Scott G. Hawkins, Jones Foster, P.A.,West Palm Beach, for Counter-Defendant, Robertson, Anschutz & Schneid, P.L.

ORDER ON COUNTER-DEFENDANT ROBERTSON, ANSCHUTZ & SCHNEID, P.L.'S MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court on June 19, 2020, upon the following motions filed by Counter-Defendant, Robertson, Anschutz & Schneid, P.L. ("RAS"):

1. Motion for Final Summary Judgment based on the *Leigh* decision filed December 24, 2019;

2. Motion for Summary Judgment based on the Defense of Litigation Privilege filed January 7, 2020; and

3. Motion for Summary Judgment based on Colombo's Lack of Standing filed May 8, 2020.

The Court has reviewed the pleadings, heard argument of counsel and is otherwise fully advised in the premises. The Court finds as follows:

On January 16, 2017, Plaintiff, US Bank, National Association, as Trustee, Successor in Interest to Bank of America, National Association, as Trustee, Successor by Merger to LaSalle Bank National Association as Trustee for Merrill Lynch Mortgage Investors Trust, Mortgage Loan Asset-Backed Certificates, Series 2006-MLN-1 ("US Bank"), filed this foreclosure action against Defendants, Peter and Lori Colombo, asserting that their mortgage loan was in default and the default had not been cured.

On March 29, 2017, counsel for the Colombos, James A. Bonfiglio ("Bonfiglio") sent an email to RAS, counsel for Plaintiff, seeking information about charges that were included in a statement regarding the indebtedness which was sent to Colombo by Nationstar. The RAS litigation attorney assigned to handle the foreclosure action, Jamie Epstein ("Epstein"), responded to Bonfiglio's questions about the charges and referenced language from the Mortgage.

On April 5, 2017, after Attorneys Bonfiglio and Epstein had exchanged several emails on the subject of the charges and Bonfiglio's questions, Epstein sent an email to Bonfiglio which stated:

> Okay, I am going to order you a reinstatement quote and a breakdown of all of the charges that are reflected on the quote. I think that is the best way to begin to resolve this.

Bonfiglio immediately responded:

> Thank you. Can we try to get a response before the 30 days runs on my EOT to Answer? The response may affect the Answer & Defenses. Thanks Jim

That same day, Epstein ordered a reinstatement letter from the payoff department at RAS and requested that it be emailed directly to Bonfiglio as counsel for the borrower. On April 13, 2017, RAS's payoff department emailed a reinstatement letter ("Reinstatement Letter") regarding the Colombo loan to Bonfiglio which included the following section entitled "Description of Charges":

Description of Charges	Amounts Due
Title Examination	$1,335.00
Litigation Fees	$107.50
Attorney's Fees	$2,415.00
Attorney's Fees paid to prior counsel in the current action	$3,733.00

On October 9, 2018, Colombo filed an Amended Counterclaim which included a single count, Count One, against RAS and Nationstar, premised upon the Reinstatement Letter, for the alleged violation of Florida's Consumer Collection Practices Act (the "FCCPA"). Colombo's claim is that the Reinstatement Letter was an attempt to enforce an illegitimate debt, in violation of Section 559.72(9), Florida Statutes, on the basis that it sought to collect attorneys' fees and costs from a prior unsuccessful foreclosure action.

The "prior unsuccessful foreclosure action" refers to a foreclosure case filed against the Colombos in 2008 on the same Mortgage by US Bank's predecessor-in-interest styled *LaSalle Bank, N.A., as Trustee for the MLMI Trust Series 2006-MLNI vs. Peter A. Colombo; Lori Colombo, etc., et al*; Case No. 502008CA029465 AW ("Prior Foreclosure Case"). The Prior Foreclosure case was dismissed for lack of prosecution on November 15, 2013, and the Colombos, represented by Bonfiglio, were awarded attorney's fees as the prevailing party.

Section 559.72, Florida Statutes, the statute Colombo relies upon in his Amended Counterclaim as well as in his Revised Third Amended Counterclaim for his claim against RAS provides, in pertinent part:

> In collecting consumer debts, no person shall:
>
> * * *
>
> (9) Claim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate, or assert the existence of some other legal right when such person knows that the right does not exist.

§ 559.72(9), Fla. Stat. A claim under section 559.72(9) has three elements: an illegitimate debt, a threat or attempt to enforce that debt, and knowledge that the debt is illegitimate. *Davis v. Sheridan Healthcare, Inc.*, 281 So. 3d 1259, 1264 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D2535a]. No claim will lie under section 559.72(9) of the FCCPA where the debt sought to be enforced is legitimate. *Id.*

Paragraph 19 of the Mortgage being foreclosed in this case addresses reinstatement of the loan and provides, in pertinent part:

> 19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued . . . . Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; ***(c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument;*** and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged.

(Emphasis added).

A. Motion for Final Summary Judgment based on the *Leigh* Decision

On December 24, 2019, RAS filed a Motion for Summary Judgment arguing that it is entitled to summary judgment based on the recent decision by the Fifth District Court of Appeal in *U.S. Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust v. Leigh*, 293 So.3d 515 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2914a]. The Court in *Leigh* held that in connection with reinstatement or cure of a loan in default, a lender may require a borrower to repay the lender's attorneys' fees and other costs incurred in a prior foreclosure even if the lender was unsuccessful in that prior action. 293 So. 3d at 515-16. In construing a similar provision to the Reinstatement Clause at issue in the present case, the Court stated:

> Paragraph nineteen of the mortgage provides that in order for Appellee to reinstate the mortgage, she would be required to pay the lender all sums then due and all expenses incurred in enforcing the mortgage, including reasonable attorney's fees and specified foreclosure litigation expenses. According to the plain language of the mortgage, Appellant was not required to be the prevailing party in the first foreclosure action in order to seek and recover its attorney's fees and expenses.

Id.

The Court finds that the decision in *Leigh* is dispositive of the issues raised in this case. Colombo's claim rests on his assertion that RAS knowingly included illegitimate charges in the Reinstatement Letter sent to Colombo. Pursuant to the Court's decision in *Leigh,* charges in a Reinstatement Letter for attorney's fees and expenses incurred in a prior foreclosure action are legitimate based on the plain language of the mortgage contract, and therefore Colombo's FCCPA claim fails as a matter of law.

Colombo makes a number of arguments as to why the Court should not follow the Court's decision in *Leigh*. First, Colombo argues that Section 57.105(7), Florida Statutes, is controlling, and since Colombo was the prevailing party in the Prior Foreclosure, neither Nationstar nor RAS may validly request attorney's fees arising out of the prior foreclosure action in this case.

This argument overlooks the fact that paragraph 19 establishes a contractual right for a borrower to reinstate a defaulted loan and sets forth the conditions that must be met to reinstate the loan. Under paragraph 19, the borrower has the right to reinstate even after default and acceleration while the lender receives the corresponding right to be made whole. In signing the Mortgage, Colombo agreed to the conditions set forth in paragraph 19. The Reinstatement Letter sent by RAS reflects sums which paragraph 19 of the Mortgage permits the lender to request, including attorneys' fees and expenses for the prior foreclosure case, in the event Colombo chooses to reinstate the loan.

Moreover, Section 57.105(7) applies only in actions to enforce a contract. *BVS Acquisition Co. LLC v. Brown*, 9:12-CV-80247-DMM, 2013 WL 12173085, at *3 n. 2 (S.D. Fla. May 30, 2013) ("Fla. Stat. § 57.105(7) only applies to causes of action seeking the enforcement of a contract."). The plain language of Section 57.105(7), provides, in pertinent part:

> If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract.

The Fourth District has strictly construed Section 57.105 to apply only to render "bilateral a unilateral contractual clause for prevailing party

attorney's fees." *Florida Hurricane Prot. & Awning, Inc. v. Pastina*, 43 So. 3d 893, 895 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2024a] (*En Banc*) ("Simply put, the statute means what it says and says what it means; nothing more, nothing less."). Section 57.105 cannot be used to expand the parties' agreement beyond its precise terms. *Id.* ("The statute is designed to even the playing field, not expand it beyond the terms of the agreement.") Section 57.105(7) does not affect the application of the *Leigh* decision to the facts of this case.

Second, Colombo argues that the Fourth District has already decided the issue in this case in *Cabrera v. U.S. Bank Nat'l Ass'n*, 281 So. 3d 516 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D2528a]. However, the only question decided in *Cabrera* was a procedural question, whether a borrower sued by a lender can bring a class action as a counterclaim. The Court in *Cabrera* concluded the borrower could bring the counterclaim, however, it never addressed the underlying merits of the case.

Finally, Colombo claims that Florida Rule of Civil Procedure 1.420(d) renders illegitimate the charge for prior attorneys' fees and expenses included in the Reinstatement Letter. Similar to Section 57.105(7), Rule 1.420(d) only applies to a request made to a court for an award by a prevailing party in connection with a disputed claim in court. It has no application here where RAS merely sent the Reinstatement Letter requesting costs authorized by the plain language of paragraph 19 of the Mortgage.

Colombo argues that a disputed issue of material fact remains as to the manner in which the charge was characterized in the Reinstatement Letter. Colombo asserts that he may bring a claim under the FCCPA because the description of the debt in the Reinstatement Letter stated: "Attorney's Fees paid to prior counsel in the current action" rather than "Attorney's Fees paid to counsel in the prior action." According to Colombo, the unclear description is "false, misleading and deceptive" and "[a]t a minimum, creates an issue of fact that should result in the denial of the Motion for Summary Judgment."

As previously stated, Colombo's claim against RAS is based on Section 559.72(9), Florida Statutes, which, provides:

> In collecting consumer debts, no person shall:
>
> * * *
>
> (9) Claim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate, or assert the existence of some other legal right when such person knows that the right does not exist.

A claim based on Section 559.72(9) requires as its elements: "an illegitimate debt, a threat or attempt to enforce that debt, and knowledge that the debt is illegitimate." *Davis*, 281 So. 3d at 1264. Nothing in Section 559.72(9) or any other section of the FCCPA creates a claim where the debt is legitimate but its description is unclear or even incorrect. As long as the debt sought to be collected is legitimate, there is no basis to bring a claim under Section 559.72(9). *See Malowney v. Bush/Ross*, 8:09-CV-1189-T-30TGW, 2009 WL 3806161, at *6 (M.D. Fla. Nov. 12, 2009) (no claim could be stated under FCCPA where the debt was legitimate but "the letters were deceiving because they would lead a consumer into believing that a foreclosure action is imminent and that the consumer would have to pay excessive attorney's fees and costs."); *Coheley v. Lender Legal Services, LLC*, 8:19-CV-185-T-27CPT, 2019 WL 6311767, at *5 (M.D. Fla. Nov. 25, 2019) (FCCPA claim failed as a matter of law where there was no claim that the debt was not legitimate but instead the creditor failed to include 'any detailed breakdown or itemization, hid the true character of the alleged debt,' and knowingly sent the Pay-Off Demand in an attempt to collect monies from the debtor that was clearly misleading on its face.)

Based on the foregoing, the Court finds that RAS Motion for Summary Judgment filed December 24, 2019 should be granted.

B. Motion for Summary Judgment Based on the Defense of Litigation Privilege

Based on the Court's ruling on the foregoing Motion, this Court need not address RAS Motion for Summary Judgment based on the defense of litigation privilege. However, the Court notes in *Cedre v. Albertelli, P.A.*, 2018 WL 6959446 (M.D. 2018), under similar circumstances to those set forth in the instant case, the Court determined there was a genuine issue of material fact as to whether the litigation privilege applied.

The Court in *Cedre* addressed cross motions for summary judgment regarding application of the litigation privilege. The reinstatement letter in that case was sent while the parties' attorneys were also exchanging correspondence expressly negotiating resolution of the foreclosure action. The court stated:

> When held against the light, however, the Reinstatement Letter—(1) lacks any indication that it is intended as a settlement offer; and (2) makes no mention of the Foreclosure Action.

Id at 5. In *Cedre*, because there was "some indication that [the Reinstatement Letter] was related to the settlement email chain communications", the Court determined that there was a question of fact regarding application of the litigation privilege which required denial of both parties' motions for summary judgment.

Likewise, here, the Court finds that there is a factual dispute as to whether the litigation privilege is applicable to the Reinstatement Letter and, therefore, RAS is not entitled to a summary judgment as a matter of law.

C. RAS Motion for Summary Judgment Based on Standing

Colombo brings the claim against RAS both in an "individual capacity" and as "putative Class representative" on behalf of a subclass which Colombo defines in paragraph 213 of the Amended Counterclaim and in paragraph 212 of the Revised Third Amended Counterclaim. As set forth above, this Court finds that RAS is entitled to summary judgment in its favor as to Colombo's individual claim, based on the decision in *U.S. Bank Trustee, N.A. as Tr. for LSF9 Master Participation Trust v. Leigh*, 293 So. 3d 515 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D2914a].

Unless a putative class representative has a threshold claim against the defendant, he or she has no standing to continue the case individually or as a class representative. *Taran v. Blue Cross Blue Shield of Fla., Inc.*, 685 So. 2d 1004, 1006 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D135i] (the determination of a putative class representative's standing must precede class discovery); *Graham v. State Farm Fire & Cas. Co.*, 813 So. 2d 273, 273-74 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D844a] ("No class action may proceed unless there is a named plaintiff with standing to represent the class."). Based on this Court's finding that Colombo has no viable individual claim against RAS, Colombo lacks standing to act in a representative capacity on behalf of any putative class.

As the Florida Supreme Court explained in *Sosa v. Safeway Premium Finance Co.*, 73 So. 3d 91, 116 (Fla. 2011) [36 Fla. L. Weekly S373a], "[t]o satisfy the standing requirement for a class action claim, the class representative must illustrate that a case or controversy exists between him or her and the defendant, and that this case or controversy will continue throughout the existence of the litigation." Where it is established that a putative class representative "no longer has a claim for individual damages . . . standing to serve as a class representative on that count is lacking as he has no case or controversy as to that claim." *Ahearn v. Mayo Clinic*, 180 So. 3d 165, 170 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D2502d]. "[I]f the claim of the putative class representative is extinguished before class certification, then the putative representative cannot bring a claim on behalf of the class." *Id. See also Chinchilla v. Star Cas. Ins. Co.*, 833

So. 2d 804, 805 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D2389a] (insured who had no claim against insurer had no standing to maintain a class action against the insurer); *Ramon v. Aries Ins. Co.*, 769 So. 2d 1053, 1056 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1830a] (trial court properly granted summary judgment in favor of defendant where "[f]aced with a litigant with no injury and that litigant's mere conjecture that others may have suffered the harm he no longer can claim,").

Here, where Colombo no longer has a valid claim against RAS, he has no standing to continue this case either individually or as a class representative.

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

1. Counter-Defendant, Robertson, Anschutz & Schneid, P.L.'s Motion for Summary Judgment filed December 24, 2019 is GRANTED.

2. Counter-Defendant, Robertson, Anschutz & Schneid, P.L.'s Motion for Summary Judgment filed January 7, 2020 is DENIED.

3. Counter-Defendant, Robertson, Anschutz & Schneid, P.L.'s Motion for Summary Judgment filed May 8, 2020 is GRANTED.

Counter-Defendant, Robertson, Anschutz & Schneid, P.L. shall submit a proposed Final Summary Judgment in its favor within ten (10) days of the date of this Order.

* * *

Insurance—Automobile—Personal injury protection—Application—Misrepresentations—Materiality—Policy was properly rescinded, and therefore void ab initio, based on insured's failure to disclose his girlfriend as household member

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. RICHARD IRVIN ETSCORN, DANIEL JOSEPH GAROFOLO, JAMES MICHAEL DYKE, GERALDINE MICHELLE BLAY-RAFFO, THE WENDY'S COMPANY, and SEMINOLE COUNTY SHERIFF'S OFFICE, Defendants. Circuit Court, 18th Judicial Circuit in and for Seminole County. Case No. 2019-CA-000266-08-L. July 31, 2020. Jessica Recksiedler, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Robert A. DuChemin, Sr., DuChemin Law & Mediation, Winter Park, for Defendant.

ORDER ON PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AS TO DEFENDANT, RICHARD IRVIN ETSCORN

THIS CAUSE having come before this Court at the hearing on July 28, 2020, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendant, RICHARD IRVIN ETSCORN, and the Court having considered the same, it is hereupon,

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

Factual Background

Plaintiff, Direct General Insurance Company brought the instant Declaratory Action against the insured, Richard Irvin Etscorn, regarding the policy rescission as a result of the insured's material misrepresentation on the renewal application for insurance dated March 24, 2018. Plaintiff rescinded the policy of insurance on the basis that Richard Irvin Etscorn failed to disclose that he resided with his girlfriend, Jennifer Lindsey, at the time of policy inception and had he disclosed this information the Defendant would not have issued the policy on the same terms, namely Plaintiff would have charged a higher premium to issue the policy.

Mr. Richard Irvin Etscorn completed a renewal application for a policy of automobile insurance from Direct General Insurance Company on March 24, 2018. Mr. Richard Irvin Etscorn failed to list his girlfriend, Jennifer Lindsey, as a household member over the age of 14 when completing the following section of the application on page 1 of 4:

> "Complete for Applicant, spouse and all persons age 14 and older residing with Applicant (licensed or not). Also list any other regular operators of vehicles on this application, including children away from home or in college (licensed or not)."

In addition, the insured, Mr. Richard Irvin Etscorn, signed the application on page 4 of the application for insurance, which provides in pertinent part as follows:

> "I acknowledge that all regular operators of my vehicle(s) have been reported to the Company. I ALSO ACKNOWLEDGE THAT ALL PERSONS AGES 14 AND OLDER WHO LIVE WITH ME HAVE BEEN REPORTED TO THE COMPANY. I further acknowledge and agree that I will report to the company any person who becomes a regular operator of my insured vehicle(s) or who become residents of my household during the term of the policy within thirty (30) days of such occurrence. I have reported any business use or commercial use of my vehicle to the company. I acknowledge that my principle residence/place of vehicle garaging is in the state set forth herein at least ten (10) months each year. I hereby authorize the Company to order the transfer of any vehicle, which is the subject of a loss under any policy issued by the Company, to a location where storage costs will be reduced if the vehicle is disabled."

Following the September 26, 2018 motor vehicle accident, an Examination Under Oath (EUO) was taken of the Defendant, Richard Irvin Etscorn, on November 13, 2018, wherein Mr. Etscorn disclosed under oath to Plaintiff that he lived with his girlfriend, Jennifer Lindsey prior to the renewal application, and all times since. Plaintiff determined that had Richard Irvin Etscorn provided the proper information at the time of the insurance application dated March 24, 2018, then Plaintiff would have been charged a higher premium rate. Therefore, Direct General Insurance Company declared the policy void *ab initio* due to material misrepresentation and returned the paid premiums to Richard Irvin Etscorn. Due to the policy being declared void *ab initio* the Plaintiff denied coverage for the subject motor vehicle accident.

Plaintiff, Direct General Insurance Company, argued in their summary judgment that, as both the statute and the binding appellate decisions state, materiality of the risk is determined by the insurer, not the insured, and thus Defendant's contention that the undisclosed resident could not be material was irrelevant. *See Fla. Stat. 627.409.* As the Fla. Supreme Court ruled "[t]he statute recognizes the principals of law that a contract issued on a mutual mistake of fact is subject to being voided and defines the circumstances for the application of this principle. This Court cannot grant [**10] an exception to a statute nor can we construe an unambiguous statute different from its plain meaning." *Continental Assurance Co. v. Carroll,* 485 So. 2d 406, 409, (Fla. 1986). Therefore, the insurer determines materiality. Additionally, as an insurer rates risks based on the likelihood of a future event, such as an accident, then the insurer may treat any resident/household member as a potential risk. For example, a resident relative may be covered under an automobile insurance policy if struck by a vehicle whilst walking, and thus an insurer must determine rates accordingly. *See Travelers Ins. Co. v. Furlan*, 408 So.2d 767 (5th DCA 1982). Therefore, to ensure both parties enter the contract with full understanding, the Plaintiff is entitled to all information that Plaintiff deems necessary to determine the risk. Additionally, the Legislature allows an insurer to rescind for a material misrepresentation, regardless of the insured's intent, and thus the Legislature clearly burdened the applicant with the duty to fully disclose all requested information. *See United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (3rd DCA 2009) [34 Fla. L. Weekly D1578a]. It was the Plaintiff's position that Plaintiff properly rescinded the policy at issue based on an unlisted household

member as the terms were unambiguous within the application.

Pursuant to the policy of insurance issued to Richard Irvin Etscorn, Direct General Insurance Company may void the insurance policy as follows:

> **FRAUD AND MISREPRESENTATION**
>
> The statements made by **you** in the application are deemed to be **your** representations. A misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under this policy if:
>
> 1. The misrepresentation, omission, concealment, or statement is fraudulent or is material either to the acceptance of the risk or to the hazard assumed by **us**; or
>
> 2. If the true facts had been known to **us**, **we** in good faith would not have issued the policy, would not have issued it at the same premium rate, would not have issued a policy in as large an amount, or would not have provided the coverage with respect to the hazard resulting in the loss.

Further, Florida Statute § 627.409(1) provides:

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

Analysis Regarding Whether the Undisclosed Resident was Material

The Court ruled that the question of materiality is considered from the perspective of the insurer and therefore Defendant's claims that the failure to list a resident relative who did not drive on the insurance application could not be material lacked support. Rather, the Court found that "[a] material misrepresentation in an application for insurance, whether or not made with knowledge of its correctness or untruth, will nullify *any policy* issued and is an absolute defense to enforcement of the policy." *United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (3rd DCA 2009) [34 Fla. L. Weekly D1578a]. The Court ruled that the failure to disclose a household member that would have caused the insurer to issue the policy at a higher rate is sufficient to support a rescission. *See Privilege Underwriters Reciprocal Exch. v. Clark,* 174 So. 3d 1028, 1031 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1810a]. Additionally, the Court found that as Defendant failed to provide testimony to contradict Plaintiff's claim that the disclosure would have caused Plaintiff to issue the policy at a higher premium rate, then Plaintiff was entitled to rescind. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen*, 999 F.2d 1532 (1993).

Additionally, the Court found that the affiant, Lisa Robison, provided sworn testimony to knowledge of the application for insurance and administration of the underwriting guidelines for the insurance policy issued to Richard Irvin Etscorn, and could claim personal knowledge from a review of the records, therefore, Plaintiff's affiant, Ms. Robison, satisfied the threshold to satisfy the business records exception. *See Nationstar Mortg., LLC v. Berdecia*, 169 So. 3d 209, 213 [(5th DCA 2015) [40 Fla. L. Weekly D1502a]]. Consequently, Plaintiff established without contrary evidence that the misrepresentation was material, as set forth in the Affidavit of Lisa Robison.

Conclusion

This Court finds that the Plaintiff, Direct General Insurance Company's application for insurance unambiguously required Defendant, Richard Irvin Etscorn, to disclose his girlfriend, Jennifer Lindsey, as a household member, that Plaintiff provided the required testimony to establish said that Defendant, Richard Irvin Etscorn's failure to disclose his girlfriend as a person over the age of 14 in the household was a material misrepresentation because Plaintiff would not have issued the policy on the same terms, and thus Plaintiff properly rescinded the subject policy of insurance. Consequently, Plaintiff properly denied coverage for the loss at issue.

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

a. Plaintiff, Direct General Insurance Company's Motion for Summary Judgment is hereby **GRANTED**;

b. This Court ***hereby enters final judgment*** for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendant, RICHARD IRVIN ETSCORN;

c. The Court finds that the facts alleged by the Plaintiff, DIRECT GENERAL INSURANCE COMPANY, in its Complaint for Declaratory Judgment and in the Affidavit of Lisa Robison, are not in dispute, which are as follows:

i. The Defendant, RICHARD IRVIN ETSCORN, failed to disclose Jennifer Lindsey (brother) as a household member at the policy address at the time of the renewal application for insurance dated March 24, 2018, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # FLPA399508064, issued by DIRECT GENERAL INSURANCE COMPANY;

ii. There is no insurance coverage for the named insured, RICHARD IRVIN ETSCORN, for any bodily injury liability, property damage liability, personal injury protection benefits, and accidental death coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX8064;

iii. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend or indemnify the insured, RICHARD IRVIN ETSCORN, for any claims made under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX8064;

iv. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify the insured, RICHARD IRVIN ETSCORN, for any bodily injury claim for JAMES MICHAEL DYKE under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX8064;

v. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify the insured, RICHARD IRVIN ETSCORN, for any bodily injury claim for GERALDINE MICHELLE BLAY-RAFFO under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX8064;

vi. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify the insured, RICHARD IRVIN ETSCORN, for any property damage claim for DANIEL JOSEPH GAROFOLO under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX8064;

vii. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify insured, RICHARD IRVIN ETSCORN, for any property damage claim for SEMINOLE COUNTY SHERIFF'S OFFICE under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX8064;

viii. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify insured, RICHARD IRVIN ETSCORN, for any property damage claim for THE WENDY'S COMPANY under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX8064;

ix. There is no personal injury protection ("PIP") insurance coverage for RICHARD IRVIN ETSCORN for the motor vehicle accident which occurred on September 26, 2018, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX8064;

x. There is no bodily injury liability insurance coverage for JAMES MICHAEL DYKE for the motor vehicle accident which occurred on September 26, 2018, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX8064;

xi. There is no bodily injury liability insurance coverage for GERALDINE MICHELLE BLAY-RAFFO for the motor vehicle accident which occurred on September 26, 2018, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX8064;

xii. There is no property damage liability insurance coverage for DANIEL JOSEPH GAROFOLO for the motor vehicle accident which occurred on September 26, 2018, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX8064;

xiii. There is no property damage liability insurance coverage for SEMINOLE COUNTY SHERIFF'S OFFICE for the motor vehicle accident which occurred on September 26, 2018, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX8064;

xiv. There is no property damage liability insurance coverage for THE WENDY'S COMPANY for the motor vehicle accident which occurred on September 26, 2018, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX8064;

xv. The Defendant, RICHARD IRVIN ETSCORN, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX8064, for the September 26, 2018 motor vehicle accident;

xvi. The Defendant, JOSEPH GAROFOLO, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX8064, for the September 26, 2018 motor vehicle accident.

xvii. The Defendant, JAMES MICHAEL DYKE, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX8064, for the September 26, 2018 motor vehicle accident;

xviii. The Defendant, GERALDINE MICHELLE BLAY-RAFFO, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX8064, for the September 26, 2018 motor vehicle accident;

xix. The Defendant, THE WENDY'S COMPANY, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX8064, for the September 26, 2018 motor vehicle accident;

xx. The Defendant, SEMINOLE COUNTY SHERIFF'S OFFICE, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX8064, for the September 26, 2018 motor vehicle accident;

xxi. Credit Nation Auto Sales, Inc. is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX8064, for the September 26, 2018 motor vehicle accident;

xxii. There is no insurance coverage for the motor vehicle accident which occurred on September 26, 2018, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX8064;

xxiii. There is no personal injury protection ("PIP") insurance coverage for the motor vehicle accident which occurred on September 26, 2018, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX8064;

xxiv. There is no bodily injury liability coverage for the motor vehicle accident which occurred on September 26, 2018, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX8064;

xxv. There is no property damage liability coverage for the motor vehicle accident which occurred on September 26, 2018, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX8064;

xxvi. There is no accidental death coverage for the motor vehicle accident which occurred on September 26, 2018, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX8064;

xxvii. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # FLPAXXXXX8064, is rescinded and is void *ab initio*

* * *

Criminal law—Search and seizure—Vehicle—Odor of cannabis coming from defendant's parked vehicle, with no other reasonable suspicion of criminal activity, did not provide valid basis to detain defendant and perform warrantless search of vehicle or defendant because odor of cannabis is indistinguishable from odor of now-legal hemp—Motion to suppress is granted

STATE OF FLORIDA, Plaintiff, v. ORISSON NORD, Defendant. Circuit Court, 20th Judicial Circuit in and for Collier County. Case No. 20-CF-57. August 8, 2020. Ramiro Mañalich, Judge. Counsel: Amira Fox, State Attorney and Brian Ashby, Assistant State Attorney, Naples, for Plaintiff. Mike Carr and Dominick Russo, Naples, for Defendant.

ORDER GRANTING DEFENSE MOTION TO SUPPRESS

This case is before the Court on the Defendant's motion to suppress all statements of the Defendant and all evidence seized as a result of an alleged unlawful arrest and search of the Defendant and his vehicle. The Court held an evidentiary hearing on July 9, 2020 at which the State called one witness, Officer Michael Puka, and both sides presented legal arguments. The Court took the matter under advisement to consider the evidence and the case law authority referenced by the parties. Having completed said review, the Court hereby grants the Defendant's motion to suppress. The Court's reasoning is set forth below.

Facts in Evidence

The essential facts and evidence are established by the hearing testimony of Officer Michael Puka and the related probable cause affidavit of arrest filed by Officer Puka in this case. According to the Officer, on Sunday, January 7, 2019, at approximately 11:20 PM, Officer Puka was working road patrol and identified the Defendant's vehicle as appearing to be suspicious because it was parked in front of a closed business without any vehicle lights on. Officer Puka stated that as he approached the vehicle he was able to observe the sole male occupant start to make "furtive movements" in that he put his left hand underneath the driver seat where he was seated. Officer Puka walked up to the vehicle and attempted to speak with the sole

occupant, the Defendant. When the Defendant opened the driver's side door, Officer Puka said he immediately detected an extremely strong odor of marijuana emitting from the vehicle. Officer Puka says that he has training and experience in recognizing the odor of marijuana. Based on the odor of marijuana, Officer Puka ordered the Defendant out of the vehicle and then proceeded to search the vehicle finding a firearm under the front seat and marijuana in a black zippered bag on the front passenger seat.

On cross-examination, Officer Puka responded to Defense Counsel's questioning by stating that the Defendant asked if he was being detained prior to the search and Officer Puka told him he was indeed being detained based on the odor of marijuana. The officer also testified that at this point the Defendant was not free to leave. The probable cause affidavit states that the Defendant specifically refused to consent to a search of his vehicle and that he "debated" that he did not have to give permission to search and that there was no probable cause to search the vehicle. Defendant was placed into handcuffs prior to the search commencing.

Arguments of Counsel

The essential basis for the defense motion to suppress is that in July, 2019 the Florida Legislature excluded hemp from the definition of cannabis in Section 893.02 (3), Fla. Stats. According to the Defense, this means that hemp, which is allegedly identical to marijuana in appearance and odor, is legal in the State of Florida. The Defense argument goes on to further reason that, if hemp is now legal under all circumstances, prior existing case law holding that the odor of marijuana, by itself, constitutes probable cause to search is no longer applicable since the legal hemp odor is indistinguishable from the illegal marijuana odor. The Defense buttresses this argument with a persuasive, but not controlling, memorandum from Bruce H. Colton, the elected State Attorney for the Nineteenth Judicial Circuit of Florida, in which the State Attorney says the following to law enforcement in his circuit regarding the July, 2019 hemp exemption in Florida law: "Since there is no way to visually distinguish hemp from cannabis, the mere presence of suspected cannabis or its odor will no longer suffice to establish probable cause to believe that the substance is cannabis. Law enforcement officers should therefore look for other evidence of illegality before taking any action that requires probable cause." The State, in the case sub judice, did not dispute the assertion that the odor and appearance of hemp is indistinguishable from marijuana.

The State's argument is founded on existing case law providing that the odor of burnt marijuana emanating from a vehicle provides probable cause to search the entire passenger compartment of the vehicle and each of its occupants. *State v. Betz,* 815 So. 2d 627 (Fla. 2002) [27 Fla. L. Weekly S285b]; *Dixon v. State,* (Fla. 2d DCA 1977); *State v. K V.,* 821 So. 2d 1127 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D1449b] and *State v. Brookins,* 290 So. 3d 1100 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D460a]. In the alternative, the State also argues that the scenario in the present case could be viewed as a detention prior to formal arrest under *Terry v. Ohio,* 392 U.S. 1, 30 (1968), or a detention based on the reasonable suspicion of a possible driving under the influence crime.

Analysis

It is undisputed that, prior to the July, 2019 exemption of hemp from the definition of cannabis in Florida Statutes, Florida law clearly established that the odor of burnt marijuana emanating from a vehicle provided probable cause to search the vehicle and the occupants. *State v. Brookins,* 290 3d 1100 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D460a]. *Brookins* explained that this was so because the mere possession of marijuana is illegal. *Brookins* also mentioned that a search incident to arrest can occur before the arrest so long as the officer actually had probable cause to arrest the Defendant. *Brookins* at pages 1104-05.

Johnson v. State, 275 So. 3d 800 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D1752a], also found that the smell of burnt marijuana was a sufficient basis for probable cause to search the Defendant's vehicle. In *Johnson,* the Defendant argued that the burnt marijuana odor establishing probable cause to search caselaw become irrelevant after Florida authorized medical marijuana. The *Johnson* court rejected that argument for the following reasons. First, Florida's medical marijuana laws at the time of the *Johnson* case did not authorize smokable marijuana. Second, the law did not allow use in a vehicle other than for low THC cannabis. Third, possession of marijuana remained a crime under federal law. Fourth, even if smoking marijuana were legal altogether, the officer would have had probable cause based on the fact that the Defendant in *Johnson* was operating a motor vehicle and driving under the influence of drugs is a criminal offense. The *Johnson* court went on to add that, even putting all that aside, the possibility that a driver might be a medical marijuana user would not automatically defeat probable cause if there is enough evidence that there would be a fair probability of a violation of law based on what reasonable and prudent people would think about the scenario, no matter what legal technicians would say. *Johnson* at pp. 801-02.

The Defense in this case supplemented the argument at the hearing in this case with a post-hearing submittal of the First District Court of Appeal recent case of *Kilburn v. State,* (No. 1D18-4899, May 29, 2020) [45 Fla. L. Weekly D1303a]. In *Kilburn,* the First District analyzed existing Florida case law regarding *Terry* stops and held that a detention by law enforcement of a Defendant based only on the officer seeing the butt of a handgun sticking out of the waistband on the Defendant's person did not provide reasonable suspicion for a *Terry* detention because bearing arms is legal in the state of Florida. *Kilburn* mentioned that other courts have also taken the position that legally carrying a weapon is not justification for a *Terry* stop; there must be additional facts present. (citing to *United States v. Black,* 707 F. 3d 531, 540, 4th Cir. 2013) (noting that the Fourth Amendment would be eviscerated if an investigatory detention was allowed based on a person openly carrying a firearm without more in a state that allows a person to openly carry). *Kilburn* held that the detention based on the officer's observation of the gun protruding from the Defendant's waistband was unconstitutional because a potentially lawful activity cannot be the sole basis for a detention or else the Fourth Amendment would be eviscerated. *Kilburn* at pp. 7-8

Based on the arguments and authority presented by the parties in the case sub judice, it appears that, the issue of probable cause to search a vehicle based solely on the odor of marijuana, in the post hemp legalization era in Florida, is a matter of first impression. It also appears that, even though it is a decision occurring subsequent to the medical marijuana legal exemption, the very recent Second District Court of Appeal decision in *Brookins,* 297 3d 1100 (February 28, 2020), did not address the new hemp law aspect of this search issue. The Court's own legal research found an Orange County, FL. Circuit Court case that is on point. In *State v. Ruise,* 28 Fla. L. Weekly Supp. 122a, that trial court held that an officer who smelled the odor of marijuana during a traffic stop had probable cause for a warrantless search of the vehicle, even though the odor of cannabis was found to be indistinguishable from the odor of now legal hemp. This Court respectfully disagrees with that decision for the reasons stated in this analysis but also finds *Ruise* to be distinguishable. In *Ruise,* there was "odor-plus" because the facts involved observed driving violations that could be indicators of impairment from marijuana and the Defendant claimed the substance was hemp but also said he smoked to get high. This Court respectfully disagrees with the *Ruise* court's reliance on a strict "probabilities" analysis for probable cause as set

forth in *United States v. Harris,* 2019 W.L. 6704996 (E.D. N.C. Dec. 9, 2019), because hemp is legal and its odor is the same as illegal marijuana so there is no reasonable way to automatically conclude that the odor, without other facts, establishes a probability of criminal activity.

The officer in this case detained the Defendant after observing his car parked, without the lights on, in the parking lot of a closed business at 11:20 pm on a Sunday night. The officer testified that he detained the Defendant after seeing him make a "furtive" movement inside the car by putting his left hand underneath the car seat and due to the strong odor of marijuana emanating from the car when the Defendant opened the door to respond to the officer. No evidence was presented as to the lighting conditions or how the officer could see the alleged furtive movement by Defendant in the dark vehicle. The Court does not find credible the alleged furtive movement allegation. Even if it were a credible observation, there are innocent reasons for observing such a movement by a suspect (e.g., reaching for a wallet or a dropped cell phone). The Court does not believe that the mere presence of the automobile in the parking lot, by itself, created reasonable suspicion of criminal activity. There are no facts in evidence of any DUI investigation.[1] Putting all the alleged facts together in a totality of the circumstances analysis does not equate in this case to a reasonable suspicion of crime conclusion. The totality of these few potentially innocent facts do not make the whole greater than the sum of the above mentioned individual observations by the officer. The validity of the search of Defendant's automobile depends exclusively on the odor of marijuana emanating from the vehicle.

Based on all of the above, the Court finds that this fact pattern is analogous to the *Kilburn* scenario. In *Kilburn* the First District Court of Appeal found that an officer's observation of a gun protruding from the Defendant's waistband, by itself, did not create probable cause or reasonable suspicion to detain the Defendant. Similarly, in the present case, the Court finds that the odor of marijuana alone, with no other reasonable suspicion of criminal activity, is no longer a valid basis to detain a Defendant and do a warrantless search of a vehicle or its occupant because hemp is legal in Florida and its odor is indistinguishable from the odor of cannabis.[2] The Defense motion to suppress is hereby granted.

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[1]The probable cause affidavit also mentions that the Defendant refused to answer if he had hemp or legal marijuana. The Court finds that this refusal to answer should not form the basis for reasonable suspicion of criminal activity because it is merely a citizen exercising the right to remain silent. The converse of this would also be true, i.e., that a Defendant's claim of hemp or legal medical marijuana does not preclude reasonable suspicion to search if there are other articulable facts supporting same.

[2]This Court is ever mindful that, as a trial court, its role is to follow stare decisis. However, where changes in the law create a question of first impression regarding the subject of search and seizure, the Court must exercise the power of judicial review and legal interpretation of existing case law in a manner that upholds established constitutional limits on warrantless searches.

* * *

Torts—Attorneys—Legal malpractice—Claims in impleader complaint brought by judgment creditor claiming that attorneys who represented defendant in personal injury action breached their agreements with and duties to defendant in connection with their representation of her in that suit sound in legal malpractice—Accordingly, claims are not assignable and may not be pursued by impleader plaintiff—Even if claims were assignable, they cannot be legally maintained where impleader plaintiff released claims in broad general release—Claims against attorneys also barred by judicial and collateral estoppel given dismissal of attorneys from underlying quantum meruit action for attorney's fees brought by attorneys who originally represented defendant in personal injury case—Impleader complaint is dismissed with prejudice

VICTIM JUSTICE, P.C., and JOHN CLUNE, MICHAEL DOLCE, and DOLCE LAW, P.A., Plaintiffs, v. DEANNA WILLIAMS, JONATHAN A. HELLER, LAW OFFICES OF JONATHAN A. HELLER, P.A., PETER ITZLER, and ITZLER & ITZLER, P.A., Defendants. MAGER PARUAS, LLC as Judgment Creditor of Deanna Williams, Impleader Plaintiff, v. JONATHAN A. HELLER, LAW OFFICE OF JONATHAN A. HELLER, P.A., GLORIA ALLRED, GLORIA R. ALLRED, a Professional Corporation, NATHAN GOLDBERG, and ALLRED, MAROKO & GOLDBERG, A partnership, Implead Defendants. Circuit Court, 20th Judicial Circuit in and for Lee County. Case No. 13-CA-003181. July 20, 2020. James Shenko, Judge. Counsel: Cody German and Ryan Weiss, Cole, Scott & Kissane, P.A., Miami, for Impleader Defendants Gloria Allred, Gloria R. Allred, Nathan Goldberg, and Allred, Maroko & Goldberg. Glenn Waldman, Gunster, Fort Lauderdale, for Impleader Defendants Jonathan A. Heller, Law Office of Jonathan A. Heller, P.A.

[Appeal to Second District Court of Appeal filed August 20, 2020; Mager Paruas v. Deanna Williams, et al, Case No. 2D20-2486.]

Order on Impleader Plaintiff's Motion for Reconsideration and for Clarification

This cause came on for hearing before this court on June 23, 2020 upon Impleader Plaintiff, Mager Paruas, LLC's Motion for Reconsideration and for Clarification of this Court's May 8, 2020 Orders. In considering this matter, the Court has reviewed and considered the following: (i) the Motion for Reconsideration with exhibits; (ii) the Responses and Memoranda of Law in Opposition filed by both the Heller and Allred Defendants; (iii) authorities cited by all parties; (iv) the Notices to Appear issued by this Court on December 19, 2019 and January 2, 2020 to the Heller and Allred Defendants; (v) Plaintiff's IMPLEADER COMPLAINT IN PROCEEDINGS SUPPLEMENTARY; (vi) the Defendants' several affidavits filed in opposition to the Proceedings Supplementary; (vii) the Notice of filing Affidavit of Jonathan A. Heller, filed May 3, 2020, specifically Plaintiffs' Notice of Dropping Certain Party Defendants (Ex. 7), and the associated GENERAL RELEASE executed and delivered to the Heller Defendants by Impleader Plaintiff, Mager Paruas, LLC and attorney Scott Mager, individually in connection with the resolution of the instant litigation (Ex. 6); and (viii) all other matters reflected in the Court's docket. Having heard extensive argument form all counsel and having reviewed applicable case law, and being otherwise duly advised in the premises, the Court GRANTS the motion for reconsideration and for clarification, IN PART, and it is thereupon Ordered and Adjudged as follows:

FACTUAL AND PROCEDURAL BACKGROUND

1. This action originated on or about November 13, 2013, when Plaintiffs initiated a 2 count complaint for *quantum meruit* for attorneys' fees and declaratory judgment against Defendant Deanna Williams and the Heller Defendants (the "Underlying Litigation").

2. The present posture of this case, as discussed more fully below, is post-judgment Proceedings Supplementary.

3. On October 8, 2019, the Plaintiff filed a Motion to Initiate Proceedings Supplementary, on October 30, 2019, Plaintiff filed an Amended Motion to Initiate Proceedings Supplementary, and finally, on November 12, 2019, the Plaintiff filed a Second Amended Motion to Initiate Proceedings Supplementary (collectively the "Motions to Initiate Proceedings Supplementary").

4. Despite the fact that the Motions to Initiate Proceedings Supplementary sought relief against the Heller Defendants, who had previously been parties and counsel of record in the Underlying Litigation, no prior notice of Motions to Initiate Proceedings Supplementary was given to the Heller Defendants. The Allred Defendants also received no notice of the Motions to Initiate Proceedings Supplementary against them.

5. The Allred Defendants were not parties in the Underlying Litigation, and acted only as co-counsel—for a period of time mostly prior to the initiation of the Underlying Litigation—with the Heller Defendants in representing Defendant Williams.

6. The Heller and Allred Defendants have opposed these Proceed-

ings Supplementary arguing various legal and factual grounds, including that: (a) the claims have been discharged by the Plaintiff by reason of the prior dismissal of the Heller Defendants in the Underlying Litigation; (b) the claims have been discharged by the express terms of the General Release granted by the Plaintiffs in the Underlying Litigation; and (c) the claims which Plaintiff seeks to pursue in these Proceedings Supplementary arise from and or are related to prior legal representation and therefore, non-assignable attorney malpractice claims.

Brief Summary of Relevant Proceedings in the Underlying Litigation

7. The Underlying Litigation has been extensive, and this Court's docket has 165 entries spanning over 6 and ½ years.

8. The Underlying Litigation involved the Plaintiffs' claims to seek recovery of attorneys' fees for prior representation of Deanna Williams in claims against a third party (unrelated to the present proceedings and hereinafter referred to as the "Personal Injury Lawsuit").

9. Plaintiffs' sought a *quantum meruit* claim against Ms. Williams, and to have this Court determine (and issue a declaratory judgment as to) the entitlement to fees by all attorneys representing Ms. Williams in the prior Personal Injury Lawsuit.

10. The Court recognizes that there is a Final Judgment against Defendant Williams for *quatum meruit* fees, entered November 20, 2017, which was never appealed.

11. However, it is nonetheless relevant to examine briefly what happened in the Underlying Litigation as it relates to the Heller and Allred Defendants:

a. For many years, the Heller Defendants as counsel for Ms. Williams, vigorously opposed the Plaintiffs' entitlement to any fees, claiming that: (a) they had withdrawn from a contingent fee representation before the contingency was fulfilled; and (b) no charging lien had been timely filed in the prior Personal Injury Lawsuit.

b. Plaintiffs, in turn, claimed that they still maintained the right to seek *quantum meruit* fees (because they asserted that Ms. Williams had somehow forced their withdrawal).

c. At the same time, the Heller Defendants maintained they should not have been sued as there was nothing for the Court to declare, because the Plaintiffs had never filed a charging lien in the prior Personal Injury Lawsuit.

d. The fact that no charging lien was ever filed in the Personal Injury Lawsuit has been established. In fact, the Second District in its decision in *Williams, et al., v. Victim Justice, P.C., et al.*, 198 So. 3d 822, 825 n.3 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D640a] found that Plaintiffs had conceded that they never filed a charging lien in the Personal Injury Lawsuit.

e. In August 2016, Ms. Williams discharged the Heller Defendants as her counsel, and on September 22, 2016, this Court granted the Heller Defendants' motion to withdraw as counsel.

f. After such withdrawal, the Heller Defendants nevertheless remained involved in the case as party defendants.

g. The Heller Defendants had previously served Proposals for Settlement to Plaintiffs (*See* May 3, 2020 Notice of Filing, Ex. 1); and filed a Motion for Summary Judgment (*See* May 3, 2020 Notice of Filing, Ex. 2).

h. With a second hearing on the Heller Defendants' Motion for Summary Judgment imminent, Plaintiffs and Heller Defendants engaged in discussions about a possible "mutual walk away" resolution. *See*, Heller Affidavit, filed May 3, 2020.

i. Following these discussions, which Plaintiff has not refuted took place, the parties reached a resolution in July 2017, as a result of which: (1) The Plaintiffs dismissed the Heller Defendants from the Underlying Litigation; (2) Plaintiffs granted a General Release to Heller Defendants and their "heirs, legal representatives, attorneys, insurers, agents, employees and assigns"; and (3) the Heller Defendants agreed to forego their motion for summary judgment and any potential claims for fees as a result of the proposals for settlement.

j. Following the withdrawal of the Heller Defendants as counsel for Ms. Williams, and their later being dropped as party defendants, the Underlying Litigation proceeded expeditiously against Ms. Williams, ultimately resulting in an August 2017 Order Granting Sanctions against Ms. Williams, which struck her pleadings and disregarded all her defenses. Shortly thereafter, on November 20, 2017, the Court entered two judgments against Ms. Williams that are relevant to the present proceedings, one for the *quantum meruit* claims in the amount of $575,000.00, and a second for attorneys' fees as sanctions against Ms. Williams in the Underlying Litigation in the amount of $439,524.52.

k. With a final judgment in hand, Plaintiffs now seek though Proceedings Supplementary to claim that the Heller and Allred Defendants are somehow obligated to Ms. Williams, and seek to "stand in her shoes" in claims against the Heller and Allred Defendants. (*See* Impleader Complaint in Proceedings Supplementary, at ¶¶13, 14).

l. Plaintiffs seek recovery against the Heller and Allred Defendants only of the *quantum meruit* judgment and not the attorneys' fees as a sanction judgment.

Procedural Status Of The Impleader Action

12. Plaintiff filed the instant Impleader Complaint in Proceedings Supplementary against the Heller Defendants and the Allred Defendants on or about January 2, 2020 seeking inter alia, 'to prosecute any and all causes of action Ms. Williams may have against Impleader Defendants . . . for the benefit of Impleader Plaintiff MAGER PARUAS,LLC as a Judgment Creditor. . . . . .'. (*See* Impleader Complaint, Par. 13 (b)).

13. As further alleged, 'Impleader Plaintiff MAGER PARUAS, LLC stands in the shoes of Ms. Williams in these proceedings.' (Impleader Complaint, Par. 14).

14. The claims asserted against the Impleader Defendants consist of Breach of Contract, Unjust Enrichment, Breach of Fiduciary Duty and Promissory Estoppel.

15. Despite the legal causes of action asserted, the essence of the Impleader Complaint is that Plaintiff's allegations that Ms. Williams has legal claims that entitled her to have the Heller and Allred Defendants to pay for all or part of the same *quantum meruit* fees which were originally sought against the Heller Defendants in the Underlying Litigation and are incorporated into the November 20, 2017 final judgment.

16. Plaintiffs in the Impleader Complaint seek to stand in the shoes of Ms. Williams to pursue those claims.

17. The Allred Defendants filed a Motion to Vacate the Court's November 19, 2019 Impleader Order, or In the Alternative, for an Evidentiary Hearing, and Motion to Stay Response to Impleader Complaint Pending Ruling on Motion to Vacate, on February 5, 2020 ("Motion to Vacate"). The Allred Defendants also filed Affidavits of Gloria Allred and Nathan Goldberg in this action, on February 18, 2020, in response to the Notice to Appear.

18. The Heller Defendants, on February 19, 2020, filed a Motion to Stay or Abate Action (the "Motion to Stay"). On that same date, the Heller Defendants also filed a Motion for Sanctions Pursuant to §57.105 Fla. Stat.

19. The Heller Defendants also responded to the Notice to Appear with an affidavit asserting that they were not indebted to Ms. Williams in any way, and that any claims brought by Plaintiffs in the Impleader complaint were barred by the prior dismissal of the Heller Defendants in the Underlying Litigation and the fact that the Plaintiffs had granted the Heller Defendants a very broad General Release. (*See* Notice of Filing Affidavit of Jonathan A. Heller, Esq., with Exhibits, filed May

3, 2020).

20. Plaintiff filed a Response in Opposition to the Allred Defendants' Motion to Vacate on February 10, 2020, and a Response in Opposition to the Heller Defendants' Motion to Stay on April 28, 2020.

21. Plaintiff filed the affidavit of Scott Mager on April 30, 2020.

22. The Allred Defendants filed a Reply to the Response in Opposition to the Motion to Vacate on April 30, 2020.

23. The Court held a one hour telephonic hearing on May 4, 2020, upon the Allred Defendants' Motion to Vacate and the Heller Defendants' Motion to Stay.

24. On May 8, 2020, the Court entered an Order on Heller Defendants' Motion to Stay/Abate Action and an Order Setting Evidentiary Hearing on the Allred Defendants' Motion to Vacate.

25. On May 19, 2020, Plaintiffs filed a Motion for Reconsideration and for Clarification ("Motion for Consideration").

26. On May 29, 2020, the Allred Defendants filed a Response to the Motion for Reconsideration.

27. On June 16, 2020, the Heller Defendants filed a Response to the Motion for Reconsideration.

28. This Court held another one-hour hearing on the Motion for Reconsideration on June 23, 2020, at which time the Court heard further argument from counsel for Plaintiffs, and the Heller and Allred Defendants.

29. During the course of the hearings occurring on May 4, 2020, and June 23, 2020, it became apparent to the Court that this Court must address the issues raised by the Heller and Allred Defendants regarding whether these Proceedings Supplementary may even go forward, including the scope and applicability of the General Release to the claims in the Impleader Complaint.

30. Before addressing the legal analysis regarding the Heller and Allred Defendants' position that the claims in the Impleader Complaint are barred, this Court announces that is has reviewed the General Release and that: (a) The terms of the GENERAL RELEASE are clear, unequivocal and without ambiguity; and (b) all of the claims asserted by the Impleader Plaintiff on behalf of Deanna Williams arose out of or relating to the attorney client relationship with the Heller and Allred Defendants.

Legal Analysis

The Court after reviewing all the various filings and memoranda filed by the parties, and hearing over two hours of legal argument on two separate dates, has concluded that it must examine the threshold question of whether the claims in the Impleader Complaint may be legally maintained by the judgment creditor Plaintiff.

The Claims in The Impleader Complaint Are Non-Assignable Claims Arising from the Former Legal Representation

In its Complaint, Impleader Plaintiff alleges that "Impleader Plaintiff MAGER PARUAS, LLC stands in the shoes of Ms. Williams in these proceedings."(See Impleader Complaint, ¶14). This begs the real question that this Court must consider, which is whether the claims brought in the Impleader Complaint are really claims sounding in legal malpractice?

In the present case, the only relationship that existed between Ms. Williams and the Heller and Allred Defendants arose from their representation of Ms. Williams, first in the original Personal Injury Lawsuit (from which the quantum meruit fee claim originates) and then in the Underlying Litigation (this case). There is nothing in the record that indicates that the Heller or Allred Defendants had any form of independent legal relationship with Ms. Williams different or distinct from the attorney-client relationship and the Impleader Plaintiff Counsel has conceded this point during oral argument on the present matter. The allegations of the Impleader Complaint state that the breach of contract claim (Count I) arises from the contract for representation between Williams and the Heller Defendants. (See Impleader Complaint, ¶17). In fact, the Impleader Complaint claims that the contract for legal representation (when the Heller Defendants became Ms. Williams successor counsel) contained a provision that called for the Heller Defendants to pay for any fees assessed in favor of prior counsel. (See Impleader Complaint, ¶18). The other claims also arise out of the Heller and Allred Defendants' role as Ms. Williams' attorneys, whether in the form of receiving settlement proceeds that are alleged should have been disbursed differently or whether the allegation is they received and wrongfully kept more attorneys' fees that they were entitled to. This Court finds that a plain examination of the allegations of the Impleader Complaint leads to the conclusion that all the claims arise from or are related to the only relationship which existed between Ms. Williams and the Heller and Allred Defendants, which was an attorney-client relationship arising from the Personal Injury Lawsuit. Therefore, this Court concludes that the claims in the Impleader Complaint against the Heller and Allred Defendants are all sounding in legal malpractice.

The Supreme Court of Florida and the appellate courts across the state have ruled legal malpractice claims are not assignable. *Law Office of David J. Stern, P.A. v. Sec. Nat'l Servicing Corp.*, 969 So. 2d 962 (Fla. 2007) [32 Fla. L. Weekly S396a] ("[L]egal malpractice claims are not assignable because of the personal nature of legal services which involve a confidential, fiduciary relationship of the very highest character, with an undivided duty of loyalty owed to the client."); *Forgione*, 701 So. 2d at 559 (Fla. 1997) [22 Fla. L. Weekly S704a] (quoting *Washington v. Fireman's Fund Ins. Co.*, 459 So. 2d 1148, 1149 (Fla. 4th DCA 1984) ("Florida law views legal malpractice as a personal tort which cannot be assigned because of 'the personal nature of legal services which involve highly confidential relationships.' ")).

The Florida Supreme Court created an extremely narrow exception to this rule in *Cowan Liebowitz & Latman, P.C. v. Kaplan*, which dealt with legal representation that was deemed ***not personal*** in nature, but rather, involved the publication of corporate information to third parties. *Cowan Liebowitz & Latman, P.C. v. Kaplan*, 902 So. 2d 755 (Fla. 2005) [30 Fla. L. Weekly S155a]. Impleader Plaintiff argues that under *Kaplan*, the Impleader Plaintiff may stand in the shoes of Defendant Williams and bring the claims against Heller and Allred Defendants. This Court does not agree.

In *Kaplan*, the Supreme Court of Florida permitted the assignment of a legal malpractice claim because the information prepared in Kaplan, a private placement memorandum intended to be circulated to prospective investors, was intended for release to third parties, and, therefore, the assignment did not violate attorney-client confidentiality. *Id.* However, the Court stressed that "the vast majority of legal malpractice claims remain unassignable because in most cases the lawyer's duty is to the client." *Id.* at 757 (emphasis added).

Here, no attorney-client relationship existed between Impleader Plaintiff and Heller and Allred Defendants. The Heller and Allred Defendants had what appears to have been a standard attorney-client relationship with Ms. Williams in connection with the Personal Injury Lawsuit. The law is clear that the Impleader Plaintiff cannot obtain an assignment to pursue the legal malpractice derived claims that Plaintiff attempts to now assert against the Impleader Defendants.

In *Mickler v. Aaron*, 490 So.2d 1343 (Fla. 4th DCA 1986), the Fourth District affirmed the dismissal with prejudice of an impleader complaint against the attorneys who represented the defendant in that action, and the dismissal of his petition for proceedings supplementary. In doing so, the Court stated the following:

> Appellant's contentions are without merit based upon this court's decisions in *Washington v. Fireman's Fund Insurance Co.*, 459 So.2d 1148 (Fla. 4th DCA 1984) (holding legal malpractice action not

assignable because of the personal nature of legal services involving highly confidential relationships) and *Puzzo v. Ray*, 386 So.2d 49 (Fla. 4th DCA 1980) (holding a mere right of action for a personal tort is not property which can be reached by a creditor's suit pursuant to section 56.29, Florida Statutes).

Id.

This case compels the same result. Here, Impleader Plaintiff has alleged that the Heller and Allred Defendants breached their agreements with and duties to Ms. Williams in connection with their legal representation of Ms. Williams in the separate Personal Injury Lawsuit. Specifically, Impleader Plaintiff has alleged that Heller and Allred Defendants had obligations to their former client, Ms. Williams, to distribute their respective portions of Ms. Williams' settlement proceeds to satisfy Ms. Williams' prior attorneys' fees. Any such obligation or agreement between the Heller and Allred Defendants and Ms. Williams would have arisen from their attorney client relationship in the Personal Injury Litigation. This is not a situation like that in *Kaplan* where the transactional investment document preparation performed by the impleader defendants in that case was specifically intended for publication to third parties, and Impleader Plaintiff has not made any such allegations in its Impleader Complaint. Rather, Impleader Plaintiff is merely a judgment creditor attempting to collect on its judgment against Deanna Williams, a former client of the Heller and Allred Defendants in the Personal Injury Lawsuit.

As the Court noted in *Cowan Liebowitz & Latman, P.C. v. Kaplan*, the vast majority of legal malpractice claims remain unassignable because in most cases the lawyer's duty is personal to the client.

Impleader Plaintiff cites to *Craft v. Craft*, 757 So. 2d 571 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1032a] to support their position that Ms. Williams' claims are assignable to the Impleader Plaintiff in these proceedings supplementary. However, the facts in *Craft* were materially different from those in the present case. In *Craft*, one party in a marital dissolution action sought to take over the rights of the other spouse to a litigation matter. While the litigation matter was against a law firm, the law firm belonged to one of the sons of the couple and the claims did not arise strictly from the attorney client relationship, but rather from the son, other non-lawyers and his firm's joint fraudulent mishandling of "various business and financial interests." *Craft*, 757 So. 2d at 753. Because the nature of the claims more closely resembled the kinds on litigation claims that could be assigned, and not legal malpractice claims, the Court found them assignable in the proceedings supplementary and affirmed. *Id.* As has already been discussed above, that is not the situation here, where all of the claims putatively available to Ms. Williams arise from and are related to the performance by the Heller and Allred Defendants of their attorney-client responsibilities pursuant to a legal services contract. Therefore, *Craft* is inapplicable.

This Court finds nothing in the record before it to conclude that the relationship between Ms. Williams and the Heller and Allred Defendants was other than the traditional attorney-client relationship and finds *Kaplan*, *Craft* and the cases relied upon by Plaintiff to be inapplicable. Therefore, the Court concludes that as a matter of law, the claims in the Impleader Complaint are not assignable, and may not be pursued by the Impleader Plaintiff against the Heller and Allred Defendants.

The General Release Bars the Claims in the Impleader Complaint Against Heller Defendants

Even if the Court were to have concluded the claims in the Impleader Complaint were assignable, they are still not legally maintainable because the Impleader Plaintiff released the claims in the General Release executed in July 2017.

Based upon the record before the Court, it appears that the language of the GENERAL RELEASE was carefully negotiated among, and crafted by, the Heller Defendants and multiple counsel for the Plaintiffs.

Florida courts have a strong public law encouraging the resolution of litigation, and the enforcement of valid releases. *Mazzoni Farms, Inc. v. E.I. Dupont De Nemours and Co*., 761 So.2d 306 (Fla. 2000) [25 Fla. L. Weekly S446a]. Interpretation of the release is a question of law for the Court and the language used in the general release is the best evidence of the parties intent. *See Rosen. v. Florida Ins. Guar. Assn'n*, 802 So.2d 291 (Fla. 2001) [26 Fla. L. Weekly S611a]; *Patco Transport, Inc. v. Estupinan*, 917 So.2d 922 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D2797a]; *Hurt v. Leatherby Ins. Co.,* 380 So.2d 432, 433 (Fla. 1980).

Therefore, this Court must examine the language of the General Release to determine its enforceability, whether the scope of the release, based upon the language of the General Release bars or precludes the claims against the Heller Defendants, and by extension the Allred Defendants, as pled in the Impleader Complaint.

Turning to the express language of the General Release, it provides that all plaintiffs, including Scott Mager and his law firm, Mager and Paruas, LLC, their Legal representatives, ***predecessors***, successors, heir or assigns released, satisfied and forever discharged the Heller Defendants as follows:

> HEREBY remise, release, acquit, satisfy and forever discharge the second party of and from any and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands whatsoever, in law or in equity, ***which said parties ever had, now have, or which any*** Legal Representative, ***predecessor***, successor, heir or assign ***of said parties, hereafter can, shall or may have against the second party, whether known or unknown, for, upon or by reason of any matter, cause or thing whatsoever***, including but not limited to, any and all claims whether raised or not, with respect to the claims and defenses asserted in that certain action styled *Victim Justice, P.C. and John Clune. Michael Dolce and Dolce Law P.A. vs. Deanna Williams. Jonathan A. Heller, Law Offices of Jonathan A. Heller, P.A. et. al.*, Case Number 13-CA-003181 in the Circuit Court of the 20th Judicial Circuit in and for Lee County, Florida (the "Lawsuit").
>
> THIS RELEASE covers any and all claims or defenses of the first party which were raised, which existed and were not raised, or which will hereafter arise out of the subject matter of the Lawsuit.
>
> THIS RELEASE shall further cover and extend to the pleadings, motions, offers of judgment, motions for attorneys' fees, outstanding orders, pending motions for summary judgment, charging liens filed or unfiled charging liens, attorney fees, costs, as well as, all legal or equitable claims for attorney's fees, costs, damages, judgments, interest, and any and all other claims arising out of this Lawsuit. Each said party to bear their own costs and attorney's fees concerning this Lawsuit.

See, May 3, 2020 Notice of Filing, Ex. 6, June 29, 2017 General Release, p.1 (emphasis supplied).

The Impleader Plaintiff has attempted to persuade this Court that the claims in the Impleader Complaint belong to Ms. Williams and that since as to those claims they stand in the shoes of Ms. Williams, the claims should not be governed by the General Release. This Court disagrees.

The language of the General Release is worded in the broadest possible sense. Even accepting the Plaintiffs' position that it is standing in the shoes of Ms. Williams, the Court finds that this would make Ms. Williams a "predecessor" to Plaintiffs.

The unequivocal language of the General Release extends to any claims that such a predecessor "***hereafter can, shall or may have***

against the second party, whether known or unknown, for, upon or by reason of any matter, cause or thing whatsoever, including but not limited to, any and all claims whether raised or not, with respect to the claims and defenses asserted in. . ." the Underlying Litigation. Thus, the language encompasses past, present and future claims such "predecessor" might have.

The claim Ms. Williams (the "predecessor") might have against the Heller Defendants arises from whether or not she might be able to seek indemnification or contribution from the Heller Defendants for the *quatum meruit* fees awarded in Plaintiffs' judgment. As a result, it falls within the scope of the General Release.

Nor can this Court overlook the included and customized language of the last paragraph which tailored the GENERAL RELEASE to effectively discharge "**charging liens filed or unfiled charging liens, attorneys fees, costs, as well as all legal or equitable claims for attorney's fees, costs, damages, judgments, interest and any and all other claims arising out of this lawsuit**." *See*, May 3, 2020 Notice of Filing, Ex. 6June 29, 2017 General Release, p.1 (emphasis supplied).

Notwithstanding this, the Impleader Plaintiff urges this Court to simply ignore the General Release. This Court cannot do so.

The General Release, was negotiated at arms-length amongst sophisticated parties who were all attorneys, and is, from a review of the unequivocal language, a broad and all-encompassing Release.

Plaintiff also asks this Court to permit discovery, and hold a hearing to determine the parties' intent in executing the General Release. Florida law provides that "[w]here the language of a release is clear and unambiguous, a court cannot entertain evidence contrary to its plain meaning." *Pritchard, III, v. Levin*, ___ So. 3d ___, 2020WL2050691 (Fla. 3d DCA April 29, 2020) [45 Fla. L. Weekly D1015c], citing *Cerniglia v. Cerniglia*, 679 So. 2d 1160, 1164 (Fla. 1996) [21 Fla. L. Weekly S357a] and *Sheen v. Lyon*, 485 So. 2d 422, 424 (Fla. 1986).

The Court finds that the language of the General Release is clear and unambiguous, and therefore, Impleader Plaintiff's request for discovery and an evidentiary hearing are DENIED. The Court further finds that the scope of the language of the General Release encompasses any claims for *quatum meruit* fees that Impleader Plaintiff may have against the Heller Defendants, including any indirect claims that Plaintiffs' predecessor Defendant Williams might have for breach of contract, indemnity, contribution or otherwise. Consequently, the Court finds as a matter of law, that the Impleader Plaintiff is legally incapable of maintaining the claims in the Impleader Complaint against the Heller Defendants.

The Claims in the Impleader Complaint Cannot Be Maintained Against the Allred Defendants

Even if the Court were to have concluded the claims in the Impleader Complaint were assignable against the Allred Defendants, they are still not legally maintainable because the Impleader Plaintiff released the claims against said Defendants since they were clearly agents of the Heller Defendants as defined in the 2017 Release. More specifically, the General Release defined the Impleader Plaintiff as the "first party" and the Heller Defendants as the "second party" and stated: "(Whenever used herein the terms "first party" and "second party" shall include singular and plural, heirs, legal representatives, attorneys, insurers, agents, employees and assigns of corporations)." As established above, the Allred Defendants acted as co-counsel—for a period of time mostly prior to the initiation of the Underlying Litigation—with the Heller Defendants in representing Defendant Williams. The Plaintiff now seeks to sue the Heller and Allred Defendants by standing in the shoes of Ms. Williams as it relates to their role as co-counsel in the representation of Ms. Williams in the Personal Injury Litigation. Given their undisputed role as co-counsel for Ms. Williams, it would be absurd to conclude the Allred Defendants were not agents of the Heller Defendants in their joint representation of Ms. Williams in the Personal Injury Litigation. The Plaintiff entered into the broad general release and mutually defined the release to cover their "agents" as well as the Heller Defendants' "agents". The unambiguous language of the general release covers the Allred Defendants as agents of the Heller Defendants, and therefore, Impleader Plaintiff is legally incapable of maintaining the claims in the Impleader Complaint against the Allred Defendants.

The Claims in the Impleader Complaint are Barred by Estoppel Due to the Prior Dismissal

The Heller Defendants also contend that the Plaintiffs are barred from proceeding against the Heller Defendants under the doctrines of judicial and equitable estoppel. "Judicial estoppel is an equitable doctrine that prevents litigants from taking inconsistent positions in separate judicial or quasi-judicial proceedings." *Crawford Residences, LLC v. Banco Popular N. Amer.,* 88 So. 3d 1017, 1020 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1260d]. "At its core, judicial estoppel requires a showing that a litigant successfully maintained a position in one proceeding, while taking an inconsistent position in a later proceeding, and that the other party was misled and changed its position in such a way that it would be unjust to allow the litigant to take the inconsistent position." *Id.*, citing *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1066 (Fla. 2001) [26 Fla. L. Weekly S473a].

The Heller Defendants contend that the Plaintiffs made the decision to dismiss them and grant the General Release, in part as a tactical decision because they wanted to clear an easier path for them to obtain substantial judgments against Ms. Williams. It cannot be disputed that the Plaintiffs received some benefits from the dismissal of the Heller Defendants. First, the Heller Defendants abandoned claims for attorneys' fees pursuant to the proposals for settlement, which fee claims were released in the same General Release discussed above. Also, it cannot be disputed that at the time the Heller Defendants chose to release those claims in reliance upon the representation by the Plaintiffs that the Heller Defendants would be able to "walk away" from the Underlying Litigation forever. The Impleader Complaint Plaintiff is seeks to pull the Heller Defendants back in to this litigation and make them responsible for paying the very *quantum meruit* judgment that the Heller Defendants contend was easier to obtain due to their dismissal from the case.

The Court finds that the Plaintiffs are also precluded from pursuing the Heller Defendants under the doctrines of judicial and equitable estoppel. The elements of equitable estoppel are: "(1) the party against whom the estoppel is sought must have made a representation about a material fact that is contrary to a position it later asserts; (2) the party claiming estoppel must have relied on that representation; and (3) the party seeking estoppel must have changed his position to his detriment based upon the representation and his reliance on it." *Winans v. Weber*, 979 So. 2d 269, 274-75 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2954a]. All the elements for equitable estoppel are present here. The Plaintiffs got the benefits of their bargain, the Heller Defendants attorneys' fees claims were released, and the issues were narrowed in the Underlying Litigation against Ms. Williams, allowing the expeditious entry of judgments. Therefore, the Court finds it would be inequitable not to grant the Heller Defendants the benefits they bargained for, namely their permanent discharge from any and all claims arising from the Underlying Litigation.

Conclusion

Based upon the extensive briefing by the parties and multiple hearings before this Court, and the factual history and legal analysis set forth above, the Court hereby ORDERS and ADJUDGES, that:

1. The motion for reconsideration and for clarification is

GRANTED, IN PART and DENIED, IN PART.

2. This Court VACATES the orders entered on May 8, 2020 relating to the Allred Defendants' Motion to Vacate, and the Heller Defendants Motion to Stay.

3. Upon reconsideration, the Impleader Plaintiff's request for leave to take discovery and for an evidentiary hearing are DENIED.

4. The Motion to Vacate is GRANTED, the Order granting the Motions to Initiate Proceedings Supplementary, and the Notices to Appear issued to the Allred Defendants and the Heller Defendants are hereby VACATED.

5. The Heller Defendants' Motion to Stay is hereby DENIED AS MOOT.

6. Because the Court finds as a matter of law that the Impleader Plaintiff is legally barred from pursuing the claims in the Impleader Complaint against the Heller Defendants and the Allred Defendants, the Court dismisses the Impleader Complaint, with prejudice.

7. The Heller Defendants' Motion for Sanctions Pursuant to §57.105, Fla. Stat. is held in abeyance for thirty (30) days.

* * *

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COUNTY COURTS

Criminal law—Driving under influence—Evidence—Breath test—Substantial compliance with administrative rules—Twenty-minute observation period—Where defendant was placed behind lead partition outside of view of any officer for part of twenty-minute observation period, breath test results are inadmissible

STATE OF FLORIDA, v. THOMAS ANDERSON, Defendant. County Court, 2nd Judicial Circuit in and for Leon County. Case No. 2019-CT-1953-A. SPN No. 261429. August 17, 2020. Nina Ashenafi Richardson, Judge. Counsel: Jon Bielby, Assistant State Attorney, Office of the State Attorney, Tallahassee, for State. Lee Meadows, Tallahassee, for Defendant.

ORDER

BEFORE this court is Defendant's ***Motion in Limine - Insufficient Observation,*** and after noting the contents of said motion, hearing arguments from the State and Counsel for the Defendant, viewing a video of the aforementioned, and reviewing case authority, this Court finds as follows:

1. On September 22, 2019, Defendant was arrested, charged with DUI, and taken to the Leon County Jail. The defendant was requested to submit to an intoxilyzer. The defendant had results above .08.

2. Officer Johnson began his observation of Defendant at 1:46 am and Defendant provided the first sample at 2:08 am.

3. At 1:55 am, Defendant was placed in a room of the Leon County Jail, behind a lead partition.

4. During which time, the Defendant was not in the line of sight of Officer Johnson or any other law enforcement officer.

5. Chapter 11D-8.007(3) of the Florida Administrative Code states "The breath test operator, agency inspector, arresting officer, or person designated by the permit holder shall reasonably ensure that the subject has not taken anything by mouth or has not regurgitated for at least twenty (20) minutes before administering the test."

6. The State has the burden of proving substantial compliance with this regulation. See *Dep't of Highway Safety & Motor Vehicles v. Farley,* 633 So. 2d 69 (Fla. 5th DCA 1994).

7. The Petitioner does not bear the burden of proof that he did not take something by mouth or regurgitate. *Vernon v. State,* 558 So.2d 535 (Fla. 1st DCA 1990).

8. In *State v. Fisher,* 14 Fla. L. Weekly Supp. 471a (J. Aikens, Leon Cty. Ct. 2006) the Leon County Court granted the defendant's motion to suppress intoxilyzer results based on the 20 minute observation period stated, when the officer failed to observe the Defendants during the requisite 20 minute period, it can logically be concluded that the integrity of the test results was affected and the results obtained are unreliable. This Court finds Deputy Cole did not observe Defendant continuously for 20 minutes. The testimony did not conclusively establish Deputy Cole remained within close and continuous observation where he could detect belching, regurgitation, or the ingestion of anything by Defendant through utilizing his senses of sight, sound, or smell.

Continuing, the Leon County Court stated, it is well established that in order for the results of a defendant's breath test to be admissible in evidence in a DUI prosecution, the tests must be made in compliance with the statutes and administrative rules. *State v. Bender,* 382 So. 2d 697 (Fla. 1980); *Robertson v. State,* 604 So.2d 783 (Fla. 1992). In order to establish the admissibility of breath test results, the state must establish the fact that the tests were made in substantial conformity with the applicable administrative rules and statutes. See *State v. Donaldson,* 579 So.2d 728 (Fla. 1991); *State v. Reisner,* 584 So.2d 141 (Fla. 5th DCA 1991).

9. In "*State v. Davis,* 13 Fla. L. Weekly Supp. 1191b (J. Aikens, Leon Cty. Ct. 2006), the Order of the Court stated in other words, while the purpose of the observation period can certainly be satisfied by the arresting officer or operators relying on senses in conjunction with sight, to suggest that looking at the driver is unnecessary to observe, just does not ring true. See *State v. Arnold,* 80 S.W.3d 27, 30 (Tenn. Crim. App. 2002) (stating, in pertinent part, "a belch or regurgitation sufficient to skew the results of a breath analysis test may not produce a sound loud enough to be heard by another person"); see also *State v. Carson,* 133 Idaho 451, 988 P.2d 225, 227 (Idaho Ct. App. 1999)."

10. Although an officer need not stare fixedly at a defendant for the full 20-minute period, an officer must be in close enough proximity to use alternative senses to ensure a defendant did not ingest any substance or regurgitate during the observation period. *Barone v. State, Dep't of Revenue, Motor Vehicle Div.,* 736 P.2d 432 (Colo. App. 1987).

11. As was demonstrated in the bodycam footage, Defendant was placed behind a lead partition, outside of the view of law enforcement, which would have prevented the officers from hearing Defendant burp or regurgitate, especially with the background noise in the jail.

12. Because Officer Johnson would not have been able to meet the level of observation required by Chapter 11D-8.007(3) of the Florida Administrative Code, the State has failed to show substantial compliance, meet its burden, and the intoxilyzer results are therefore unreliable and inadmissible.

ORDERED AND ADJUDGED

1. Defendant's Motion in Limine - Insufficient Observation is hereby granted.

2. The results of Defendants intoxilyzer results are inadmissible.

* * *

Criminal law—Driving under influence—Medical records—Investigative subpoena—Hearsay evidence and other evidence from probable cause affidavit provide reasonable suspicion that defendant's medical records would further investigation and demonstrate whether or not defendant was impaired—State's request for subpoena granted

STATE OF FLORIDA, v. DAVID LEE DUNCAN, Defendant. County Court, 3rd Judicial Circuit in and for Columbia County. Case No. 20 CT 904. July 23, 2020. Tom Coleman, Judge.

ORDER GRANTING STATE'S SUBPOENA FOR MEDICAL RECORDS

THIS CAUSE came before the Court for hearing on July 21, 2020, pursuant to the State's Notice of Request for Medical Records and Subpoena Duces Tecum For Records. Defendant, through counsel, objected to the subpoena and requested a hearing before the Court. The hearing was conducted via Zoom and Defendant and his attorney, Steven Turnage were present along with Assistant State Attorney Jarrett Thomas. Arguments and case law were presented to the Court and the Court recessed to consider the merits of the case.

The Assistant State Attorney argued that the FHP Incident Report was sufficient for the Court to authorize the subpoena duces tecum. Defense counsel argued that any accident report could not be considered and that the incident report which included hearsay was improper evidence for the Court to consider. The Court has reviewed the case law presented by counsel.

The matter before the Court concerns access to otherwise private records. "To overcome a person's right to keep his or her medical records private, the State is obligated to show a compelling interest in having the records disclosed. *Gomillion v. State of Florida*, 267 So.3d

[502] at 506 (Fla. 4th DCA, 2019) [44 Fla. L. Weekly D758a]. The State can demonstrate a compelling interest by showing that the medical records are relevant to a pending criminal case. *Gomillion*, at 506. *See also, Faber v. State*, 157 So.3d [429] at 431 (Fla. 2nd DCA, 2015) [40 Fla. L. Weekly D348a].

The next question is what level of proof must be presented to show relevance of the records sought. *State v. Rivers*, 787 So.2d [952] at 953 (Fla. 2d DCA, 2001) [26 Fla. L. Weekly D1512a] states that ". . . the dispositive question is whether the State has presented a 'reasonable founded suspicion' that the records it seeks are relevant to an ongoing investigation." *See also, State v. Rutherford*, 707 So.2d 1129, 1131 (Fla. 4th DCA [1997]) [22 Fla. L. Weekly D2387b] which states "A compelling state interest in this type of case is established by showing that the police have a reasonable founded suspicion that the protected materials contain information relevant to an ongoing investigation". *Gomillion* at 507 states ". . . the cases have required that the State show a 'nexus' between the medical records the State seeks and some relevant material issue in the case by (1) identifying some theory that reasonably makes the records relevant and (2) producing some evidence that makes it reasonable to expect that the records will produce evidence that supports the theory".

What does it take to create a reasonable founded suspicion? Headnote 8 in *Leka v. State*, 283 So.3d 853 (Fla. 2nd DCA, 2019) [44 Fla. L. Weekly D2445a] provides as follows: "In considering a request by the State for a subpoena for the medical records of an individual suspected of having committed an uncharged driving offense, pursuant to statutes permitting the request of such a subpoena for the purposes of an ongoing criminal investigation, the court can rely on the State's argument and the accident report or probable cause affidavit to establish relevance". *See also, McAlevy v. State*, 947 So.2d [525] at 529 (Fla. 4th DCA, 2006) [32 Fla. L. Weekly D80c] and *Leka v. State*.

Hearsay was included in some of the cases cited herein. *See Leka v. State*. The State was not allowed subpoena the medical records but the Court's ruling turned on the State's failure to identify the medical records sought or demonstrate the medical records relevance to a criminal investigation. In *Leka v. State* at 856 the Court allowed an officer to testify to hearsay evidence provided by a fellow officer. The fellow officer rule has long existed in the state of Florida and allows officers to rely on evidence provided by a fellow officer.

In the case at bar, the State did rely on some hearsay evidence and other evidence from a probable cause affidavit. Additionally, the officer personally observed obvious signs of impairment due to alcohol ingestion. The report also alluded to identified eyewitnesses that put Defendant at the control of an ATV and in possession of numerous empty beer cans. At this stage of the investigation there is no need to prove anything beyond a reasonable doubt. The question is whether the officer had sufficient information to provide reasonable suspicion that the medical subpoena would further the investigation and either demonstrate that the Defendant was impaired or not. The State has met its burden in this case and is entitled to the medical records subpoena. Accordingly, it is hereby

ORDERED AND ADJUDGED that the subpoena duces tecum for medical records of the Defendant identified as "Abstract of medical records for David Lee Duncan (D.O.B. [redacted]), date of service May 2, 2020 until discharge date to include all drug and alcohol toxicology results" may be served on Shands of Gainesville Medical Records Department.

* * *

Insurance—Personal injury protection—Demand letter—Letter reflecting an amount claimed to be due that exceeded $2500 policy limits applicable where an insured has not been determined to have emergency medical condition was not invalid

DENNIS HUGHES, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 4th Judicial Circuit in and for Duval County, Small Claims Court. Case No. 16-2019-SC-001943, Division CC-A. July 29, 2020. Emmet F. Ferguson, III, Judge. Counsel: Ashley-Britt Hansen, Law Office of D. Scott Craig, LLC, Jacksonville, for Plaintiff. Cameron J. Ringo, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER, having come before this Court on Defendant's Motion for Summary Judgment on July 7, 2020. Both parties were represented by Counsel. The Court being otherwise duly advised in the premises, the Court finds as follows:

1. This is a claim for Personal Injury Protection ("No-Fault") benefits arising out of a motor vehicle accident. Plaintiff submitted to Defendant a presuit demand letter ("demand letter") with an attached itemized statement and a valid Revocation of Assignment of Benefits providing Plaintiff standing to bring forth the instant action.

2. The demand letter accurately stated the total amount billed by Plaintiff's medical provider Advanced Healthcare Centers and the total amount paid to Advanced ($0.00, due to Defendant's coverage denial). The demand letter states it is a demand letter in compliance with F.S. §627.736(10) providing the correct claim number, named insured, and date of loss.

3. Up to the filing of the instant lawsuit, Plaintiff has not been diagnosed with an Emergency Medical Condition ("EMC") pursuant to F.S. §627.736(1)(a)(4) which states:

> (1)(a)(4) Reimbursement for services and care provided in subparagraph 1. or subparagraph 2. is limited to $2,500 if a provider listed in subparagraph 1. or subparagraph 2. determines that the injured person did not have an EMC.

4. Defendant asserts that its policy language complies with the Supreme Court's ruling in *Geico Gen. Ins. Co. v. Virtual Imaging Srvcs.,* 141 So. 3d 147 (Fla. 2013) [38 Fla. L. Weekly S517a], and sufficiently implicates the Florida No-Fault fee schedule of 200% of Medicare B, referenced in the No-Fault statute. Therefore, Defendant itself asserts and acknowledges that the total No-Fault benefits payable should Plaintiff ultimately prevail in this suit, is less than $2,500.

5. Defendant argues F.S. §627.736(1)(a)(4) refers to, and depends on, F.S. §627.736(4)(b) in order to comply with F.S. §627.736(10). However, neither subsection of the Florida No-Fault Law relates to the other. Statutory interpretation mandates that when the language of a statute is clear and unambiguous, and also conveys a "clear and definite" meaning, then the court must not interpret the language in a way that creates a different outcome, or meaning, from the individual subsections. The statute must be given its plain and obvious meaning. *See FL Dept. Of Transp. v. Clipper Bay Invest., LLC,* 160 So. 3d 858 (Fla. 2015) [40 Fla. L. Weekly S164b].

6. The lack of an EMC is not meant to prevent a medical provider or patient access to courts by creating an additional presuit requirement. The demand letter subsection of the Florida No-Fault Law provides the requirements to file suit, and whether an EMC was rendered is not a requirement contained in F.S. §627.736(10).

7. Litigants with medical bills over $2,500 who are seeking payment up to that amount due to the lack of an EMC diagnosis, but still having to place the exact amount *claimed* to be due in the demand letter, would be prevented from filing a law suit should Defendant's position prevail. A due process violation is clearly created when a litigant is prevented from pursuing legal rights. When examining a potential litigant's burden in complying with a condition precedent to suit, such as the presuit demand letter at issue here, Florida courts are required to construe such requirements so as to not unduly restrict a Florida citizen's constitutionally guaranteed access to courts.

Neurology Partners, PA a/a/o Bray v. State Farm, 22 Fla. L. Weekly Supp. 101b (Fla. Duval Cty. Ct., Judge Scott Mitchell, Aug. 7, 2016).

8. This Court aligns itself with and does not recede from the prior ruling of this Court itself, in accordance with other county court judges of the Fourth Judicial Circuit, who opine that the "exacting" standard of the "exact amount claimed to be due" goes to the itemized bill and not to any calculation made by Plaintiff. The exact amount *claimed* to be due on the face of the demand letter is not always the amount that is ultimately determined to be payable. *N. FL. Chiro. & Rehab. Ctr. a/a/o Forehand v. Geico,* Case No.: 16-2018-SC-004911 (Fla. Duval Cty. Ct., Judge Emmet F. Ferguson, III, Feb. 19, 2019) [27 Fla. L. Weekly Supp. 62a]; *McGowan Spinal Rehab Center a/a/o Cameron v. State Farm,* 22 Fla. L. Weekly Supp. 708a (Fla. Duval Cty. Ct., Judge Brent Shore, Dec. 17, 2014); *EBM Internal Medicine a/a/o Dorelien v. State Farm,* 19 Fla. L. Weekly Supp. 410a (Fla. Duval Cty. Ct., Judge Gary Flower, Feb 8, 2015); *N. FL. Chiro. & Rehab. Ctr. a/a/o Brown v. State Farm,* 22 Fla. L. Weekly Supp. 266b (Fla. Duval Cty. Ct., Judge Eleni Derke, dated Aug. 28, 2014); and *Silver Consulting Srvc., Inc. a/a/o Whalen v. USAA,* 23 Fla. L. Weekly Supp. 549b (Fla. Duval Cty. Ct., Judge Dawn K. Hudson, dated Sept. 24, 2015).

9. Plaintiff has stated the exact amount billed per the itemized ledger on the face of the demand letter, in full compliance with the demand letter presuit requirements. Defendant is in a better position to adjust the claim, and the burden of adjusting claims is on the insurance company, not the patient or the medical provider. Defendant is aware of its total coverage denial in this case, based on Plaintiff's alleged misrepresentation. The itemized statement and demand letter provides all necessary information for the insurer to adjust the claim and to pay Plaintiff's billing, or defend its coverage denial via this lawsuit.

10. The question of demand letter validity is "substantial compliance" and not "strict compliance". F.S. §627.736(10) must not be interpreted in a manner that results in an unreasonable denial of access to courts.

11. Defendant was supplied with an itemized ledger showing the dates of service and CPT Codes billed. Plaintiff demanded the payment it claimed as due, based on the ledger and in compliance with F.S. §627.736(10). Had Plaintiff placed $2,500 in the amount claimed to be due as Defendant alleges should have happened because of the lack of an EMC, then Plaintiff would not have met the underlying requirements of F.S. §627.736(10). Defendant was in the best position to adjust the claim to show that not more than $2,500 was owed in this case, along with the knowledge that an EMC had not been rendered.

ORDERED and ADJUDGED that:

The Defendant's Motion for Summary Judgement is DENIED.

* * *

Consumer law—Debt collection—Florida Consumer Collection Practices Act—Affirmative defenses—Fact that defendant was required to send credit card statements by Truth in Lending Act does not equate to statements not being actionable debt collection under FCCPA—TILA does not preempt FCCPA—Set-off of underlying debt against any recovery on FCCPA claim is contrary to legislative intent of FCCPA

LINDA BARNES, Plaintiff, v. DISCOVER PRODUCTS, INC., Defendant. County Court, 5th Judicial Circuit in and for Hernando County, Small Claims Division. Case No. 2019-SC-2707. July 24, 2020. Kurt E. Hitzemann, Judge. Counsel: Richard K. Peck, Peck Law Firm, P.A., Spring Hill, for Plaintiff. Jacqueline Simms-Petredis, Burr & Forman, LLP, Tampa, for Defendant.

ORDER ON PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S AFFIRMATIVE DEFENSES

THIS CAUSE, having come before the Court on July 15, 2020 upon Plaintiff's Motion to Strike Defendant's Affirmative Defenses, or in the Alternative, Motion for More Definite Statement (herein "Motion"), and the Court having considered the Motion and being otherwise being fully advised in the premises, does hereby:

ORDER AND ADJUDGE that:

1. As to the *first affirmative defense*, the Court strikes the following language: "Specifically, Plaintiff's claims are barred due to the fact that any alleged actions were not taken 'in an attempt to collect a debt' ". The Court finds that just because the Defendant may have been required by the Truth in Lending Act (TILA) to send the credit card statements at issue, such a circumstance does not equate to the credit card statements not being actionable debt collection for the purposes of the FCCPA. *Goldman v. US Bank,* 27 Fla. L. Weekly Supp. 773b (Fla. 5th Jud. Cir., Hernando Cty., FL 2019). *See also Smith v. JP Morgan Chase Bank,* 26 Fla. L. Weekly Supp. 849a (Fla. 13th Jud Cir., Hills. Co. 2018)("Whether or not the monthly credit card statements complained of are reflective of debt collection activity subject to the FCCPA is a question of fact for the finder of fact, which in this case, is the jury demanded by the Plaintiff."); *see also Jenkins v. SPS,* 26 Fla. L. Weekly Supp. 835a (Fla. 5th Jud. Cir., Hernando Cty, FL 2018); *Stewart v. Select Portfolio Servicing, Inc.,* 25 Fla. L. Weekly Supp. 455a (Fla. 5th Jud. Cir., Hernando Cty., FL 2017); *Delong v. SLS,* 25 Fla. L. Weekly Supp. 619a (Fla. 5th Jud. Cir., Hernando Cty., FL 2017); *Zicari v. Wilmington Savings and Trust, et al.,* 25 Fla. L. Weekly Supp. 176b (Fla. 5th Jud. Cir., Hernando Cty. Ct. 2017); *Rochovansky v. Wells Fargo, N.A.,* 25 Fla. L. Weekly Supp. 538a (Fla. 5th Jud. Cir., Hernando Cty. Ct. 2017); and *Grantham v. Wells Fargo Bank, N.A.,* 25 Fla. L. Weekly Supp. 667a (Fla. 5th Jud. Cit., Hernando Cty., FL 2017). Further, the Court strikes the last partial sentence contained within the *first affirmative defense* as the partial sentence seems to have been placed in the defense by accident[1].

2. As to the *third affirmative defense*, "Discover is entitled to setoff for all amounts owed by Plaintiff to Discover on her account", the Court strikes the defense as the Court finds that permitting an FCCPA Defendant to set-off a consumer's underlying debt obligation against recovery obtained by a consumer in an FCCPA case would be contrary to the Legislative Intent behind the FCCPA, which is to promote debt collection conduct that does not violate the FCCPA.

3. As to the *seventh affirmative defense*, the Court strikes the defense and finds that the TILA requirement to send credit card statements does not preempt Fla. Stat. 559.72(18). Multiple Courts have held that the TILA requirement to issue credit card statements does not preempt Fla. Stat. 559.72(18). *Goldman, supra*; *Smith, supra*; *see also Zicari, supra*; *Rochovansky, supra*; *Penkava v. FNMA, et al.,* 25 Fla. L. Weekly Supp. 176a (Fla. 5th Jud. Cir., Hernando Cty, FL 2017); *Seda v. FNMA,* 25 Fla. L. Weekly Supp. 619b (Fla. 5th Jud. Cir., Hernando Cty., FL 2017); *Maura v. Carrington Mortgage,* 23 Fla. L. Weekly Supp. 754a (Fla. 5th Jud. Cir., Hernando Cty., FL, Cty. Ct. 2015). Further, the Court rules, like the Court did in *Clark v. Statebridge Company, LLC,* 22 Fla. L. Weekly Supp. 602a, (6th Jud. Cir. Pasco Co. October 15, 2014), that the case of *Marcotte v. General Capital Services, Inc.,* 709 F. Supp. 2d 944 (S.D. Cal. 2010), aside from not being binding on this Court, is distinguishable because it interpreted a California debt collection law which, unlike Fla. Stat. 599.72(18), specifically carves out a "billing statement" exception to a prohibition against contacting persons known to be represented by legal counsel.

4. As to the *second, fourth, fifth, and sixth affirmative defenses,* those defenses are also stricken.

[1]The last sentence only read "Lastly, Plaintiff fails to attach any of the alleged".

* * *

Criminal law—Driving under influence—Search and seizure—Field sobriety exercises—Officer had reasonable suspicion to compel defendant to perform horizontal gaze nystagmus test where defendant made U-turn that violated right-of-way of another driver and stopped his vehicle in hazardous manner and deputy observed that defendant had odor of alcohol and slurred speech, had difficult time finding documents, and had bottle of gin in vehicle—Motion to suppress is denied

STATE OF FLORIDA, v. WILLIAM JAMES TORBITT, P.I.D. 693209, Defendant. County Court, 6th Judicial Circuit in and for Pinellas County. Case No. AALG90E-G. October 23, 2019. Kathleen T. Hessinger, Judge. Counsel: Gregory Terone and Michael Libers, State Attorney's Office, for State. Nancy Williams, Public Defender's Office, for Defendant.

ORDER DENYING MOTION TO SUPPRESS

This Cause came to be heard before this Court on Defendant's Motion to Suppress with Assistant State Attorney, Michael Libers, Esq., present with Defendant present represented by Nancy Williams, Esq. and this Court having heard testimony and argument of counsel, reviewed a video, and being otherwise advised of the premises, it is hereby **Ordered and Adjudged** as follows,

1. On May 28, 2019, Deputy Anthony Casteleiro charged Defendant with driving under the influence.

2. On August 27, 2019, Defendant filed a Motion to Suppress the HGN performed by Deputy Casteleiro claiming the deputy did not obtain consent from the Defendant before performing the HGN.

FACTS

3. The State called Deputy Anthony Casteleiro to testify and introduced the Coban video of the stop. The substantial, credible evidence from the deputy and the video proves as follows,

a. Deputy Casteleiro testified that he has worked traffic enforcement for the Pinellas County Sheriff's Office for two (2) years. Prior to his employment with the Sheriff's Office in Pinellas County, he worked for nine (9) years at the Seminole County Sheriff's Office. Deputy Casteleiro received his DUI training at the training academy he attended to become a law enforcement officer. In his eleven (11) years as a deputy, he has performed over 200 DUI arrests and has experience with administering field sobriety exercises.

b. On May 29, 2019, the deputy worked the 6:00 p.m. to 6:00 a.m. shift. At approximately 9:30 p.m., the deputy was traveling northbound on 34th St. No. around 50th Ave. No. At that time, the deputy observed Defendant's vehicle make a U-turn from the southbound lanes on 34th St. No. into the northbound lanes of 34th St. No. Upon the Defendant making his U-turn, the Defendant crossed over three lanes of traffic and then proceeded into the second/middle lane of the northbound lanes. At the time of the U-turn, another vehicle was traveling in the inside/median lane of the northbound lanes and had to break quickly due to the Defendant's U-turn. As the Defendant's U-turn violated the right of way of another vehicle, the deputy conducted a traffic stop of Defendant.

c. When the deputy turned on his lights, the Defendant turned on his right blinker and continued on 34th St. No. and then turned right/east onto another road to stop his vehicle. The road in which Defendant stopped was two lanes with one lane of traffic each way. The Defendant stopped in the road, thereby blocking the travel of any eastbound traffic. Deputy Casteleiro issued a command to the Defendant to move his vehicle to a safer spot, but Defendant did not move the vehicle. The deputy and another deputy, a training officer, exited the police cruiser and approached Defendant's vehicle.

d. Upon approaching the vehicle, Deputy Casteleiro leaned down to speak with the Defendant. The Deputy noticed an odor of alcohol from Defendant's breath and noted a slurred thick tongue in his speech. The deputy asked for Defendant's registration, but he had a difficult time finding it and handed the deputy his certificate of title as opposed to the registration. The deputy also saw a bottle of gin on the floorboard behind the front passenger seat. Due to the location of Defendant's vehicle and the police cruiser, the deputy waited for the westbound traffic to clear and asked the Defendant to move his vehicle to a side road a few feet away.

e. The deputy then approached Defendant's vehicle again and said, "Okay buddy, jump out of the car for me." The Defendant exited the vehicle and the officer advised that he was going to do a weapons pat down for which he quickly performed. The deputy then stated, "I'm just gonna check your eyes real quick to make sure you haven't been drinking." The deputy then performed the HGN test on Defendant's eyes. The Defendant was cooperative and gave no indication that he was not willing to cooperate with the deputy. The Coban video reflects that the deputy was nice, pleasant and non-aggressive. After the HGN test, the deputy asked the Defendant to perform additional field sobriety exercises for which Defendant agreed to perform. Thereafter, the Defendant was arrested for driving under the influence.

ARGUMENTS

4. Defendant argues that field sobriety exercises are subject to Fourth Amendment principles; thus, in order to conduct a lawful search and have the Defendant perform field sobriety exercises, a valid consent is required. He further claims the valid consent must be voluntary with a knowing and intelligent waiver of one's rights and must not be a submission to a claim of authority. Defendant argues that the HGN test should be suppressed as the deputy did not ask consent to perform the HGN test.

5. The State argues that pursuant to *State v. Liefert,* 247 So. 2d 18 (Fla. 2d DCA 1971), the officer did not need consent to have the Defendant perform the field sobriety exercises. Moreover, even if consent was required, Defendant's actions reflected his consent to the HGN test.

LEGAL ANALYSIS

The Court, in *State v. Liefert,* 247 So. 2d 18, 19 (Fla. 2d DCA 1971) addressed this issue, very succinctly. In *Liefert,* the defendant was stopped after the officer observed his panel truck weaving across two lanes of traffic. Upon approaching the defendant, the officer noticed an odor of an alcoholic beverage. The officer asked the defendant to perform field sobriety tests, for which he agreed to perform. *Id.* Thereafter, the defendant filed a motion to suppress the results of the field sobriety tests claiming the officer failed to advise him that he had a right to either take the physical tests or refuse to take the physical tests. *Id.*

The *Liefert* Court held that "we must overrule the trial's court order since the question of consent concerning such physical tests (now called exercises) has been held immaterial by the Florida Supreme Court in *State v. Mitchell,* 245 So. 2d 618 (Fla. 1971)." *Id.* The Court further held that the police officer, after having observed appellee drive in a weaving fashion and then noticing the smell of alcohol on his breath, had *sufficient cause* to believe that appellee had committed a crime in the operation of a motor vehicle and could *require* him to take part in such physical sobriety tests. *Id.* (emphasis added) The *Liefert* Court clearly held that consent to perform field sobriety tests was immaterial and the officer could require the driver to take the field sobriety tests. As such, Defendant's argument that the deputy, in the present case, was required to obtain valid consent is without merit. In *Liefert,* the defendant was asked to perform field sobriety tests and then moved to suppress the tests because he was not told he had a choice to take the tests. The *Liefert* Court finds that consent, meaning asking the driver to perform the field sobriety tests, is immaterial because the tests are required, meaning they are compulsory, if the officer has "sufficient cause" to believe the driver may be under the influence.

The *Liefert* Court's reasoning that consent is immaterial and not required is supported by the Florida Supreme Court's reasoning in *State v. Taylor,* 648 So. 2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b].

In *Taylor,* the Court held that if an officer had reasonable suspicion that the defendant was driving under the influence and a defendant refused to take field sobriety tests then the officer must advise the defendant there are adverse consequences to his refusal. *Id.,* at 703-704. As such, if adverse consequences exist for refusing to perform field sobriety tests then the tests are compulsory, i.e. required. If the tests are voluntary, then no adverse consequences would exist.

If consent was required, then no adverse consequences could exist as a consent search is generally requested when an officer does not have reasonable suspicion or probable cause to search. For example, an officer can request consent to search a person or his vehicle during a valid traffic stop. The officer may have grounds to stop a driver for speeding, but no legal grounds to search his vehicle or person, but the officer can request consent to do so. The person can refuse to allow the officer to search his person or vehicle without any adverse consequences. In DUI cases, the officer has to have reasonable suspicion that the driver committed the crime of driving under the influence in order to have the driver perform field sobriety exercises; thus, the driver is compelled to perform the field sobriety exercises. The driver has a right to refuse to perform them, but his refusal can be used against him; thus an adverse consequence of the refusal. As such, in the present case, Deputy Casteleiro legally compelled Defendant to perform the HGN test. The Defendant could have refused and the deputy would have been required to advise him of a consequence of his refusal; but the deputy did not need to ask for consent to perform the HGN provided he had reasonable suspicion that the Defendant was driving under the influence.

This Court finds that based on the rulings in both *Liefert* and *Taylor,* the deputy need only have reasonable suspicion that the driver is under the influence in order to compel the field sobriety tests. In *Liefert,* the Court ruled that the police officer had *sufficient cause to believe that the defendant had committed a crime* in the operation of a motor vehicle. (emphasis added) *Liefert,* 247 So. 2d at 19. The sufficient cause included observing the defendant drive in a weaving fashion and then noticing the smell of alcohol on his breath. *Id.* In *Taylor,* the Court held that "when Taylor exited his vehicle, he staggered and exhibited slurred speech, watery, bloodshot eyes, and a strong odor of alcohol. This combined with a high rate of speed on the highway, was more than enough to provide Quant [the arresting officer] *with reasonable suspicion that a crime was being committed,* i.e., DUI." (emphasis added) *Taylor,* 648 So. 2d at 703. The *Taylor* Court further held that the officer was entitled to conduct a reasonable inquiry to confirm or deny that probable cause existed to make an arrest and that the officer's request that the defendant perform field sobriety tests was reasonable under the circumstances. *Id.* Two circuit courts, sitting in their appellate capacity, came to the same conclusion, as this Court, in two well-reasoned opinions in *State v. Blanchette,* 20 Fla. L. Weekly Supp. 1042a (Fla. 12th Cir. Ct. Oct. 13, 2008) and *State v. Burke,* 16 Fla. L. Weekly Supp. 378a (Fla. 9th Cir. Ct. Oct. 14, 2008).

Thus, based on the facts in the present case, Deputy Casteleiro had more than reasonable suspicion to compel the Defendant to perform the HGN test. The deputy observed the Defendant make a U-turn that impeded traffic as a driver in another vehicle had to break due to Defendant's turn. The Defendant stopped his vehicle in a hazardous manner on the road causing concern for the safety of the deputies and the Defendant. The Defendant had an odor of alcohol on his breath and slurred thick tongued speech. The Defendant had a difficult time finding his registration and had a bottle of gin in the backseat of his vehicle.

It is therefore **Ordered and Adjudged** that the Motion to Suppress is **DENIED.**

* * *

Criminal law—Driving under influence—Evidence—Medical records—Medical clearance document provided by hospital doctor in order to clear defendant to be taken to jail was not a medical record requiring notice pursuant to section 395.3025—Fact that medical clearance document was included with other medical records submitted by hospital in response to subpoena of defendant's medical records not basis for granting motion to suppress the subpoenaed records—Motion to suppress is denied

STATE OF FLORIDA, v. EDWIN HENRY DECKER, Defendant. County Court, 6th Judicial Circuit in and for Pasco County. Case Nos. 09-2183XAUTWS and 09-4763 SSVTWS, Section 17. SPN Case No. 00097158. May 11, 2010. Debra Roberts, Judge.

ORDER ON MOTION TO SUPPRESS EVIDENCE OF REFUSAL AND MEDICAL RECORDS

THIS CAUSE comes before the Court on the defendant's Motion to Suppress Evidence of Refusal and Medical Records. The State concedes as to the evidence of refusal, which leaves for consideration the issue of the medical records. The Court having taken the testimony of the Trooper Michael A. Hollis, Jr. of the Florida Highway Patrol and the Court having heard arguments of Counsel, the Court finds as a factual basis that:

1. On October 7, 2009, at approximately 11:45 p.m., the defendant was involved in a crash in which his bicycle collided with a Pasco County Fire Rescue Truck, causing damage to the truck and injury to the defendant. The defendant was transported to the hospital via ambulance, where Trooper Hollis first made contact with him.

2. Trooper Hollis initially conducted a crash investigation during which he detected a strong odor of alcohol, observed extremely slurred and incoherent speech of the defendant. At the conclusion of the crash investigation, Trooper Hollis began a criminal investigation for driving under the influence, which resulted in the defendant being arrested for DUI.

3. Trooper Hollis testified that the hospital personnel inquired as to whether the defendant was being arrested, which he confirmed. The doctor then completed a document entitled "Medical Clearance", in which he certified no medical danger and cleared the defendant of any acute medical problems. He also made medical findings of "Motor Vehicle Accident, Multi contusion/Abrasions, Hypolcalcemia, THC Abuse, ETOH Intoxicated". The Trooper testified that based on prior experiences, the medical staff knew the officer needed a medical clearance in order to take the defendant to jail and prepared that document without any specific request from him. The officer took a copy of the medical clearance with him to the jail. The defense is seeking to suppress this Medical Clearance.

4. The defense motion provides that on November 30, 2009, the State sent notice to the defendant of its intent to subpoena his medical records. However, the motion does not allege improper notice. The defendant did not object within the 10-day notice period. The defense now seeks to suppress the records obtained as a result of the subpoena. The State does not intend to use the medical clearance document, but does expect to use the other medical records provided pursuant to subpoena.

The defense argues the State used the medical clearance document as a basis to subpoena the other medical records. The defense further argues that because the medical clearance document was also included with the other medical records submitted by the hospital pursuant to the subpoena, all of the records should be suppressed.

This Court rejects the defense arguments. First, the Court finds that the Medical Clearance document is not a medical record requiring notice pursuant to Section 395.3025, Florida Statutes. Second, the Court finds no basis to suppress the other medical records provided to the State by the hospital pursuant to the subpoena. Accordingly, it is

ORDERED AND ADJUDGED that the defendant's Motion to

Suppress Medical Records is hereby denied.

* * *

Insurance—Personal injury protection—Stay—Insurer's motion to stay PIP case based on claim that it did not receive emergency medical condition determination prior to suit being filed is denied—Explanation of benefits that states that documentation is insufficient to support services billed but makes no mention of need for EMC determination was insufficient notice that insurer was requesting EMC determination—Moreover, medical provider has offered evidence that EMC determination was provided to insurer prior to date of EOB, and insurer has had more than adequate time to consider EMC determination received post-suit

CENTRAL FLORIDA MEDICAL & CHIROPRACTIC CENTER, INC., d/b/a STERLING MEDICAL GROUP, a/a/o Yisell Peralta, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2019 SC 002234, Division 61. August 10, 2020. Andrea K. Totten, Judge. Counsel: Keith M. Petrochko, Simoes Davila, Deland, for Plaintiff. Rhamen Love-Lane, Orlando, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO ABATE AND/OR STAY PROCEEDINGS

THIS CAUSE came before the court upon Defendant's "amended motion for summary final judgment, motion for protective order, and/or motion to abate and/or stay the proceedings" (doc 25). The instant order addresses only Defendant's motion to abate and/or stay. Having reviewed the court file and applicable law, and having heard the argument of the parties, the Court finds as follows:

Defendant's motion to abate rests on its claim that it did not receive an Emergency Medical Determination (EMC) from Plaintiff prior to Plaintiff's commencement of the instant suit—an assertion Plaintiff denies.[1] Alternatively, argues Defendant, even if it *did* timely received the EMC but the EMC was lost or misplaced, Plaintiff failed in its pre-suit obligations under section 627.736, Florida Statutes, by not resubmitting the EMC in response to Defendant's Explanation of Benefits (EOB), dated July 23, 2018 (doc 25, exhibit D). The EOB states:

> Pursuant to Fla. Stat. 627.736(4)(b)4, payment is not overdue if the insurer has reasonable proof that the insurer is not responsible for the payment. You have not submitted documentation sufficient to support the services billed.

(Doc 25, exhibit D).

Plaintiff responds that abatement is not appropriate because the EMC was provided on June 6, 2018, prior to the commencement of the instant suit, as reflected in the sworn affidavit of Chacidie Richardson. Moreover, asserts Plaintiff, Defendant's EOB, which makes no reference to a missing EMC, and which cites only to section 627.736(4)(b)4, was insufficient to put Plaintiff on notice that it was requesting the type of information delineated under section 627.736(6)(b).

The Court agrees with Plaintiff that the EOB in the instant case was insufficient to put Plaintiff on notice that Defendant was seeking documentation as set forth in section 627.736(6)(b). *See e.g. Optimum Orthopedics & Spine, LLC. a/a/o Deborah Marley v. USAA General Indemnity Company,* 27 Fla. L. Weekly Supp. 295a (9th Jud. Cir. Cty. Ct. Apr. 11, 2019) (finding that EOB did not constitute a valid request under section 627.736(6)(b)); *Mercury Ins. Co. of Florida v. Med Manage Group, Inc. a/a/o Michael Bergey,* 17 Fla. L. Weekly Supp. 997a (15th Jud. Cir. (appellate) Apr. 8, 2010) (same). Moreover, even if Defendant's EOB *was* sufficient notice that Defendant was seeking an EMC, Plaintiff has offered evidence through the affidavit of Chacidie Richardson that the EMC was provided prior to the date of the EOB.

Additionally, if the purpose of abatement is for Defendant to examine the EMC to consider whether Plaintiff is entitled to additional reimbursement, Defendant has had more than adequate time to do so since, even by its own admission, it has had the EMC in its possession since at least December 2019.

Therefore, it is **ORDERED AND ADJUDGED** that Defendant's Motion to Abate and/or Stay Proceedings is **DENIED**.

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[1]Plaintiff's claim that the EMC was timely provided pre-suit is supported by the affidavit of Chacidie Richardson. (See doc 23).

* * *

Insurance—Personal injury protection—Standing—Assignment—Insurer waived any right to contest medical provider's standing based on provider's failure to attach valid assignment of benefits to demand letter where insurer did not apprise provider of alleged deficiency in assignment when it received demand letter, but instead issued payment for additional benefits and interest—Assignment correctly identifies sole owner of medical provider

CENTRAL FLORIDA HEALTH, INC., d/b/a THE VILLAGES REGIONAL HOSPITAL, a/a/o Shawn Martin, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2019 14712 CODL. August 12, 2020. Angela A. Dempsey, Judge. Counsel: William S. Barr, Chad Barr Law, Altamonte Springs, for Plaintiff. Rhamen Love-Lane, Orlando, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR PROTECTIVE ORDER

THIS MATTER came before the Court on August 5, 2020 on Defendant's Motion for Summary Judgment and Motion for Protective Order as to Plaintiff's standing under the subject assignment and satisfaction of condition precedent, and being considered by the Court and otherwise being fully advised of the premises, the Court finds as follows:

1. This is a claim for PIP benefits arising out of a motor vehicle collision that occurred on or about 8/15/2014 involving Shawn C. Martin.

2. Defendant issued a policy of insurance which provided $10,000.00 in PIP coverage to Shawn C Martin for the above accident.

3. Defendant received Plaintiff's bill for emergency services and reduced the charged amount of $2,155.32 by 75% ($1,616.49) prior to applying the alleged $1,000 deductible.[1] After application of the fee schedule amount to the alleged deductible, Defendant issued a check for $493.20 made payable to "VILLAGES REGIONAL HOSPITAL."

4. On or about May 23, 2019, Plaintiff submitted a Demand Letter for benefits to Defendant and attached the Plaintiff's bill, Plaintiff's Assignment of Benefits, and a copy of the check for the prior payment.

5. On or about 6/26/2019, Defendant revisited the Plaintiff's Demand Letter for additional benefits. Defendant advised that would issue additional benefits in order to comply with the mathematical calculation pursuant to *Progressive Select Ins. Co. v. Florida Hospital Med. Ctr.,* 2018 WL 6816810 (Fla. 2018) [44 Fla. L. Weekly S59a]. Defendant's response to Plaintiff's Demand Letter does not appear on its face to raise any defect or deficiency in Plaintiff's claim to benefits for the emergency services rendered to Shawn Martin on 8/15/2014.

6. Defendant tendered a second payment for the subject bill in response to Plaintiff's Statutory Demand Letter under Section 627.736(10), in the amount of $245.81 ($200 benefits and $45.81 interest) with a check made payable to "VILLAGES REGIONAL HOSPITAL AND CENTRAL FLORIDA HEALTH, INC DBA THE VILLAHES REGIONAL HOSP."

7. On or about 7/11/2019, Plaintiff filed suit as CENTRAL

FLORIDA HEALTH, INC d/b/a THE VILLAGES REGIONAL HOSPITAL a/a/o Shawn Martin.

8. On or about 8/21/2019, Defendant filed an Answer and Affirmative Defenses, raising four defenses. The First Affirmative Defense and the Fourth Affirmative Defense are the subject of Defendant's Motion for Summary Judgment before the Court, and they state, 1) The Villages Regional Hospital is a fictitious business name owned by The Villages Tri-County Medical Center, Inc.—not Central Florida Health, Inc. Accordingly Plaintiff does not possess the requisite standing to maintain the subject cause of action; and 2) Plaintiff failed to comply with Florida Statute §627.736(10), by submitting a pre-suit demand letter without a valid assignment of benefits included/attached.

9. The parties agree that the Assignment of Benefits at issue explicitly identifies Central Florida Health Alliance, Leesburg Regional Medical Center, Inc., and The Villages Health System and that the assignment was executed by Shawn C. Martin.

10. The parties submitted numerous Requests for Judicial Notice of the corporate records maintained by the Florida Division of Corporations and this Court takes notice of same pursuant to Florida Statutes 90.202 and 90.203.

11. After reviewing the facts, argument and evidence in the record, this Court concludes that Central Florida Health, Inc. is the sole owner of The Villages Tri-County Medical Center, Inc., Central Florida Health Alliance, The Villages Health System and The Villages Regional Hospital at all times material hereto and Plaintiff has standing to pursue the benefits claimed due in this matter.

12. The Court concludes that Defendant issued payment to Central Florida Health, Inc. d/b/a The Villages Regional Hospital after receipt of the subject Assignment of Benefits.

13. This Court adopts the reasoning and conclusions set forth in *Emergency Physicians, Inc. d/b/a Emergency Resources Group a/a/o Judith Rainwater v. USAA Casualty Insurance Company,* 24 Fla. L. Weekly Supp. 64a (Judge Green March 14, 2016) affirmed by *USAA Casualty Insurance Company v. Emergency Physicians, Inc. d/b/a Emergency Resources Group a/a/o Judith Rainwater,* 25 Fla. L. Weekly Supp. 410a (Volusia County Circuit Appellate July 20, 2017); *Emergency Physicians, Inc. d/b/a Emergency Resources Group a/a/o Brianna Spath v. USAA Casualty Insurance Company,* Volusia County Case Number 2015 21118 CONS (Judge Green March 14, 2016) affirmed by *USAA Casualty Insurance Company v. Emergency Physicians, Inc. d/b/a Emergency Resources Group a/a/o Brianna Spath,* 25 Fla. L. Weekly Supp. 410b (Volusia County Circuit Appellate July 20, 2017); *Emergency Physicians, Inc. d/b/a Emergency Resources Group a/a/o Bradley Roseberry v. USAA General Indemnity Company,* Volusia County Case Number 2015 21218 CONS (Judge Green July 6, 2016) affirmed by *USAA General Indemnity Company v. Emergency Physicians, Inc. d/b/a Emergency Resources Group a/a/o Bradley Roseberry,* 25 Fla. L. Weekly Supp. 411a (Volusia County Circuit Appellate July 20, 2017); *Emergency Physicians, Inc. d/b/a Emergency Resources Group a/a/o Danielle Strong-Robinson v. Garrison Property and Casualty Insurance Company,* Volusia County Case Number 2015 21117 CONS (Judge Green March 14, 2016) affirmed by *Garrison Property and Casualty Insurance Company v. Emergency Physicians, Inc. d/b/a Emergency Resources Group a/a/o Danielle Strong-Robinson,* Volusia County Case No. 2016-10010-APCC (Volusia County Circuit Appellate July 20, 2017); *Emergency Physicians, Inc. d/b/a Emergency Resources Group a/a/o Jerry Solich v. United Service Automobile Association,* 25 Fla. L. Weekly Supp. 54b (Judge Green January 5, 2017) affirmed by *United Services Automobile Association v Emergency Physicians, Inc. d/b/a Emergency Resources Group a/a/o Jerry Solich,* Case Number 2017-10006 APCC (Volusia County Circuit Appellate December 6, 2017); *Emergency Physicians, Inc. d/b/a Emergency Resources Group a/a/o Florence Freemnan v. USAA Casualty Insurance Company,* 24 Fla. L. Weekly Supp. 546a (Judge Green September 9, 2016) affirmed by *USAA Casualty Insurance Company v. Emergency Physicians, Inc. d/b/a Emergency Resources Group a/a/o Judith Rainwater,* Case Number 2016-10044-APCC (Volusia County Circuit Appellate November 2, 2017). The Court concludes that the Plaintiff hospital is controlled and governed by EMTALA and FAEC and the supremacy clause and waiver analysis of the aforementioned cases is likewise adopted by this Court.

It is hereby **ORDERED AND ADJUDGED** that:

1. Defendant's Motion for Summary Judgment regarding the First and Fourth Affirmative Defenses is hereby **DENIED.**

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[1]The Plaintiff disputes whether the deductible applies to the patient, Shawn C. Martin.

* * *

Insurance—Personal injury protection—Res judicata does not bar medical provider's suit filed subsequent to settlement of earlier suit against insurer for treatment of same insured where earlier suit was based on insurer's contention that certain charges were not reasonable, necessary or related to accident while current suit concerns only whether deductible was misapplied—Where including current claim about deductible in earlier suit would have required that provider anticipate legal precedent established by recent Florida Supreme Court decision regarding proper application of deductible, motion for summary disposition finding that provider is barred from seeking attorney's fee award in current suit by section 627.736(15), which requires that all PIP claims be brought in same action, is denied

ST. AUGUSTINE PHYSICIANS ASSOCIATES, INC., a/a/o Amelia Wiggs, Plaintiff, v. PEAK PROPERTY AND CASUALTY INSURANCE CORPORATION, Defendant. County Court, 7th Judicial Circuit in and for St. Johns County. Case No. SP19-221, Division 65. August 12, 2020. Alexander R. Christine, Jr., Judge. Counsel: Ashley-Britt Hansen, Law Office of D. Scott Craig, LLC, Jacksonville, for Plaintiff. Dawn M. Carsten, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR FINAL SUMMARY DISPOSITION REGARDING THE DOCTRINE OF *RES JUDICATA* AND FLORIDA STATUTE § 627.736(15)

THIS CAUSE came before the Court for a hearing held on March 9, 2020, on Defendant Peak Property and Casualty Insurance Corporation's "Motion for Final Summary Disposition Regarding the Doctrine of *Res Judicata* and Florida Statute § 627.736(15)." Present at the hearing representing the Plaintiff, St. Augustine Physicians Associates, Inc., as assignee of Amelia Wiggs (hereinafter referred to as "Physicians Associates"), was Britt Hansen, Esq. Present at the hearing representing the Defendant, Peak Property and Casualty Insurance Corporation (hereinafter referred to as "Peak Property"), was Dawn Cartsen, Esq. The Court has considered Peak Property's motion (DIN 35) and Physicians Associates' response thereto (DIN 38), has heard the argument of counsel, and being otherwise fully advised in the premises finds as follows:

I. Findings of Fact

On October 31, 2013, Amelia Wiggs (hereinafter referred to as the "Claimant") was injured in an automobile accident and received medical treatment in connection therewith from Physicians Associates. The Claimant received medical treatment continually throughout the time period beginning November 1, 2013 and ending August 4, 2014, and incurred a total billed amount of $8,993.00 in medical expenses from Physicians Associates. Pursuant to an Assignment of Benefits executed by the Claimant in favor of Physicians Associates, Physicians Associates submitted the aforementioned medical bills to Peak Property under claim number 92A592707 for dates of service

November 1, 2013 through August 4, 2014, for payment under the Claimant's automobile insurance policy. The subject automobile insurance policy included a limit of $10,000.00 in Personal Injury Protection ("PIP") benefits, with a $1,000.00 PIP deductible (hereinafter referred to as the "Policy").

On June 5, 2015, Physicians Associates initiated a lawsuit against Peak Property in the following-styled proceeding: *St. Augustine Physicians Associates, Inc., as assignee of Amelia Wiggs v. Peak Property and Casualty Insurance Corporation,* St. Johns County Case No. SP15-850. In that action, Physicians Associates only sought to dispute Peak Property's coverage determinations in connection with medical services rendered for the time period beginning May 27, 2014 and ending August 4, 2014. The initial lawsuit was settled, and Physicians Associates voluntarily dismissed the pending action against Peak Property with prejudice on September 7, 2015. Physicians Associates subsequently filed the instant lawsuit in which it alleges additional benefits purportedly owed under the same Policy, and arising out of the same automobile accident, as had been previously litigated in St. Johns County Case No. SP15-850. The parties presently dispute whether the doctrine of *res judicata* operates to procedurally bar the instant action and, alternatively, whether Florida Statute § 627.736(15) precludes Physicians Associates from seeking attorneys' fees in the event they prevail on the merits.

II. Legal Standard

Generally, a Motion for Summary Judgment must meet the strict procedural requirements enumerated in Rule 1.510 of the Florida Rules of Civil Procedure. The requirements set forth therein are designed to protect the litigants' constitutional right to a trial on the merits of a particular claim. *Hicks v. Hoagland,* 953 So.2d 695 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D909a]; *Bifulco v. State Farm Mutual Auto. Ins. Co.,* 693 So.2d 707 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1325a]. The Court may grant a motion for summary judgment if the pleadings, discovery, affidavits and other evidentiary materials establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510(c); *Rice v. Greene,* 941 So.2d 1230 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D2885a]; *Volusia County v. Aberdeen at Ormond Beach, L.P.,* 760 So.2d 126 (Fla. 2000) [25 Fla. L. Weekly S390a]; *see also Holl v. Talcott,* 191 So.2d 40 (Fla. 1966); *Krol v. City of Orlando,* 778 So.2d 490 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D577a]; *Willingham v. City of Orlando,* 929 So.2d 43, 47 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D1355a]; *Everett Painting Co., Inc. v. Padula & Wadsworth Const., Inc.,* 856 So.2d 1059, 1061 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2320a]; *Wells v. City of St. Petersburg,* 958 So.2d 1076, 1079 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D1486c]; *Saullo v. Douglas,* 957 So.2d 80, 88 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D1248a]; *St. Lucie Falls Property Owners Ass'n v. Morelli,* 956 So.2d 1283, 1284 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1443a]. Summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law. *Snow v. Byron,* 580 So.2d 238 (Fla. 5th DCA 1991); *Key v. Trattmann,* 959 So.2d 339 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1370b] (quoting *Morris v. Morris,* 475 So.2d 666, 668 (Fla. 1985)). The burden for establishing the elements for summary judgment are shouldered by the moving party and the trial judge must draw every inference or resolve every doubt in favor of the party opposing the motion. *Id. See also Speedway SuperAmerica, LLC v. Dupont,* 933 So.2d 75 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D1471c] (citing *Kitchen v. Ebonite Recreation Centers, Inc.,* 856 So.2d 1083 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D2401a]); *Clay Elec. Co-op., Inc. v. Johnson,* 873 So.2d 1182, 1185 (Fla. 2003) [28 Fla. L. Weekly S866a]; *Scheibe v. Bank of America, NA.,* 822 So.2d 575 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D1828b]; *Petruska v. Smartparks-Silver Springs, Inc.,* 914 So.2d 502, 504 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2614a] (citing *Turner v. PCR, Inc.,* 754 So.2d 683 (Fla. 2000) [25 Fla. L. Weekly S174a]); *Wells,* 958 So.2d at 1079. Where the basic facts of a cause of action are clear and undisputed, there being only a question of law to be determined, summary judgment is proper. *Duprey v. United Services Auto. Ass'n,* 254 So.2d 57 (Fla. 1st DCA 1971).

III. Analysis

Res Judicata

The parties' present dispute is premised on whether the dismissal with prejudice in St. Johns County Case No. SP15-850 operates as *res judicata* to bar the instant Complaint. Peak Property asserts that because the instant action arises out of medical treatment incurred as a result of the same motor vehicle incident, and subject to the same PIP claim, as previously litigated in Case No. SP15-850, Physicians Associates is procedurally barred from alleging the instant action. Physicians Associates contends that the action in Case No. SP15-850 was brought in connection with Peak Property's reliance on an Independent Medical Examiner's opinion that Physicians Associates' treatment for certain specific dates of service were not necessary, reasonable, or related to the subject motor vehicle accident; whereas the instant lawsuit states a wholly distinct cause of action arising from Peak Property's misapplication of the deductible paid by the Claimant for certain specific dates of service for which Peak Property did not dispute coverage.

Under Florida law, the following four identities must be satisfied for the doctrine of *res judicata* to apply: "[1] identity of the thing sued for; [2] identity of the cause of action; [3] identity of parties; and [4] identity of the quality in the person for or against whom the claim is made." *B & V Ltd. v. All Dade General Const., Inc.,* 662 So.2d 413, 415 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D2494b] (citing *Albrecht v. State,* 444 So.2d 8 (Fla. 1984)) (*further internal citations omitted*). The Florida Supreme Court has opined that the test for determining whether a second suit between the parties is premised on the same cause of action "is whether the facts or evidence necessary to maintain the suit are the same in both actions." *Albrecht,* 444 So.2d at 12. This test has been subsequently expounded upon to provide as follows:

> The doctrine of res judicata bars relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised. The idea underlying res judicata is that if a matter has already been decided, the petitioner has already had his or her day in court, and for purposes of judicial economy, that matter generally will not be reexamined again in *any* court (except, of course, for appeals by right).

Topps v. Florida, 865 So.2d 1253, 1255 (Fla. 2004) [29 Fla. L. Weekly S21a] *(Emphasis in original).*

The resolution of the instant summary judgment dispute turns on the requirement for "identity of the cause of action." The existence of this identity "is a question of 'whether the facts or evidence necessary to maintain the suit are the same in both actions.' " *Tyson v. Viacom, Inc.,* 890 So.2d 1205, 1209 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D185c] *(Internal citations omitted).* Florida appellate courts have declined to find the presence of identity of the cause of action in situations where the facts necessary to prove two distinct claims are not identical. *Id.* (holding that a former employee's breach of contract and whistleblower claims arising from the termination of his employment rested on distinct facts such that *res judicata* did not apply); *see also B & V,* 662 So.2d 413 (finding that the maintenance of two separate suits for two separate causes of action predicated on a series of construction contracts between the same parties was proper).

It is readily apparent that the cause of action in the instant proceedings is sufficiently distinct from the cause of action raised in Case No.

SP15-850 to support a finding that *res judicata* does not bar the instant claim. Physicians Associates filed its action in Case No. SP15-850 based upon Peak Property's contention that the medical services provided for those specific dates of services were not covered under the Policy because they were not "reasonable, necessary or related to the subject motor vehicle accident." Conversely, Peak Property had determined that the medical services provided for the dates of service in the instant proceeding were covered under the Policy; and the instant dispute concerns only whether the deductible was misapplied. Moreover, the Court observes that the parties additionally dispute when the instant cause of action accrued. Latimer Dep., at pp. 26-27. Consequently, the Court finds, as a matter of law, that the doctrine of *res judicata* is inapplicable to the instant proceedings; and this portion of Defendant's motion will be denied with prejudice.

Entitlement to Attorneys' Fees Under Fla. Stat. § 627.736(15)

With the applicability of *res judicata* to the instant case having been decided, the Court next turns to the issue of whether Section 627.736(15), Florida Statutes, which requires all PIP suits to be brought in the same action, precludes Physicians Associates from seeking attorneys' fees in this case. Fla. Stat. § 627.736 provides in pertinent part:

> (15) ALL CLAIMS BROUGHT IN A SINGLE ACTION.—In any civil action to recover personal injury protection benefits brought by a claimant pursuant to this section against an insurer, all claims related to the same health care provider for the same injured person shall be brought in one action, unless good cause is shown why such claims should be brought separately. If the court determines that a civil action is filed for a claim that should have been brought in a prior civil action, the court may not award attorney's fees to the claimant.

Because there is no appellate authority addressing what might constitute "good cause" for bringing two separate claims related to the same health care provider for the same injured person, this Court is left with little guidance as to the interpretation of Fla. Stat. § 627.736(15) in the instant situation. The instant action is wholly premised on the Florida Supreme Court's recent decision in *Progressive Select Ins. Co. v. Florida Hospital Medical Center,* in which the Court opined that Fla. Stat. § 627.739(2) requires insurers to apply the deductible to the total billed amount prior to reduction under the reimbursement limitation in Fla. Stat. § 627.739(2). 280 So.3d 219 (2018) [44 Fla. L. Weekly S59a]. The Florida Supreme Court's opinion in *Progressive* was issued on December 28, 2018; thus, for Physicians Associates to assert the instant claim within the 2015 proceedings, it would have been required to anticipate legal precedent. Based on the foregoing, the Court is disinclined at the instant stage in the proceedings to grant summary judgment finding, as a matter of law, that Physicians Associates had no good cause for filing the instant litigation separately from the 2015 action. The record has not been sufficiently developed, nor have the facts surrounding the filing of the instant litigation separately from Case No. SP15-850 been crystallized, such that the Court can arrive at a determination as to the applicability of Fla. Stat. § 627.736(15). This portion of Defendant's motion will consequently be denied as premature.

Accordingly, it is hereby:

ORDERED AND ADJUDGED that:

1. Defendant's Motion for Final Summary Disposition is DENIED with prejudice as to the doctrine of *res judicata.*

2. Defendant's Motion for Final Summary Disposition as to the applicability of Fla. Stat. § 627.736(15) is DENIED as premature.

3. The parties shall proceed accordingly.

* * *

Criminal law—Driving with unlawful blood alcohol level—Evidence—Defendant's request to introduce evidence relative to his impairment at time of driving is denied—Defendant's impairment or lack thereof is not relevant to DUBAL prosecution—State is not required to meet traditional scientific predicate for admission of breath test results where there is no allegation that test results were not obtained in substantial compliance with applicable rules and statutes—Defendant may present other evidence of breath alcohol level

STATE OF FLORIDA, Plaintiff, v. JOHN HAMILTON WAASER, Defendant. County Court, 8th Judicial Circuit in and for Alachua County. Case No. 01-2019-CT-000889-A, Division III. March 2, 2020. Walter M. Green, Judge. Counsel: Joseph Rozas, Asst. State Attorney, State Attorney's Office, for Plaintiff. Luis Rodriguez, Asst. Public Defender, Public Defender's Office, for Defendant.

ORDER GRANTING, IN PART, DENYING, IN PART, DEFENDANT'S MOTION IN LIMINE

THIS CAUSE comes before the Court upon Defendant's "Motion in Limine Requesting Ruling on Standard of Proof for Admissibility of Breath Test Results Admissibility of the In-Car Video," filed January 21, 2020. The State filed a response to the motion on February 11, 2020. A hearing was held on the motion on February 13, 2020. Upon consideration of the motion, the State's response, the legal argument of the parties, and the record, this Court finds and concludes as follows:

Defendant moves the Court "for an order allowing the introduction of evidence relative to impairment at the time of driving, including but not limited to the in-car video(s) provided by the State in discovery, or, alternatively, to require the State to present the traditional scientific predicate by way of expert testimony in order to introduce evidence of breath test results, and to rule that the defense may present other evidence of breath alcohol level at the time of driving should the State elect to proceed under a strict liability theory of prosecution."

I. DUBAL THEORY OF DUI OFFENSE

Under a strict liability theory, one who operates a motor vehicle with a blood-alcohol level of 0.08 or higher is guilty of a DUI offense.[1] *Dodge v. State,* 805 So. 2d 990, 994 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2875b]. "The strict liability theory is the offense. . . more commonly referred to as driving with an unlawful blood alcohol level (DUBAL)." *Tyner v. State,* 805 So. 2d 862, 866 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D2203a]. "Essentially, section 316.193 allows proof of a blood-alcohol level of [0.08] percent or higher to be substituted for proof of impairment—not as an unconstitutional presumption, but as an alternate element of the offense." *State v. Rolle,* 560 So. 2d 1154, 1156 (Fla. 1990); *see also Tyner,* 805 So. 2d at 867 ("We observe that the legislature continues to specifically recognize the offense of driving with an unlawful blood alcohol level as an alternative to an impairment DUI offense.").

"[T]he availability of the DUBAL [theory] makes the presumption of impairment 'a moot concern if the state proves beyond a reasonable doubt that the defendant operated a motor vehicle with an unlawful blood-alcohol level." *Cardenas v. State,* 867 So. 2d 384, 391 (Fla. 2004) [29 Fla. L. Weekly S90a] (quoting *Robertson v. State,* 604 So. 2d 783, 792 n.14 (Fla. 1992)). Thus, the presumptions contained in section 316.1934, Florida Statutes, are inapplicable to a DUBAL case because the crime itself consists of driving with a blood-alcohol level of 0.08 percent or more. *See Haas v. State,* 597 So. 2d 770, 774 (Fla. 1992).

II. REQUISITE FOUNDATION FOR DUBAL THEORY As the Hillsborough County Court explained in *State v. Komara,*

[i]n Florida, an unlawful blood or breath alcohol level can be proven by admission of evidence "under either the common law governing scientific test results or the implied consent law." *Cardenas v. State,* 867 So.2d 384, 390 (Fla. 2004) [29 Fla. L. Weekly S90a].

The common law method requires the State to establish what has come to be known as "the traditional scientific predicate." This predicate includes evidence regarding reliability, qualifications of the technician, and the meaning of the results. *See e.g. Robertson v. State,* 604 So.2d 783 (Fla. 1992); *State v. Strong,* 504 So.2d 758 (Fla. 1987); *State v. Bender,* 382 So.2d 697 (Fla. 1980).

However, the Florida legislature has chosen to make it easier for the State to admit breath test results in criminal cases through enactment of a statutory and administrative scheme known as the "Implied Consent Law." *See* §§316.1932; 316.1933 and 316.1934(5), *Fla. Stat.* It is well settled that the "Implied Consent Law" allows the State to admit breath test results in a criminal trial by an affidavit instead of the traditional scientific predicate. David A. Demers, *Florida D.U.I. Handbook,* ,§ 6.2 (2007 ed.); *Robertson,* 604 So.2d 783; *Strong,* 504 So.2d 758; *Bender,* 382 So.2d 697; *see also Leveritt v. State,* 817 So.2d 891, 895-96 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D1122a], *vacated on other grounds,* 896 So.2d 704 (Fla. 2005) [30 Fla. L. Weekly S17a]; *Dodge v. State,* 805 So.2d 990, 994 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2875b], *rev. denied,* 821 So.2d 294 (Fla. 2002); *Rafferty v. State,* 799 So.2d 243, 247 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D1864c].

The State's ability to use a breath affidavit in lieu of the traditional scientific predicate is not absolute. An affidavit in lieu of the traditional scientific predicate is available to the State only if the breath test was conducted in accordance with §§ 316.1932 or 316.1933, *Fla. Stat. See Bender,* 382 So.2d at 700; *State v. Miles,* 775 So.2d 950, 953 (Fla. 2000) [25 Fla. L. Weekly S1082a].

14 Fla. L. Weekly Supp. 648a (Fla. Hillsborough Cty. Ct. Feb. 21, 2007) (footnote omitted). Thus, "in order for the results of a defendant's breath test to be admissible in evidence in a DUI prosecution, the tests must be made in compliance with the statutes and administrative rules." *State v. Friedrich,* 681 So. 2d 1157, 1163 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D2030a] (citing *Bender,* 382 So.2d at 697; *Robertson,* 604 So.2d at 783. "In order to establish the admissibility of breath test results, the state must establish the fact that the tests were made in substantial conformity with the applicable administrative rules and the statutes." *Id.* (citing *State v. Donaldson,* 579 So.2d 728 (Fla.1991); *Department of Highway Safety Motor Vehicles v. Farley,* 633 So.2d 69 (Fla. 5th DCA 1994); *State v. Reisner,* 584 So.2d 141 (Fla. 5th DCA 1991)). "Insubstantial differences or variation from approved techniques and actual testing procedures in any individual case do not render the test nor test results invalid." *Id.* (citing § 316.1934(3), Fla. Stat.; *Ridgeway v. State,* 514 So.2d 418 (Fla. 1st DCA 1987)).

Here, there is no allegation that the breath alcohol results were not obtained in substantial conformity with the applicable rules and statutes under the implied consent law. Accordingly, the State is not required to meet the traditional scientific predicate in order to introduce evidence of the breath test results.

Based on the foregoing, it is **ORDERED AND ADJUDGED** that:

I. Defendant's motion is hereby **DENIED** as to his request to introduce "evidence relative to impairment at the time of driving, including but not limited to the in-car video(s) provided by the State in discovery." Defendant's impairment, or lack thereof, is not relevant given that the State is prosecuting Defendant solely under a DUBAL theory.[2]

II. Defendant motion is hereby **DENIED** as to his request "to require the State to present the traditional scientific predicate by way of expert testimony in order to introduce evidence of breath test results." The court will neither preclude the State from utilizing a breath affidavit in lieu of the traditional scientific predicate nor preclude the State from establishing the validity of Defendant's breath test results through the traditional scientific predicate.

III. Defendant's motion is hereby **GRANTED** as to his request to "present other evidence of breath alcohol level at the time of driving should the State elect to proceed under a strict liability theory of prosecution." After the State presents its evidence, Defendant may attack the reliability of the testing procedures and the qualifications of the operator. He may also question compliance with the approved statutory methods and regulations and the effect on the machine's integrity of failing to follow them strictly. Finally, Defendant may introduce evidence which challenges the accuracy of the breath test result. No evidence will be admitted that raises a claim of lack of impairment.

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[1]*See* § 316.193(1)(c) ("A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if the person is driving or in actual physical control of a vehicle within this state and. . . [t]he person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath."); *see also* § 316.1934(2)(c), Fla. Stat. (2019) ("[A] person who has a blood-alcohol level or breath-alcohol level of 0.08 or higher is guilty of driving, or being in actual physical control of, a motor vehicle, with an unlawful blood-alcohol level or breath-alcohol level.").

[2]The State has not yet amended its Information to charge Defendant with DUI under a DUBAL only theory. If the State fails to make this amendment prior to trial, the Court will reconsider its ruling on this issue.

* * *

Insurance—Automobile—Windshield repair—Motion to compel appraisal granted

PREMIER PROMOTIONS USA INC., d/b/a PREMIER 1 AUTO GLASS, a/a/o Brittany Watson, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2019-SC-029569-O, Division 74. August 20, 2020. Gisela T. Laurent, Judge. Counsel: John Z. Lagrow and William Terry, Malik Law, P.A., Maitland, for Plaintiff. Lisa M. Lewis and Michael Orta, Cole, Scott & Kissane, P.A., Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS, OR ALTERNATIVELY, MOTION TO STAY AND COMPEL APPRAISAL

THIS CAUSE having come before the Court on Defendant's Motion to Dismiss, or Alternatively Motion to Stay And Compel Appraisal and the Court having heard argument of counsel on **July 23, 2020**, and being otherwise advised in the Premises, it is

ORDERED AND ADJUDGED that:

1. The Defendant's Motion to Dismiss is **DENIED**.

2. The Court did not find sufficient evidence at this hearing to show Defendant's Waiver or to grant an Evidentiary Hearing on the Prohibitive Cost Doctrine, as Plaintiff requested. Therefore, the motion is hereby **DENIED**.

3. Defendant's Motion to Compel Appraisal is hereby **GRANTED**. This matter is stayed pending completion of the appraisal process.

a. The parties are to exchange the name and contact information as to their respective selected appraiser within 15 days of the entry of this Order.

b. The parties are to complete coordination the appraisal within 30 days of the entry of this Order.

c. The parties are to complete the appraisal process within 60 days of the entry of this Order, pursuant to the terms of the policy.

4. Defendant agrees to name an alternative appraiser and not utilize Linda Rollinson and Plaintiff agrees to name an alternate appraiser should Progressive object to their selected appraiser.

* * *

Criminal law—Driving under influence—Search and seizure—Detention—Where there was sufficient circumstantial evidence to suspect that defendant was driver of vehicle that crashed into lawfully parked vehicle at high speed, defendant expressed concern that she not get DUI charge to eyewitnesses, and officer observed that defendant had odor of alcohol and slurred speech, officer had reasonable suspicion to detain defendant for DUI investigation—Arrest—Officer conducting DUI investigation had probable cause for DUI arrest after observing that defendant had odor of alcohol and glassy bloodshot eyes performed poorly on field sobriety exercises—In determining probable cause for arrest, officer could not consider statements made by defendant during crash investigation, but could consider observations of officer conducting that investigation, statements of eyewitnesses to crash, and defendant's post-*Miranda* statements made during DUI investigation—Evidence—Breath test—No merit to argument that breath test results must be suppressed because test was administered at county jail, rather than within city, by arresting city police officer who is also breath test operator where both arrest and request to submit to breath test occurred within officer's jurisdiction—Motion to suppress denied

STATE OF FLORIDA, Plaintiff, v. SAMANTHA COTTON, Defendant. County Court, 9th Judicial Circuit in and for Osceola County. Case No. 2019 CT 3931. June 9, 2020. Hal C. Epperson, Jr., Judge. Counsel: Alexander Card, Assistant State Attorney, for Plaintiff. Stuart I. Hyman, Orlando, for Defendant.

ORDER DENYING MOTION TO SUPPRESS

This matter came before the court for hearing on the defendant's motion to suppress on January 29, 2020 and March 3, 2020. In her motion, the defendant asks the court to suppress all evidence obtained by law enforcement as the result of what defendant argues was an unlawful investigatory detention and an unlawful arrest. Additionally, the instant motion seeks suppression of breath test results based upon the argument that City of Kissimmee Police Officer Douvres acted outside his jurisdiction in administering the test at the county jail, outside of his jurisdictional authority. This case arises out of a DUI prosecution by the State of Florida. During two days of hearing, the court was presented with the sworn testimony of City of Kissimmee Police Officers Douvres and Lanzo as well as audio-visual evidence gleaned from the body worn cameras of each officer while they were on scene of the traffic crash and DUI investigation.

STATEMENT OF FACTS

Taken collectively, the evidence offered at hearing established the following facts pertinent to the instant motion: On November 11, 2019, shortly after 10:30pm, the defendant left her mother's house in the Eagle Pointe residential subdivision driving a silver Nissan sports utility vehicle. While still travelling in the residential neighborhood of her mother, the defendant crashed into the rear end of a parked, unoccupied Volkswagen motor vehicle. The impact of the crash caused the defendant's vehicle to flip on its side and the defendant crawled out of her vehicle through the rear hatch. A female eyewitness to the crash told arriving officers that the sound of what she deemed to be a speeding vehicle drew her attention to the defendant's vehicle and that she actually saw the crash take place. This eyewitness to the crash then saw the defendant crawl out of the crashed car through the rear of the SUV. According to this eyewitness, the defendant appeared to be panicked and commented that she did not want or need to get a DUI and that she needed to retrieve her phone. A sworn written statement was obtained from this eyewitness. Another witness on scene, a retired New York Police Officer, told arriving officers that he was inside of his home watching a sporting event when he heard a loud boom or crash just outside his home. When he exited his home, the defendant was just outside of the vehicle lying on the ground but appeared to be trying to get back to the vehicle. This witness provided a chair for the defendant to sit in and told her to be still. This witness also heard the defendant say she did not want to get a DUI charge. The two witnesses referenced above were not involved in the crash but were merely neighborhood witnesses who described what they heard and saw to arriving officers, including Officer Lanzo. Upon Officer Lanzo's arrival on scene, both of these witnesses were standing next to the defendant who was seated in the chair provided by one of the witnesses.

Officer Lanzo was one of the first police officers to arrive on scene and he conducted the traffic crash investigation. In conjunction with his investigation, Officer Lanzo spoke to the above witnesses on scene, as well as the defendant. Officer Lanzo testified that as soon as he made contact with the defendant, he smelled the odor of alcoholic beverages coming from her breath. The defendant was already sitting in the chair provided by a witness when Officer Lanzo arrived on scene. Officer Lanzo also testified that he noted slurred speech from the defendant, though during cross examination, he acknowledged that he only noticed this when the defendant was providing personal information concerning her name and date of birth. Pursuant to Officer Lanzo's crash investigation, he asked the defendant a series of questions concerning her origin of travel, destination of travel, how the crash occurred, and her domestic relationship with her husband. These questions posed by Officer Lanzo were put to the defendant during Officer Lanzo's crash investigation and prior to *Miranda* warnings being provided to the defendant. Therefore, the court will not even memorialize her responses as they are privileged and shall form no basis for determining whether officers had reasonable suspicion or probable cause. Following his questioning, Officer Lanzo informed the defendant that his traffic crash investigation was concluded and that Officer Douvres was commencing a DUI investigation.

Officer Douvres, the DUI investigator, arrived on scene shortly after Officer Lanzo. The body worn camera of Officer Douvres reveals that as soon as he arrived on scene, he was informed by a fellow officer that the defendant appeared to be intoxicated. On several occasions, Officer Douvres gave investigative directives to Officer Lanzo concerning how to conduct the traffic crash investigation. This guidance was requested by Officer Lanzo, who stated to Officer Douvres "I need your expertise". Officer Douvres informed Officer Lanzo that he needed to determine whether there was a wheel witness. He also gave Officer Lanzo guidance as to the type of information which he needed to gather in the course of the crash investigation, such as the defendant's origin and destination of travel and how the accident occurred. The body worn camera evidence reveals that Officer Lanzo briefed Officer Douvres on the information he had obtained during his crash investigation, including the observations of the neighborhood witnesses on scene, his own observations of the defendant, to include the odor of alcoholic beverages and slurred speech, and finally, the information which the defendant had provided to Officer Lanzo during his crash investigation.

Officer Douvres began his criminal investigation by informing the defendant that he was conducting a DUI investigation and reading the defendant her *Miranda* warnings. Following the giving of *Miranda* warnings, Officer Douvres questioned the defendant concerning the crash. During questioning, Officer Douvres noticed that the defendant's eyes were bloodshot and glassy and he smelled the odor of alcoholic impurities coming from her breath. The defendant said that she did not know how the accident happened and that she was traumatized. She indicated that she had just left her mother's house down the street prior to the crash and that she was travelling to her own home, a short distance away. The defendant admitted to consuming two glasses of wine before leaving her mother's house and estimated that the last glass of wine had been consumed about an hour

earlier. She also acknowledged that she had not eaten anything since approximately 6:00pm. Following a series of basic questions concerning her health, including whether the defendant was under the care of a doctor or taking prescribed medications, Officer Douvres asked the defendant whether she would submit to some exercises to make sure that she was okay to drive. The defendant agreed. Officer Douvres administered several field sobriety exercises, including the Horizontal Gaze Nystagmus Test (HGN), the Walk and Turn exercise, the One Leg Stand exercise, and the Finger to Nose exercise. The body worn camera evidence, both that of Officer Douvres and Officer Lanzo, clearly depict the quality of the defendant's performance on these exercises, which will be discussed in the analysis section below. Following the administration of the field sobriety exercises, the defendant was placed under arrest for driving under the influence. After arrest, the defendant was read implied consent on scene and requested to submit to a breath test. Ultimately, the defendant was administered a breath sample by Officer Douvres at the Osceola County Jail, outside the city limits of Kissimmee.

This recital of facts is based upon a thorough review and re-review of all of the body camera evidence introduced at hearing as well as the sworn testimony offered at hearing. To the extent any conflicts were noted between the hearing testimony and the events as depicted in the audio-visual evidence, this court deemed the real time audio visual evidence as the best evidence and resolved any conflicts in favor of the realities depicted in real time to the fact finder's own eyes and ears.

LEGAL ANALYSIS

The instant motion seeks relief based upon an ostensible violation of the defendant's right to be free from unreasonable searches and seizures as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the Florida Constitution. Additionally, defendant asserts that her rights under Article I, Sections 9 and 16 of the Florida Constitution were violated by law enforcement officers, as well as her statutory rights under Florida Statute 901.151. (See, Motion to Suppress, paragraphs 27-29) The aforementioned legal authorities protect the rights of citizens against unreasonable governmental action concerning searches and seizures, detentions and arrests and also provides a right of due process in adjudicating any claims of abridgement. In addition to the hallowed constitutional texts, a well-established body of common law has been developed providing an analytical framework for evaluating claims of constitutional violations.

In the instant case, the defendant was never the subject of an unconstitutional detention. The defendant crashed into the rear of a legally parked car in a residential neighborhood with sufficient force to cause her own vehicle to flip on its side. Under such circumstances, the defendant was duty-bound by Florida law to remain at the scene and cooperate in the crash investigation which was conducted by Officer Lanzo. *Section* 316.066, Fla. Stat. (2019). Due to the severity of the crash, Emergency Medical Services arrived on scene to render any needed medical treatment. The body worn camera evidence reveals that Officer Lanzo conducted his crash investigation in a reasonable and expedient manner and without any undue delay. Officer Lanzo initially checked on the physical well-being of the defendant, asked her some questions related to his crash investigation, gathered the necessary personal information of both the defendant and the owner of the other vehicle which had been damaged by the crash, and interviewed witnesses on scene concerning their observations. During his interactions with the defendant, Officer Lanzo smelled the odor of alcoholic beverages coming from her breath and detected slurred speech while she was providing her personal information. Both of the neighborhood witnesses who were on scene informed Officer Lanzo that immediately upon crawling out of her vehicle, the defendant repeatedly expressed her fears concerning a DUI charge.

Once Officer Lanzo completed his crash investigation, there would be no lawful basis to detain the defendant unless there was reasonable grounds or *reasonable suspicion* to believe that she was operating a motor vehicle while under the influence of alcoholic beverages. This court finds that there was *reasonable suspicion* to conduct the DUI investigation. First, there was sufficient circumstantial evidence to reasonably suspect that the defendant was the driver of the vehicle which crashed into the lawfully parked car. A neighborhood witness' attention was drawn to observation by the sound of excessive speed. This witness actually observed the subject crash and observed the defendant crawling out of the vehicle. No other occupants were observed. This lone witness provides sufficient *reasonable suspicion* as to the first element of DUI, that the defendant was driving a vehicle. The details of this witness' account is recorded on the body worn camera of Officer Lanzo.

Upon crawling out of the vehicle, the defendant's first expressed concern was that she not get a DUI charge. Specifically, the eyewitness on scene said that the defendant was panicky and said she did not want to get a DUI. A second neighborhood witness, a retired police officer, heard the crash and exited his home to find the defendant lying on the ground near the vehicle. This witness, who provided the defendant with a chair to sit down, also heard the defendant express the fear of picking up a DUI charge. Officer Lanzo, the traffic crash investigator, immediately detected the odor of alcoholic beverages coming from the defendant's breath when she spoke and noted some slurring of speech. While the totality of these facts would not be sufficient to prove a DUI beyond a reasonable doubt and arguably might fall short of probable cause for arrest, these facts certainly give rise to a *reasonable suspicion* that the defendant was driving while under the influence.

Typically, the validity of investigatory detentions for DUI involve arguments as to how much inculpatory weight should be accorded to minor weaving down a roadway or failing to turn on one's headlights. It is often the case that legitimate DUI investigatory stops are predicated upon minor traffic infractions coupled with some combination of indicia of impairment such as an odor of alcoholic beverages and slurred speech. The driving pattern is typically one factor which is considered in the calculus of reasonable suspicion of impairment. In this case, the defendant inexplicably crashed into a parked car in a residential neighborhood. While there are certainly alternative explanations for such crashes independent of impairment, crashing into a properly parked vehicle is no slight showing of an impaired ability to "judge distances, drive an automobile, make judgments, and act in emergencies". On the ledger of "reasonable suspicion or not" of impaired driving, the defendant's conduct can be put squarely in the reasonable suspicion column.

Added to the "driving pattern" are the defendant's unsolicited statements made to citizens on scene immediately following the crash. Both witnesses on scene gave statements indicating that the defendant's immediate expressed concern was the prospect of a DUI charge. These statements were made to civilian witnesses on scene even prior to the arrival of any law enforcement officers. These statements are not immunized pursuant to Florida's Accident Report Privilege and are properly considered when determining whether there was reasonable suspicion to conduct a DUI investigation. *State v. Cino,* 931 So.2d 164 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D1353a]. While certainly not dispositive of impairment, these statements are reasonably and fairly construed as statements demonstrating a consciousness of guilt for DUI. Finally, in addition to the "driving pattern" and the defendant's incriminating statements concerning DUI, Officer Lanza detected the odor of alcoholic beverages coming from the defendant's breath and noted occasional slurred speech. The question presented by these collective facts is not

whether they are sufficient to establish probable cause for arrest but whether they meet the mere standard of *reasonable suspicion* to temporarily detain for further investigation. It is this court's assessment that they do.

Officer Douvres commenced his criminal investigation by specifically informing the defendant that he was conducting a DUI investigation and reading *Miranda* warnings. Following *Miranda* warnings, the defendant admitted that she had consumed wine earlier in the evening. According to defendant, she had two glasses of wine, the most recent consumption being an hour earlier. She stated that she had not eaten anything since approximately 6pm. While speaking to the defendant, Officer Douvres observed that her eyes were glassy and bloodshot and he smelled the odor of alcoholic impurities. After confirming that the defendant was not under the care of a doctor and was not taking any prescribed medications, Officer Douvres asked her if she would perform field sobriety exercises to make sure she was fit to drive. The defendant agreed to perform the field sobriety exercises. The body worn camera evidence from both Officer Douvres and Officer Lanzo provides a quality view of the defendant's performance of the exercises. The defendants' performance on each of the field sobriety exercises is highly indicative of impairment, both in her persistent inability to recall simple instructions and in her extremely poor balance. While it is unnecessary to minutely memorialize the details of defendant's performance on each exercise, said performances are a part of the record and available for posterity. It is certainly the case that judgments regarding field sobriety exercise performances are inherently subjective, that individuals have varying degrees of agility and balance, and that persons who are overweight would seem to be naturally disadvantaged. The defendant does appear to be overweight. Notwithstanding these concessions, the defendant's profoundly poor performance on the field sobriety exercises substantially bolsters the evidence of impairment and when considered in light of the other evidence of impairment, established probable cause for Officer Douvres to believe the defendant was driving under the influence of alcoholic beverages. *Department of Highway Safety and Motor Vehicles, Division of Driver Licenses v. Possati,* 866 So.2d 737 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D375a] (odor of alcohol, bloodshot and watery eyes combined with fact that defendant struck parked vehicle characterized as "more than sufficient" to establish probable cause for DUI).

While the instant motion to suppress is itself silent with respect to the Accident Report Privilege codified in Florida law, defense counsel properly invoked the privilege during the hearing and in argument. Because individuals involved in traffic crashes are compelled by law to provide certain information to officers conducting a crash investigation, any such statements and communications are clothed with statutory immunity. *Vedner v. State,* 849 So.2d 1207 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1721b]. Moreover, while the subject statute expressly bars the State from using such compelled statements only "at trial", Florida courts have held that the Constitution prohibits the state from making *any* use of such compelled statements, either directly or derivatively. *State v. Cino,* at 931 So.2d 168. Thus, the immunity afforded by Florida's Accident Report Privilege is equivalent to the immunity demanded by the Fifth Amendment's prohibition against using compelled, self-incriminating statements. Finally, Florida courts have explicitly held that this privilege extends to probable cause hearings and other phases of prosecution. *State v. Cino,* at 931 So.2d 168, footnote 5.

In accordance with Florida's Accident Report Privilege, none of the statements made by the defendant to Crash Investigator Lanzo during his crash investigation may be properly used, either directly or indirectly, in determining whether there was reasonable suspicion to detain the defendant following the crash investigation or whether there was probable cause for Officer Deuvres' ultimate physical arrest for DUI. Specifically, the defendant disclosed to Officer Lanzo that she had driven her vehicle from her mother's house and that she was heading to her own home. Concerning the crash, she told Officer Lanzo that she did not see the other car prior to impact and she did not know how it happened. She also described her specific course of travel in the neighborhood before the crash and confirmed she was the only person in the vehicle. She disclosed that she did not have possession of any identification cards on her person but that it was at her home. In response to questions concerning her family, she told Officer Lanzo that her husband was home with her children. She also provided Officer Lanzo and another officer on scene with her personal identification information, phone numbers, and the physical address location of her mother and her own home. These disclosures were made to Officer Lanzo during the crash investigation. This court considered none of them in making its determination that Officer Douvres had reasonable suspicion to conduct his DUI investigation and ultimately probable cause for a DUI arrest. The facts relied upon in making this judgment are set out above and were not tied, directly or indirectly, to the statements made by the defendant during the crash investigation.

The court did, however, in its determination that Officer Douvres had reasonable suspicion to investigate and probable cause to arrest, consider all of the information known to Officer Douvres which was wholly independent of the privileged statements made by the defendant. This information is set out in detail above. Defense counsel argues that Officer Douvres cannot lawfully use *any information* which was obtained *during* the accident investigation. This assertion is not correct. *Cino* at 931 So.2d 167. Apart from statements made by the defendant, all other evidence may be properly relied upon by Officer Douvres so long as it was not directly or indirectly gleaned from the defendant's crash report statements. The fact that observations made by witnesses on scene occurred before or during the course of the accident investigation and were reported during the accident investigation did not preclude Officer Douvres from relying upon this witness information. The fact that two fellow officers made observations of impairment during the accident investigation and relayed these observations to Officer Douvres did not render this information unusable. Apart from defendant's statements, the proper use of evidence acquired by Officer Douvres is not governed by whether the information was acquired before, during, or after the crash investigation per se. Rather, it is the nature of the evidence and the circumstances surrounding its acquisition which implicate constitutional questions. While a distinction is properly made between a crash investigation and a criminal investigation for purposes of determining whether communications are privileged, this distinction recognized in Fifth Amendment jurisprudence does not prohibit a concurrent civil and criminal investigation nor does it mandate that officers on scene render themselves deaf and dumb to all attendant circumstances pending the communique to the defendant that particular questioning is being undertaken as part of a criminal investigation.

The statement of facts set out above references the fact that Officer Douvres, the DUI investigator, gave direction to Officer Lanzo as to the tasks which needed to be performed in furtherance of the crash investigation, including questioning the defendant concerning the crash. This direction was requested by Officer Lanzo shortly after Officer Douvres arrived on scene, and is captured on the body worn camera of each officer. This circumstance was included within the statement of facts for the purpose of addressing an issue raised by defense. Defense asserts that none of the defendant's post Miranda statements should be considered in adjudicating the instant motion because Officer Douvres' direction to Officer Lanzo, particularly with respect to questioning the defendant, nullified the efficacy of the

Miranda warnings which Officer Douvres later provided to the defendant prior to questioning. This argument, while industrious, is an overly extravagant application of common law precedent concerning a materially different set of circumstances—where police, for the very purpose of rendering *Miranda* warnings ineffective, intentionally forego the reading of *Miranda* during custodial interrogation until they receive a confession, and then seek to sanitize the confession by providing *Miranda* with the expectation that a confused suspect will repeat the confession. See, *Missouri v. Seibert,* 542 U.S. 600 (2004) [17 Fla. L. Weekly Fed. S476a]; *Ross v. State,* 45 So.3d 403 (2010) [35 Fla. L. Weekly S295a]. When confessions are obtained under these circumstances, that is, when officers use improper and deliberate tactics in delaying the administration of *Miranda* warnings for the purpose of minimizing the significance of *Miranda* rights in the mind of the suspect, then such confessions may be deemed inadmissible.

The instant case does involve two instances of questioning the defendant, first, pursuant to a statutorily mandated crash investigation, and second, pursuant to a DUI criminal investigation. Defendant's statements during the crash report are indeed privileged, not because the statements were the product of un-Mirandized custodial interrogation but because the statements were, in a sense, compelled by the statutory duty to cooperate with the crash investigation. When Officer Douvres commenced his criminal investigation, however, he told the defendant he was commencing a criminal investigation and provided *Miranda* warnings. This is not the conduct of officers seeking to elicit a confession by the type of tactical schemes brought to light in *Seibert* and *Ross.* Significantly, the crash investigator did not even make any inquiries of the defendant with respect to whether she had been drinking. This subject matter was not broached with the defendant until after *Miranda* warnings were provided. In fact, the extent of questioning by Crash Investigator Lanzo was strikingly brief and bereft of granular detail, hardly the work of a clever officer attempting to elicit incriminating information from an unsuspecting defendant in advance of possible *Miranda* warnings. In short, the efficacy of the *Miranda* warnings provided to the defendant in this case was not vitiated by police misconduct directed at undermining the effectiveness of the warning. Defendant's post *Miranda* statements, including her admission to consuming alcoholic beverages before driving, were proper for Officer Deuvres to consider in determining whether there was probable cause for arrest.

In summary of the issues regarding detention and arrest, Officer Douvres had reasonable suspicion to conduct a DUI investigation based upon the information provided on scene by lay witnesses and by fellow officers. Prior to commencing his DUI investigation, Officer Douvres knew from witnesses on scene that the defendant had crashed into a parked vehicle on a residential street with such force that her own vehicle flipped on its side. Officer Douvres knew from an eyewitness to the crash that the defendant singularly crawled out of her car after the crash and he knew from two witnesses on scene that the defendant immediately expressed concerns about getting charged with a DUI. Officer Douvres was informed by at least two officers on scene, Officer Lanzo and another uniformed police officer captured on video, that the defendant had a strong odor of alcoholic beverages coming from her person. Officer Douvres was told on scene by Officer Lanzo that the defendant's speech was slurred. While this assertion was the subject of impeachment during hearing, the fact that Officer Douvres was told this by a fellow officer on scene is fairly considered as one factor when evaluating his decision to commence the DUI investigation. The totality of these circumstances provided a reasonable suspicion for Officer Douvres to believe the defendant was driving under the influence and to detain her for further investigation. In speaking with the defendant, Officer Douvres himself detected the odor of alcoholic beverages coming from the defendant and noticed that her eyes were glassy and bloodshot. In a *post-Miranda* admission, the defendant acknowledged she had been consuming wine earlier in the evening, the last drink approximately an hour earlier. The defendant acknowledged that she had not eaten in hours. During her performance of field sobriety exercises, the defendant exhibited what a reasonable person would perceive to be indicators of impairment as simple instructions had to be repeated and her equilibrium appeared to be substantially compromised. Following his DUI investigation, Officer Duevres had probable cause for a DUI arrest. *Department of Highway Safety and Motor Vehicles, Division of Driver Licenses v. Possati,* 866 So.2d 737 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D375a].

The last issue raised by the instant motion arises from the fact that Officer Deuvres is a City of Kissimmee Police Officer. Following the defendant's arrest, she was transported to the Osceola County Jail where she was administered a breath test. Defense asserts that, "since Officer Douvres was located outside of his jurisdiction he had no authority to require the defendant to submit to a breath test". (See Paragraph 25, Motion to Suppress) As a factual matter, the evidence at hearing established that the defendant was read implied consent at the scene of the traffic crash following her arrest and was also requested to take a breath test on scene, in the city of Kissimmee. The breath test itself was administered at the Osceola County Jail by arresting officer, Officer Douvres, in his capacity as a breath tech operator. Officer Douvres' authority to administer a chemical breath test is governed by rules promulgated by the Florida Department of Law Enforcement. The defendant's motion fails to assert that Officer Douvres was unqualified to administer a breath test based upon governing rules and no evidence was adduced at hearing to support such a finding. Nor was any legal authority presented for the specific proposition that a law enforcement officer who is certified as a breath tech operator is prohibited from administering such tests outside of the jurisdiction in which he serves as an officer and wherein he or she possesses particularized arrest powers. The breath test taken by the defendant in this case is not subject to suppression on the basis that it was administered at the county jail as opposed to the city limits in which breath test operator serves as a Kissimmee Police Officer.

WHEREFORE, for the foregoing reasons, the Motion to Suppress is **DENIED**.

* * *

Criminal law—Driving under influence—Evidence—Breath test—Substantial compliance with administrative rules—Twenty-minute observation period—Officer who was in close proximity to and observed defendant for twenty-five minutes prior to breath test administration and did not see or hear defendant regurgitate or ingest anything orally was in substantial compliance with observation period requirement—Fact that officer momentarily looked away from defendant to seek RFI source and prepare machine for test does not constitute unreasonable departure from observation requirement—Motion to suppress denied

STATE OF FLORIDA, Plaintiff, v. SAMANTHA COTTON, Defendant. County Court, 9th Judicial Circuit in and for Osceola County. Case No. 2019 CT 3931. June 11, 2020. Hal C. Epperson, Jr., Judge. Counsel: Alexander Card, Assistant State Attorney, for Plaintiff. Stuart I. Hyman, Orlando, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS BREATH TEST OR IN THE ALTERNATIVE MOTION IN LIMINE WITH REGARD TO INTOXILYZER RESULTS VII

This matter came before the court for hearing on January 29, 2020 on the defendant's Motion to Suppress Breath Test or in the Alternative Motion in Limine with Regard to Intoxilyzer Test Results VII. In her motion, the defendant seeks an Order prohibiting the State from

eliciting any information concerning the fact that the defendant was allegedly administered an intoxilyzer test and prohibiting the State from eliciting any information concerning the alleged intoxilyzer test results. The requested Order is premised upon the allegation that the breath technician failed to properly observe the defendant for a period of twenty (20) minutes prior to the administration of the breath test to make reasonably certain that the defendant did not ingest anything or regurgitate prior to the administration of the test.

MATERIAL FACTS

At hearing, Officer Douvres of the Kissimmee Police Department testified concerning his DUI investigation, his arrest of the defendant, the reading of implied consent, and the administration of the breath test which occurred in the breath testing room at the Osceola County Jail. Given the instant motion, Officer Douvres was queried concerning the requisite twenty minute observation period which took place prior to the administration of the defendant's breath tests. Officer Douvres testified that he had been in the DUI breath testing room with the defendant for at least twenty five minutes prior to the instrument beginning its first diagnostic check. During this observation time, Officer Douvres was sitting approximately ten feet away from the defendant in the room. At no time during this observation period did Officer Douvres see or hear the defendant regurgitate or ingest anything into her mouth. Due to the intoxilyzer's detection of radio frequency interference (RFI) during the first diagnostic check and prior to the administration of the first breath test, Officer Douvres briefly looked around the room for the possible source of interference. More specifically, he looked at his radio and he walked to and from a desk to make sure cell phones were turned off. Additionally, preparation of the instrument for testing necessitated that Officer Douvres push a button, install a mouthpiece onto the hose, and occasionally look at the instrument's screen.

LEGAL ANALYSIS

The relevant regulation which pertains to the twenty minute observation period which must precede the administration of a breath test states the following:

> "(3) The breath test operator, agency inspector, arresting officer, or person designated by the permit holder shall ***reasonably ensure*** that the subject has not taken anything by mouth or has not regurgitated for at least twenty (20) minutes before administering the test. This provision shall not be construed to otherwise require an additional twenty (20) minute observation period before the administering of a subsequent sample." Fl. Admin. Code R. 11D-8.007(3). (emphasis supplied)

Significantly, the previous version of this rule said "make certain" rather than "reasonably ensure". The import of this amendment to the rule, which materially changed the permit holder's responsibility, is manifested in the plethora of cases which have been reported since its amendment, reflecting the change in standard.

The State of Florida typically has the burden of proving substantial compliance with this regulation. *Department of Highway Safety and Motor Vehicles v. Farley,* 633 So.2d 69 (Fla. 5th DCA 1994). The instant motion in limine, however, merely alleges noncompliance but does not allege any specific facts in support of the proposition. Some circuit court appellate courts have held that the State's burden of demonstrating substantial compliance is not even triggered in the absence of a defense motion which avers specific facts of noncompliance. *State v. Arnold,* 7 Fla. L. Weekly Supp. 160a (Fla. 9th Cir. Ct. Oct. 26, 1999); *State v. Griese,* 5 Fla. L. Weekly Supp. 137a (Fla. 9th Cir. Ct. Nov. 3, 1997). Inasmuch as this court entertained the motion and received evidence, it will proceed on the merits notwithstanding any pleading deficiencies.

It is very well established that the State's burden of demonstrating substantial compliance with the twenty minute observation period does not require a showing that the observer looked the subject in the face for the entire period. *Kaiser v. State,* 609 So.2d 768 (Fla. 2d DCA 1992); *State v. Williams,* 23 Fla. L. Weekly Supp. 74a (Fla. 9th Cir. April 27, 2015); *Hamann v. Dep't of Highway Safety and Motor Vehicles,* 20 Fla. L. Weekly Supp. 315a (Fla. 9th Cir. Ct. Oct. 18, 2012). There are numerous published circuit court appellate opinions concerning the twenty minute observation period and a vast array of factual scenarios which have been evaluated for the purpose of adjudicating the matter of substantial compliance. In surveying these cases, one may fairly conclude that the focus tends to the reasonableness of the observer's conduct and whether any deviations from a strict twenty minute observation period might serve to prejudice the defendant in the form of a negative impact on the reliability of the test results. Such prejudice, according to the prescribed purpose of the rule, could come in the form of unnoticed regurgitation or unobserved ingestion of something into the mouth.

As noted above, the instant motion avers no particular facts to support the proposition that Officer Douvres failed to substantially comply with the regulation's twenty minute observation period prior to the test. Nor was any evidence presented at hearing to support the proposition that the defendant may have regurgitated or ingested anything by mouth during the twenty minutes before the administration of the breath test. To the contrary, Officer Douvres observed the defendant for at least twenty five minutes prior to administration of the first breath test. During this observation period, he was in close proximity to the defendant. He testified that the defendant did not noticeably regurgitate and did not ingest anything orally. The fact that Officer Douvres momentarily looked about the room in response to the RFI indicator and prepared the instrument for administration of the tests does not constitute an unreasonable departure from the rule's requirement governing observation. Nor is there a single reported appellate opinion which would support such a conclusion. Based upon the sworn testimony offered at hearing, Officer Douvres was in substantial compliance with the regulation requiring a twenty minute observation of the defendant prior to testing.

WHEREFORE, the defendant's Motion to Suppress Breath Test or in the Alternative Motion in Limine with Regard to Intoxilyzer Test Results VII is **DENIED**.

* * *

Criminal law—Driving under influence—Evidence—Statements of defendant—Post-*Miranda* statements made by defendant during DUI investigation are admissible where defendant's apparent consumption of alcohol did not so impair her as to render her incompetent to waive her *Miranda* rights—Motion to suppress denied

STATE OF FLORIDA, Plaintiff, v. SAMANTHA COTTON, Defendant. County Court, 9th Judicial Circuit in and for Osceola County. Case No. 2019 CT 3931. June 11, 2020. Hal C. Epperson, Jr., Judge. Counsel: Alexander Card, Assistant State Attorney, for Plaintiff. Stuart I. Hyman, Orlando, for Defendant.

AMENDED ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS CONFESSIONS, STATEMENTS AND ADMISSIONS

This matter came before the court for hearing on January 29, 2020 and March 3, 2020 on the defendant's Motion to Suppress Confessions, Statements and Admissions. In her motion, the defendant does not particularize or designate specific statements as being subject to suppression but rather asserts that any and all statements made by the defendant were not freely and voluntarily given and were therefore obtained in violation of the defendant's rights as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article 1, Section 9, of the Florida Constitution. During hearing on the defendant's motion, the court received

into evidence the sworn testimony of Kissimmee Police Officers Lanzo and Douvres as well as the body worn camera evidence from each officer. In a previous Order entered by this court on a separate motion, the court provided a comprehensive statement of the facts in this case which will be included in this Order as well, though not all facts contained herein are necessarily pertinent to the instant motion.

STATEMENT OF FACTS

Taken collectively, the evidence offered at hearing established the following facts: On November 11, 2019, shortly after 10:30pm, the defendant left her mother's house in the Eagle Pointe residential subdivision driving a silver Nissan sports utility vehicle. While still travelling in the residential neighborhood of her mother, the defendant crashed into the rear end of a parked, unoccupied Volkswagen motor vehicle. The impact of the crash caused the defendant's vehicle to flip on its side and the defendant crawled out of her vehicle through the rear hatch. A female eyewitness to the crash told arriving officers that the sound of what she deemed to be a speeding vehicle drew her attention to the defendant's vehicle and that she actually saw the crash take place. This eyewitness to the crash then saw the defendant crawl out of the crashed car through the rear of the SUV. According to this eyewitness, the defendant appeared to be panicked and commented that she did not want or need to get a DUI and that she needed to retrieve her phone. A sworn written statement was obtained from this eyewitness. Another witness on scene, a retired New York Police Officer, told arriving officers that he was inside of his home watching a sporting event when he heard a loud boom or crash just outside his home. When he exited his home, the defendant was just outside of the vehicle lying on the ground but appeared to be trying to get back to the vehicle. This witness provided a chair for the defendant to sit in and told her to be still. This witness also heard the defendant say she did not want to get a DUI charge. The two witnesses referenced above were not involved in the crash but were merely neighborhood witnesses who described what they heard and saw to arriving officers, including Officer Lanzo. Upon Officer Lanzo's arrival on scene, both of these witnesses were standing next to the defendant who was seated in the chair provided by one of the witnesses.

Officer Lanzo was one of the first police officers to arrive on scene and he conducted the traffic crash investigation. In conjunction with his investigation, Officer Lanzo spoke to the above witnesses on scene, as well as the defendant. Officer Lanzo testified that as soon as he made contact with the defendant, he smelled the odor of alcoholic beverages coming from her breath. The defendant was already sitting in the chair provided by a witness when Officer Lanzo arrived on scene. Officer Lanzo also testified that he noted slurred speech from the defendant, though during cross examination, he acknowledged that he only noticed this when the defendant was providing personal information concerning her name and date of birth. Pursuant to Officer Lanzo's crash investigation, he asked the defendant a series of questions concerning her origin of travel, destination of travel, how the crash occurred, and her domestic relationship with her husband. These questions posed by Officer Lanzo were put to the defendant during Officer Lanzo's crash investigation and prior to *Miranda* warnings being provided to the defendant. Therefore, the court will not even memorialize her responses as they are privileged and shall form no basis for determining whether officers had reasonable suspicion or probable cause. Following his questioning, Officer Lanzo informed the defendant that his traffic crash investigation was concluded and that Officer Douvres was commencing a DUI investigation.

Officer Douvres, the DUI investigator, arrived on scene shortly after Officer Lanzo. The body worn camera of Officer Douvres reveals that as soon as he arrived on scene, he was informed by a fellow officer that the defendant appeared to be intoxicated. On several occasions, Officer Douvres gave investigative directives to Officer Lanzo concerning how to conduct the traffic crash investigation. This guidance was requested by Officer Lanzo, who stated to Officer Douvres "I need your expertise". Officer Douvres informed Officer Lanzo that he needed to determine whether there was a wheel witness. He also gave Officer Lanzo guidance as to the type of information which he needed to gather in the course of the crash investigation, such as the defendant's origin and destination of travel and how the accident occurred. The body worn camera evidence reveals that Officer Lanzo briefed Officer Douvres on the information he had obtained during his crash investigation, including the observations of the neighborhood witnesses on scene, his own observations of the defendant, to include the odor of alcoholic beverages and slurred speech, and finally, the information which the defendant had provided to Officer Lanzo during his crash investigation.

Officer Douvres began his criminal investigation by informing the defendant that he was conducting a DUI investigation and reading the defendant her *Miranda* warnings. Following the giving of *Miranda* warnings, Officer Douvres questioned the defendant concerning the crash. During questioning, Officer Douvres noticed that the defendant's eyes were bloodshot and glassy and he smelled the odor of alcoholic impurities coming from her breath. The defendant said that she did not know how the accident happened and that she was traumatized. She indicated that she had just left her mother's house down the street prior to the crash and that she was travelling to her own home, a short distance away. The defendant admitted to consuming two glasses of wine before leaving her mother's house and estimated that the last glass of wine had been consumed about an hour earlier. She also acknowledged that she had not eaten anything since approximately 6:00pm. Following a series of basic questions concerning her health, including whether the defendant was under the care of a doctor or taking prescribed medications, Officer Douvres asked the defendant whether she would submit to some exercises to make sure that she was okay to drive. The defendant agreed. Officer Douvres administered several field sobriety exercises, including the Horizontal Gaze Nystagmus Test (HGN), the Walk and Turn exercise, the One Leg Stand exercise, and the Finger to Nose exercise. The body worn camera evidence, both that of Officer Douvres and Officer Lanzo, clearly depict the quality of the defendant's performance on these exercises, which will be discussed in the analysis section below. Following the administration of the field sobriety exercises, the defendant was placed under arrest for driving under the influence. After arrest, the defendant was read implied consent on scene and requested to submit to a breath test. Ultimately, the defendant was administered a breath sample by Officer Douvres at the Osceola County Jail, outside the city limits of Kissimmee.

This recital of facts is based upon a thorough review and re-review of all of the body camera evidence introduced at hearing as well as the sworn testimony offered at hearing. To the extent any conflicts were noted between the hearing testimony and the events as depicted in the audiovisual evidence, this court deemed the real time audio visual evidence as the best evidence and resolved any conflicts in favor of the realities depicted in real time to the fact finder's own eyes and ears.

LEGAL ANALYSIS

As set out above, the defendant was asked questions by Officer Lanzo while he was conducting his crash investigation. The defendant's responses to these questions are privileged and may not be used by the State during any phase of the instant criminal prosecution. *Section* 316.066, Florida Statutes (2019); *Vedner v. State,* 849 So.2d 1207 (Fla. 5th DCA 2002) [28 Fla. L. Weekly D1721b]; *State v. Cino,* 931 So.2d 164 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D1353a]. The inadmissibility of these statements made to Officer Lanzo during the crash investigation is not in dispute as the State conceded as much

during argument. Therefore, the court shall provide no further analysis beyond the declaration of inadmissibility and the citation of legal authorities.

Following the conclusion of the crash investigation, Officer Douvres informed the defendant that he was conducting a DUI criminal investigation and advised the defendant of her *Miranda* warnings. Based upon the sworn testimony adduced at hearing coupled with the court's review of the body worn camera evidence, this court finds, by a preponderance of the evidence, that the defendant was adequately advised of *Miranda* rights prior to custodial interrogation. Defendant, however, challenges the matter of a voluntary waiver on grounds independent of the adequacy of the *Miranda* warning. In paragraphs 8 and 9 of the motion to suppress, the defendant alleges the following:

> 8. That the State alleges that the Defendant was under the influence of alcohol to the extent her normal faculties were impaired.
>
> 9. That based upon the allegations of the State, the Defendant could not knowingly, intelligently, freely and voluntarily waiver her Miranda rights.

(See Motion to Suppress, page 2, paragraphs 8, 9)

The defendant avers the incongruity of the State's allegation that, on the one hand, the defendant was impaired by alcohol but on the other hand, she was sufficiently sober to have an awareness of her legal rights and to understand the consequences of a waiver. There is an unassailable logic to the defendant's argument. Moreover, the burden is always on the State to prove the validity of a waiver of *Miranda* rights and the voluntariness of the defendant's statements by a preponderance of the evidence. *Bevel v. State,* 983 So.2d 505 (Fla. 2008) [33 Fla. L. Weekly S202a]; *Padmore v. State,* 743 So.2d 1203 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2541a]. The fair question raised by the defendant is, how can the court possibly conclude that the defendant was aware of constitutional rights and the consequences of a waiver if she was impaired by alcohol?

The leading case in the State of Florida on this question, it seems, is *DeConingh v. State,* 433 So.2d 501 (Fla. 1983). In this case, the Florida Supreme Court addressed the impact drug and alcohol consumption may have on the admissibility of a defendant's statements. In its holding, the Court ruled that the consumption of such substances will justify the exclusion of a confession if the defendant reaches a level of "mania or is unable to understand the meaning of his statements". *DeConingh* at 433 So.2d 501, 503 n.2 (Fla. 1983). While the Court did not provide a precise definition for its "mania rule", the meaning of the ruling was further defined in *Burns v. State,* 584 So.2d 1073 (Fla. 4th DCA 1991). In *Burns,* which involved a defendant who provided statements to police while under the influence of Demerol, the court stated that a defendant who is under the influence of alcohol or drugs is nevertheless competent to waive his or her rights if that person:

> "is aware and able to comprehend in a general way what he is doing and to communicate with coherence and rationality. By "rationality", we mean whether the defendant's responses or communications have a contextual relationship, not whether it is objectively reasonable for a person in the circumstance of the defendant to make the statement sought to be admitted."

Burns at 584 So.2d 1073, 1075-1076.

In the instant case, the evidence adduced at hearing did establish probable cause to believe the defendant was under the influence of alcoholic beverages at the time she was *Mirandized* and at the time she provided her Post-*Miranda* statement to Officer Duevres. However, the evidence did not establish that she was so impaired so as to be unaware or unable to comprehend in a general way what she was doing. Nor was she unable to communicate with some coherence and rationality. The defendant's responses to the officer's questions consistently bore a contextual relationship to the subject matter. In short, the defendant's apparent consumption of alcohol did not so impair her as to render her incompetent to waive her rights based upon the standards enunciated above by controlling authorities. The post *Miranda* warning statements made by the defendant to Officer Duevres are not inadmissible on the grounds that she was rendered incompetent to waive her Fifth Amendment rights.

WHEREFORE, the defendant's Motion to Suppress Confessions, Statements and Admissions is **DENIED**.

* * *

Insurance—Automobile—Windshield repair— Appraisal— Prohibitive cost doctrine—Prohibitive cost doctrine is not applicable to appraisal provision where appraisal costs that were agreed to in policy and over which repair shop has significant control would not render shop unable to pursue claim—Clear and unambiguous appraisal clause that does not violate statutory law and is not contrary to public policy is enforceable

BROWARD INS. RECOVERY CENTER (LLC), a/a/o Mario Musa, Plaintiff, v. PROGRESSIVE AMERICAN INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-026437-SP-23, Section ND02. June 8, 2020. Natalie Moore, Judge. Counsel: Emilio R. Stillo, Emilio Stillo, P.A., Davie, and Joseph Dawson, Law Offices of Joseph R. Dawson, P.A., Fort Lauderdale, for Plaintiff. Randi B. Franz, Antonio Roldan, and Jessica L. Pfeffer, Progressive PIP House Counsel, Fort Lauderdale, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This matter comes before the Court on Defendant's Motion to Dismiss Plaintiff's Amended Complaint, Or Alternatively, Defendant's Motion to Abate or Stay and Motion to Compel Appraisal. After hearing the argument of the parties, reviewing the filed documents and briefs, and considering the applicable law, it is hereby:

ORDERED AND ADJUDGED that Plaintiff's motion to dismiss is **GRANTED**. The motion to stay and compel appraisal is denied as moot.

This lawsuit involves a dispute between an insurance company and an auto glass vendor regarding the cost of replacing an insured's windshield. As is common in the industry, Plaintiff, an auto glass vendor, obtained an assignment of benefits relating to the insurance claim for the replacement of the insured's windshield. This assignment allows a vendor to "step into the shoes" of the insured. The vendor is then able to negotiate with and collect from the insurer.

The insurance contract in this case requires Defendant to pay "the amount necessary to repair the damaged property to its pre-loss physical condition." The policy further states: "In determining the amount necessary to repair damaged property to its pre-loss physical condition, the amount paid by us: will not exceed the prevailing competitive labor rates charged . . .and the cost of repair or replacement parts and equipment, as reasonably determined by us . . . ." The contract also states that if the insurer and the insured cannot agree on an amount of loss then either party may demand an appraisal.

Defendant has admitted there is a covered loss and argues that the only remaining issue is the amount of loss. Defendant argues that this a dispute that is appropriate for appraisal and is specifically identified in the contract as an issue for which appraisal can be demanded. Defendant made a timely demand for appraisal and has not acted inconsistently with that right at any time. This motion to dismiss seeks to enforce that right.

Appraisal clauses are enforceable in Florida. Parties are free to create contracts that they deem appropriate to their needs unless the form or content of the contract conflicts with law or public policy. *Green v. Life and Health of America*, 704 So.2d 1386 (Fla. 1998) [23 Fla. L. Weekly S42a]. Courts cannot and should not interfere with the freedom to contract, and a court should not substitute its judgment for

that of the parties to the contract.

Plaintiff initially argues that the issue here is not just the amount of loss. Plaintiff suggests that the contract was breached not only because Defendant did not pay the replacement cost as charged, but also that they calculated the replacement cost in a manner inconsistent with the contract. Plaintiff argues that this issue, how the calculation was made, is not an issue which is proper for appraisal. This might be a compelling argument, but it fails. Contrary to Plaintiff's position here, a careful reading of the complaint shows that the only breach alleged is "Defendant's failure and/or refusal to pay the aforesaid benefits due. ." [Complaint p. 5]. If Plaintiff believes the amount determined by Defendant was not "reasonably determined" by the insured then the remedy is to contest that amount of loss. That contest is one appropriate for appraisal.

Next, Plaintiff argues that the Court should not enforce the appraisal provision of the contract. The contract language calling for appraisal is clear and unambiguous. It describes a detailed process for appraisal. The parties freely contracted for the right of appraisal, the terms described do not violate statutory law, and they are not contrary to public policy needs.

Finally, Plaintiff argues that the prohibitive cost doctrine renders the appraisal clause unenforceable. The Prohibitive Cost Doctrine is derived from the United States Supreme Court's ruling in *Green Tree Financial Corp v. Randolf,* 531 U.S. 79 (2000). In *Green Tree* a litigant sought to invalidate a contractual arbitration clause, arguing that it was prohibitively expensive. *Id.* The arbitration clause in *Green Tree* was silent as to how the costs associated with arbitration would be paid. *Id.* The Supreme Court held 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 and that a party seeking to avoid arbitration bears the burden of showing the likelihood of such costs. *Id*. at 522.

Plaintiff requests an evidentiary hearing to determine whether the appraisal cost would be a prohibitive cost. Here, Defendant does not seek to invoke a formal, expensive arbitration process. And, contrasted with the silence as to costs in *Green Tree,* the contractual language here specifies that each party is to select and pay for its own appraiser (ostensibly allowing each party to choose an appraiser they can afford) and, if required, to share the cost of an umpire to resolve any disagreement between appraisers.

The Court declines to extend the Prohibitive Cost Doctrine to cover the contractual provision in this case. There is no binding legal precedent that supports such an application. Further, where a party is forewarned by the language in the contract as to what costs they will bear, as Plaintiff clearly was here, and where a party has significant control as to the costs, as here, this Court cannot conclude that the costs they themselves agreed to would render them unable to pursue their claim. To do so would require the Court to substitute its judgment for that of a contracting party. Plaintiff agreed that if there was a dispute as to an amount of loss it would proceed with, and could afford, the described appraisal process if demanded. This Court declines to conclude otherwise.

For the forgoing reasons, Defendant's motion is granted and this case is **DISMISSED**.

* * *

Insurance—Property—Declaratory action against Citizens Property Insurance Corporation seeking declaration on coverage for benefits is not barred by Citizens' statutory sovereign immunity

M & G RESTORATION GROUP, INC., a/a/o Clara Soto, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-006729-CC-25, Section CG02. July 21, 2020. Elijah A. Levitt, Judge. Counsel: Francisco Cieza and Daniela Coy, Francisco Cieza, P.A., Coral Gables, for Plaintiff. Briana L. Jones, Boca Raton, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE, having come before this Court on July 13, 2020, on Defendant's Motion to Dismiss Plaintiff's Complaint for Declaratory Relief, and this Court having read and considered the Motion, having reviewed the Court file and relevant legal authorities, having heard argument, having made a thorough review of the matters argued, and having been sufficiently advised in the premises, it is hereby ORDERED AND ADJUDGED as follows:

1. Defendant's Motion to Dismiss Plaintiff's Complaint is DENIED.

2. Defendant shall have twenty (20) days from the date of this Order to file an Answer to the Complaint.

In support of this Order, the Court provides the following:

Section 627.351(s)(1), Florida Statutes (2020), states,

> There shall be no liability on the part of, and no cause of action of any nature shall arise against, any assessable insurer or its agents or employees, the corporation or its agents or employees, members of the board of governors or their respective designees at a board meeting, corporation committee members, or the office or its representatives, for any action taken by them in the performance of their duties or responsibilities under this subsection. Such immunity does not apply to:
>
> a. Any of the foregoing persons or entities for any willful tort;
>
> b. The corporation or its producing agents for breach of any contract or agreement pertaining to insurance coverage;
>
> c. The corporation with respect to issuance or payment of debt;
>
> d. Any assessable insurer with respect to any action to enforce an assessable insurer's obligations to the corporation under this subsection; or
>
> e. The corporation in any pending or future action for breach of contract or for benefits under a policy issued by the corporation; in any such action, the corporation shall be liable to the policyholders and beneficiaries for attorney's fees under s. 627.428.

Based on the plain language of the statute, Defendant does not have immunity in an action "for benefits under a policy issued by the corporation." *Id.* The Complaint filed in the present case is a declaratory judgment action seeking a declaration on coverage for benefits under section 86.021, Florida Statutes (2020), and on whether Plaintiff is entitled to seek benefits in excess of the cap provided in the Reasonable Emergency Services section of the insurance policy. Section 627.351(s)(1) does not limit the type of "action" that may be brought so long as the action is "for benefits" under the policy. The Court finds that the present action is one "for benefits" under the policy.

Wherefore, the Court denies Defendant's Motion to Dismiss

* * *

Insurance—Personal injury protection—Demand letter— Sufficiency—Demand letter for transportation costs did not satisfy requirements of section 627.736(10) where letter did not specify medical clinic to which insured traveled, dates of treatment for which he traveled, or exact amount due and owing—Policy limits were properly exhausted

ORLANDO MENENDEZ, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2012 1780 SP 25 (04). June 4, 2018. Rehearing Denied February 6, 2020. Carlos Guzeman and Robert T. Watson (On Rehearing), Judges. Counsel: George A. David, George A. David, P.A., Coral Gables, for Plaintiff. Abbi S. Freifeld, Roig Lawyers, Deerfield Beach, for Defendant.

[Notice of Appeal filed February 18, 2020.]

FINAL JUDGMENT FOR THE DEFENDANT

THIS CAUSE having come before the Court for hearing on

February 22, 2017 on Defendant's Motions for Final Summary Judgment regarding Invalid Demand Letter and regarding Exhaustion of Benefits, the Court having reviewed the Motions and supporting affidavits; the entire Court file; and reviewing the relevant legal authorities; having heard arguments by Counsel; having made a thorough review of the matters filed on record; and having been otherwise fully advised in the premises, it is hereupon,

ORDERED AND ADJUDGED:

Background

This is an action by the Plaintiff, Orlando Menendez (herein after referred to as "Menendez" or "Plaintiff') to recover alleged overdue No-Fault mileage benefits from the Defendant, State Farm Mutual Automobile Insurance Company (hereinafter referred to as "State Farm" or "Defendant"). Specifically, the Plaintiff sought alleged expenses relating to mileage incurred to and from his medical providers as a result of an alleged February 19, 2008 motor vehicle accident.

At the time of the accident, Orlando Menendez was covered under a policy of insurance which was issued by the Defendant, STATE FARM which provided personal injury protection ("PIP") benefits up to $10,000.00, with no medical payments coverage.

On February 22, 2017, this Honorable Court heard argument on Defendant's two Motions for Final Summary Judgment regarding invalid demand letter and exhaustion of benefits.

Invalid Demand Letter

It is undisputed that on December 16, 2011, the Plaintiff, Menendez, through counsel George A. David, P.A., sent a pre-suit demand letter to the Defendant, STATE FARM requesting alleged overdue PIP benefits under §*627.736(10), Florida Statutes,* for a claim for "PIP transportation expenses." The letter does not state the amount at issue, the dates of service for which Mr. Menendez incurred his transportation expenses, or the address of the clinic(s) to which Mr. Menendez traveled to and from. Attached to Plaintiff's demand was a letter dated November 10, 2011—Plaintiff's first request for transportation expenses—from George A. David, P.A., specifically advising that Mr. Menendez traveled from "308 W. 18th St for 56 treatments with the South Miami Health Center and returned to 308 W. 18th St. for 168 miles." Furthermore, said correspondence indicates that "Orlando Menendez's reasonable transportation expense is 61 cents a mile". Said attached November 10th correspondence does not state the exact amount at issue, the dates of service for which Mr. Menendez incurred his transportation expenses, or the address of the clinic(s) to which Mr. Menendez traveled to and from.

Argument

The Defendant State Farm argues that if Plaintiff is entitled to transportation benefits under Florida Statute §627.736 as he claims to be, so too must Plaintiff fulfill its obligations under the Statute. Namely, that Plaintiff, as a condition precedent to filing the instant lawsuit, must submit a pre-suit demand letter that complies with Florida Statute §627.736(10). Specifically, subsection (10) of the Statute provides:

> (10) DEMAND LETTER.—
>
> (a) As a condition precedent to filing any action for benefits under this section, written notice of an intent to initiate litigation must be provided to the insurer. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).
>
> (b) The notice must state that it is a "demand letter under s. *627.736*" and **state with specificity**:
>
> 1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.
>
> 2. The claim number or policy number upon which such claim was originally submitted to the insurer.
>
> 3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; **and an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due.** A completed form satisfying the requirements of paragraph (5)(d) or the lost-wage statement previously submitted may be used as the itemized statement. To the extent that the demand involves an insurer's withdrawal of payment under paragraph (7)(a) for future treatment not yet rendered, the claimant shall attach a copy of the insurer's notice withdrawing such payment and an itemized statement of the type, frequency, and duration of future treatment claimed to be reasonable and medically necessary. (Emphasis Added.)

State Farm argues simply that Plaintiff's "demand letter" failed to comply with Florida Statute §627.736(10) as it failed to attach an itemized statement or any statement specifying the exact amount due, the dates of treatment for which Mr. Menendez incurred his transportation expenses, or the address of the clinic(s) to which Mr. Menendez traveled to and from.

In response, the Plaintiff, Mr. Menendez, does not dispute that its Demand Letter did not include the address of the medical clinic to which he traveled to and from, the dates of treatment for which he incurred his transportation expenses, or the exact amount due and owing, but instead argues that Defendant could have discovered what was at issue, the dates of service and the clinic address(es) by reviewing its claim file, and that by issuing payment in response to Plaintiff's Demand Letter, albeit less than what Plaintiff alleges, is evidence that Defendant understood Plaintiff's demand.

Moreover, the Plaintiff relies on testimony from the State Farm Claim Representative, Dean Rogers, that the Defendant has no evidence that the Plaintiff did not travel 168 miles to and from medical treatment, or evidence that the accident did not occur.

Findings of Law

Florida Statute, 627.736(10) states in pertinent part:

> (10) DEMAND LETTER
>
> (a) As a condition precedent to filing any action for benefits under this section, the insurer must be provided with written notice of an intent to initiate litigation. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).
>
> (b) The notice required *shall* state that it is a "demand letter under s. 627.736 (10)" and shall state with specificity:
>
> 1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.
>
> 2. The claim number or policy number upon which such claim was originally submitted to the insurer.
>
> 3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and an itemized statement specifying each exact amount, the date of treatment, service or accommodation, and the type of benefit claimed to be due . . . *Id.*

As with any PIP claim including a claim for transportation benefits, a Plaintiff must first give the Defendant written notice of an intent to initiate litigation in the form of a pre-suit demand letter prior to filing a lawsuit. The letter "shall state with specificity" an "itemized statement specifying each exact amount" due. *See Id.* Florida courts have held that this language is unambiguous and places the burden upon the Plaintiff to fulfill the requirements outlined. *MRI Associates of Am., LLC (Ebba Register) v. State Farm Fire & Cas. Co.,* 61 So. 3d 462, 465 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b], reh'g

denied (June 24, 2011). Thus, in interpreting the language of section *627.736, Florida Statutes,* trial courts across the State have imposed a duty on medical care providers to specify the proper compensable amount owed by insurers in order to satisfy the requirements on the Statute. *Id.* However an insurer is not properly placed on notice if the wrong amount is stated in the demand letter. *See Id.*; *see also Wide Open MRI v. Mercury Ins. Group,* 16 Fla. L. Weekly Supp. 513b (Fla. 17th Cir. Cty. Ct. March 13, 2009).

Courts have also held that the specifications of §*627.736(10), Fla. Stat. [previously §627.736 (11)],* must be strictly construed. *See Chambers Medical Group, Inc. (a/a/o Marie St. Hillare) v. Progressive Express Ins. Co.*, 14 Fla. L. Weekly Supp. 207a Circuit Court, (13th Jud. Cir. Cty. Ct., December 1, 2006); *MRI Associates of Am., LLC (Ebba Register),* 61 So.3d at 465, citing to *Fountain Imaging of West Palm Beach, LLC v. Progressive Express Ins. Co.,* 14 Fla. L. Weekly Supp. 614a (15th Jud. Cir. Cty. Ct. March 30, 2007). A strict compliance with the notice requirements is required to effect the purpose of the statute. *See Chambers Medical Group, Inc. (a/a/a Marie Hillare),* 14 Fla. L. Weekly Supp. 207a. A "substantial compliance" standard would trigger significant litigation as to sufficiency of the papers attached to a demand letter, the result of which would be that payment of claims would cease to be automatic, and providers would be relieved of their obligation under the Statute. *Id.* Inaccurate, misleading, illegible, or stale information contained in a demand does not strictly comply with the statutory requirement. *Id.*

It is clear from legislative intent and the supporting case law that strict specificity must be adhered to regarding the demand letter requirement. As such, this Honorable Court finds that the Plaintiff failed to strictly adhere to the demand letter requirements as required under *Florida Statute 627.736(10)* for the reasons set forth by the Defendant. The Court is not persuaded by Plaintiff's arguments that Defendant should be required to interpret and/or review its own records to make sense of Plaintiff's vague demand letter.

Exhaustion of Benefits

At hearing, the Defendant, by way of affidavit testimony from its claim representative, Mr. Dean Rogers, put forth evidence reflecting that STATE FARM made various PIP payments to certain medical providers and to the Plaintiff, Mr. Menendez, pursuant to the terms of the PIP insurance policy and in accordance with *Florida Statute §627.736.* These payments exhausted PIP Benefits in the amount of $10,000.00 on or about December 19, 2012, following the filing of the instant lawsuit.

Argument

The Defendant State Farm argues pursuant to Florida Statute §627.736 entitled "Required Personal Injury Protection Benefits; Exclusions; Priority; Claims", (1) of "Required Benefits", that "Every insurance policy complying with the security requirements of § *627.733* shall provide personal injury protection to the named insured. . .subject to the provisions of subsection (2) and paragraph (4)(d), to a ***limit of $10,000.00*** for loss sustained by any such person as a result of bodily injury, sickness, disease, or death. . ." (Emphasis added). Consistent with the Statute, the Policy of insurance issued by the Defendant provided its insured, Mr. Menendez, with $10,000.00 in PIP benefits as a result of the February 19, 2008 automobile accident. The Defendant relies on the affidavit of Dean Rogers in support of its Motion, which sets forth that State Farm issued payments to Plaintiff's medical providers and to Plaintiff in the amount of $10,000.00.

In response, the Plaintiff argues that Defendant's Motion and supporting affidavit do not conclusively prove that payments were not made gratuitously or in bad faith. Plaintiff did not, however, provide this Court with any evidence to dispute that the benefits totaling $10,000.00 were paid, or any competent evidence tending to prove that any of the payments issued to other providers or to the Plaintiff were in fact gratuitous or otherwise made in bad faith.

Findings of Law

The Court, after reviewing the affidavit and deposition testimony of Dean Rogers, finds that benefits were properly exhausted. Moreover, the Plaintiff did not put forth any evidence to create any question of fact that the manner in which the benefits were exhausted was improper or gratuitous; and in finding that no genuine issue of material fact exists, no benefits are due and owing, and the Plaintiff has no entitlement to interest, penalty, or attorney's fees and costs. The Court relies on *Northwoods Sports Medicine and Physical Rehab. Inc. v. State Farm Mut. Auto. Ins. Co.,* 137 So.3d 1049 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a]; *GEICO Indemnity Co. v. Gables Ins, Recovery, Inc. a/a/o Rita Lauzan,* 159 So.3d 151 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D2561a]; *Richard A. Sheldon, D.C., (a/a/o Travis Baliel) v. United Services Automobile Association,* 55 So.3d 593 (Fla. 1st DCA 2010) [36 Fla. L. Weekly D23a]; and *Robert Simon v. Progressive Express Ins. Co.,* 904 So.2d 449 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1156b].

Based upon the foregoing, the Court finds that the Defendant State Farm Mutual Automobile Insurance Company's Motions for Final Summary Judgment are both hereby granted, and Final Judgment is hereby entered on behalf of Defendant, State Farm Mutual Automobile Insurance Company. The Plaintiff, Orlando Menendez, shall take nothing by this action and the Defendant, State Farm Mutual Automobile Insurance Company, shall go hence without a day. The Court retains jurisdiction for the purpose of determining any motion by the Defendant to tax fees and costs.

[ON MOTION FOR REHEARING]

ORDER

THIS CAUSE having come before the Court on Plaintiff's Motion for Rehearing and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon,

ORDERED AND ADJUDGED that said motion be, and the same is hereby:

DENIED.

The undersigned, as a successor to the judge who presided over the hearing and entered summary judgment, will not disturb the ruling.

DONE AND ORDERED in Chambers, in Miami Dade County, Florida this ____ day of _____, 20___.

Conformed Copy

* * *

Insurance—Personal injury protection—Coverage—Transportation costs—Demand letter for transportation costs that failed to provide address of medical provider visited or dates of service and identified incorrect medical provider did not satisfy condition precedent to suit

DAVID RIVERA, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2014-12640-SP-25 (02). July 27, 2018. Elijah Levitt, Judge. Counsel: George A. David, George A. David, P.A., Coral Gables, for Plaintiff. Abbi S. Freifeld, Roig Lawyers, Deerfield Beach, for Defendant.

FINAL JUDGMENT FOR THE DEFENDANT

THIS CAUSE having come before the Court for hearing on June 20, 2018, on Defendant's January 19, 2016, Motion for Summary Judgment regarding an invalid demand letter, and the Court, having reviewed the Motion, Plaintiff's response, the Parties' referenced exhibits and depositions, and the entire Court file, and having heard the argument of the Parties, having reviewed the relevant legal authorities, and having been otherwise fully advised in the premises,

it is hereby

ORDERED AND ADJUDGED:

Defendant's Motion for Summary Judgment is GRANTED for the reasons stated herein.

FACTUAL AND PROCEDURAL BACKGROUND

This is an action by the Plaintiff, David Rivera (hereinafter referred to as "Rivera" or "Plaintiff"), to recover alleged overdue No-Fault mileage benefits from the Defendant, State Farm Mutual Automobile Insurance Company (hereinafter referred to as "State Farm" or "Defendant"). Specifically, Plaintiff sought alleged expenses relating to mileage incurred to and from a medical provider as a result of a March 28, 2014, motor vehicle accident. Plaintiff's Amended Complaint does not provide the name of the medical provider, the medical provider's address, the mileage for which Plaintiff requests reimbursement, the total amount owed, the dates of travel, or the amount per mile requested. *See* Plaintiff's March 5, 2015, Motion to Amend Complaint at 4-7.

At the time of the accident, Rivera was covered under a policy of insurance that was issued by State Farm and provided personal injury protection ("PIP") benefits up to $10,000.00.

On June 20, 2018, this Court heard argument on Defendant's Motion for Final Summary Judgment regarding an allegedly invalid demand letter. According to the Parties, this Motion, if granted, would be dispositive of this cause of action.

A. The Demand Letter

The Parties do not dispute that on August 11, 2014, Rivera, through counsel George A. David, P.A., (hereinafter referred to as "Plaintiff's counsel") sent a pre-suit demand letter to State Farm requesting alleged overdue PIP benefits under §627.736(10), Florida Statutes, for a claim of "PIP Benefits for transportation expenses." *See* Defendant's Motion for Summary Judgment at Exhibit 3. The demand letter does not provide the name of the medical provider, the medical provider's address, the mileage for which Plaintiff requests reimbursement, the total amount owed, the dates of travel, or the amount per mile requested. *See id.*

The Parties also do not dispute that Plaintiff's counsel sent a one-page letter dated July 10, 2014, to State Farm both on or about July 10, 2014, and as an attachment to the August 11, 2014, demand letter. *See* Defendant's Motion for Summary Judgment at Exhibit 2. During oral argument, State Farm acknowledged that this July 10, 2014, should be considered as an attachment to the demand letter.

The July 10, 2014, letter advised State Farm that Rivera traveled from "15341 S.W. 153rd Street for 16 treatments with the Kendall Chiropractic and returned to 15341 S.W. 153rd Street for 96. Accordingly David Rivera drove 96 miles for a partial portion of his medical treatment in this matter. David Rivera's reasonable transportation expense is .61 cents a mile." *Id.* The July 10, 2014, correspondence does not provide the exact amount at issue, the dates of service for which Rivera incurred his transportation expenses, or the address of the clinic to and from which Rivera traveled. *See id.*

The record regarding the July 10, 2014, letter reflects that Plaintiff never traveled to a medical provider named "Kendall Chiropractic." The health insurance claim forms provided to the Court contain a "service facility location" of "CHRIOPRACTIC [sic] CLINICS S FL 13501 SW 136TH ST STE 202 MIAMI FL 33186" and "billing provider info" of "CHIROPRACTIC CLINICS OF S. FL PO BOX 864895 ORLANDO FL 32886-4895." *See* Defendant's Motion for Summary Judgment at Exhibit 1. At no time did either party introduce evidence of medical services rendered at a provider named "Kendall Chiropractic" or an affiliate of said company.

B. State Farm's Efforts to Clarify the Claim

On or about July 25, 2014, Defendant sent a letter to Plaintiff requesting clarification of the mileage claim, specifically for an "itemized list of the dates and number of miles for each date to be submitted in writing." *See* Plaintiff's Opposition to Defendant's Motion for Summary Judgment at Exhibit F.

On or about August 7, 2014, Plaintiff's counsel responded to this letter. *See* Plaintiff's Opposition to Defendant's Motion for Summary Judgment at Exhibit G. The letter provided, *inter alia*, that "Rivera traveled on average 6 miles . . . on: April 1, 2014; April 7, 2014; April 9, 2014; April 11, 2014; April 16, 2014; April 18, 2014; April 21, 2014; April 23, 2014; April 25, 2014; April 28, 2014; April 30, 2014 and May 2, 2014." *Id.* According to the claim forms, this letter incorrectly identified April 1, 2014, instead of April 2, 2014, as a treatment date. The Court also notes that this letter did not include thirteen other treatment dates between June 23, 2014, and August 6, 2014, that appear in the claim forms. *See* Defendant's Motion for Summary Judgment at Exhibit 1. Lastly, the August 7, 2014, letter was not attached to, or sent with, the August 11, 2014, demand letter.

C. Deposition Transcripts

The Parties provided the Court with the transcript of State Farm corporate representative Anthony Romney. *See* Defendant's Motion for Summary Judgment at Exhibit 1 and Plaintiff's Opposition to Defendant's Motion for Summary Judgment at Exhibit D. Mr. Romney testified that Defendant paid Plaintiff $32.54 for the twelve visits itemized in Plaintiff's August 7, 2014, letter at the rate of 56.5 cents per mile plus sixteen cents interest. *Id.* at 82 and 108. Further, Mr. Romney did not dispute the payments for the twelve trips. *Id.* at 137.

Defendant provided the Court with Plaintiff's deposition transcript. According to the transcript, Plaintiff could not remember the name or address of the medical service provider that rendered the services in question. *See* Deposition of David Rivera at 20 and 23. Plaintiff did not recall the name "Kendall Chiropractic." *Id.* at 26. Plaintiff also could not articulate how he calculated the cost of the mileage. *Id.* at 46-49 and 58-59.

ARGUMENT

Defendant argues that if Plaintiff is entitled to transportation benefits under Florida Statute § 627.736, as he claims to be, so too must Plaintiff fulfill its obligations under the Statute. Namely, Plaintiff, as a condition precedent to filing the instant lawsuit, must submit a pre-suit demand letter that complies with Florida Statute § 627.736(10). Specifically, subsection (10) of the Statute provides:

> (10) DEMAND LETTER—
>
> (a) As a condition precedent to filing any action for benefits under this section, written notice of an intent to initiate litigation must be provided to the insurer. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).
>
> (b) The notice must state that it is a "demand letter under s. 627.736" and **state with specificity**:
>
> 1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.
>
> 2. The claim number or policy number upon which such claim was originally submitted to the insurer.
>
> 3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; **and an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due.** A completed form satisfying the requirements of paragraph (5)(d) or the lost-wage statement previously submitted may be used as the itemized statement. To the extent that the demand involves an insurer's withdrawal of payment under paragraph (7)(a) for future treatment not

yet rendered, the claimant shall attach a copy of the insurer's notice withdrawing such payment and an itemized statement of the type, frequency, and duration of future treatment claimed to be reasonable and medically necessary. (Emphasis added.)

State Farm argues simply that Plaintiff's "demand letter" failed to comply with Florida Statute § 627.736(10) as it failed to attach an itemized statement identifying each exact amount due, the dates of treatment, service, or accommodation for which Rivera incurred his transportation expenses, and the type of benefit claimed to be due. Among other cases, Plaintiff relied on *Orlando Menendez v. State Farm Automobile Insurance Company*, No. 12-1780-SP-25 (Fla. Miami-Dade Cty. Ct. June 4, 2018). Plaintiff argued that *Menendez* involved a nearly identical situation, in which the same Plaintiff's counsel as the present case sent a similar demand letter to State Farm. The *Menendez* Court found that the demand letter did not comply with the strict requirements of Florida Statute § 627.736(10). *Id.* Thus, State Farm argued that this Court should follow the *Menendez* opinion.

In response, Plaintiff did not dispute that its Demand Letter did not include the address of the medical clinic to which he traveled, the dates of treatment for which he incurred his transportation expenses, or the exact amount due and owing, but instead argued that Defendant could have discovered what was at issue, the dates of service and the clinic's address, by reviewing its claim file. Plaintiff argued that issuing payment in response to Plaintiff's Demand Letter, albeit less than what Plaintiff alleges, is evidence that Defendant understood Plaintiff's demand. Plaintiff also argued that Defendant is raising an issue on summary judgment that was not raised as an affirmative defense. Lastly, Plaintiff, *inter alia*, referred the Court to *Progressive Express Insurance Company v. Michelet Polynice*, 12 Fla. L. Weekly Supp. 1015b (Fla. 9th Cir. Ct. July 1, 2005), and argued that the legislative intent of Florida Statute § 627.736(10) was to provide insurers with notice of intent to sue. In *Polynice*, the Ninth Circuit Court, acting in its appellate capacity, found a demand letter that requested reimbursement from January 1, 2002, to April 1, 2002, for 198 miles complied with Florida Statute § 627.736(10). *See id.* In this case, Plaintiff believes that informing State Farm of Plaintiff's intent to sue if State Farm did not pay Plaintiff 61 cents per mile for 96 miles complied with the requirements of *Polynice* and the legislative intent of § 627.736(10).[1]

FINDINGS OF LAW

As a preliminary matter, the Court finds Defendant's Third Affirmative Defense adequately pleads the issues raised in Defendant's Motion for Summary Judgment. The Third Affirmative Defense alleges a deficient demand letter for failure to comply with Florida Statute § 627.736(10) for the same reasons as appear in Defendant's Motion for Summary Judgment. *See* Plaintiff's Opposition to Motion for Summary Judgment at Exhibit D. Defendant's argument for denial of Defendant's Motion on these grounds is without merit.

Florida Statute § 627.736(10) provides in pertinent part:

(10) DEMAND LETTER

(a) As a condition precedent to filing any action for benefits under this section, the insurer must be provided with written notice of an intent to initiate litigation. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).

(b) The notice required shall state that it is a "demand letter under s. 627,736 (10)" and shall state with specificity:

1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.

2. The claim number or policy number upon which such claim was originally submitted to the insurer.

3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and an itemized statement specifying each exact amount, the date of treatment, service or accommodation, and the type of benefit claimed to be due . . . *Id.*

Regarding the judicial interpretation of this statute, the trial court's reasoning in *Menendez v. State Farm*, No. 12-1780-SP-25 (Fla. Miami-Dade Cty. Ct. June 4, 2018) is persuasive. The Court provided the following:

As with any PIP claim including a claim for transportation benefits, a Plaintiff must first give the Defendant written notice of an intent to initiate litigation in the form of a pre-suit demand letter prior to filing a lawsuit. The letter "shall state with specificity" an "itemized statement specifying each exact amount" due. *See id.* Florida courts have held that this language is unambiguous and places the burden upon the Plaintiff to fulfill the requirements outlined. *MRI Associates of Am., LLC (Ebba Register) v. State Farm Fire & Cas. Co.*, 61 So. 3d 462, 465 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b], reh'g denied (June 24, 2011). Thus, in interpreting the language of section 627.736, Florida Statutes, trial courts across the State have imposed a duty on medical care providers to specify the proper compensable amount owed by insurers in order to satisfy the requirements on the Statute. *Id.* An insurer, however, is not properly placed on notice if the wrong amount is stated in the demand letter. *See id.*; *see also Wide Open MRI v. Mercury Ins. Group,* 16 Fla. L. Weekly Supp. 513b (Fla. 17th Cir. Cty. Ct. March 13, 2009).

Courts have also held that the specifications of §627.736(10), Fla. Stat. [previously §627.736(11)], must be strictly construed. *See Chambers Medical Group, Inc. (a/a/o Marie St. Hillare) v. Progressive Express Ins. Co.,* 14 Fla. L. Weekly Supp. 207a Circuit Court, (13th Jud. Cir. Cty. Ct., December 1, 2006); *MRI Associates of Am., LLC (Ebba Register)*, 61 So.3d at 465, citing to *Fountain Imaging of West Palm Beach, LLC v. Progressive Express Ins. Co.,* 14 Fla. L. Weekly Supp. 614a (15th Jud. Cir. Cty. Ct. March 30, 2007). A strict compliance with the notice requirements is required to effect the purpose of the statute. *See Chambers Medical Group, Inc. (a/a/a Marie Hillare),* 14 Fla. L. Weekly Supp. 207a. A "substantial compliance" standard would trigger significant litigation as to sufficiency of the papers attached to a demand letter, the result of which would be that payment of claims would cease to be automatic, and providers would be relieved of their obligation under the Statute. *Id.* Inaccurate, misleading, illegible, or stale information contained in a demand does not strictly comply with the statutory requirement. *Id.*

It is clear from legislative intent and the supporting case law that strict specificity must be adhered to regarding the demand letter requirement. As such, this Honorable Court finds that the Plaintiff failed to strictly adhere to the demand letter requirements as required under Florida Statute 627.736(10) for the reasons set forth by the Defendant. The Court is not persuaded by Plaintiff's arguments that Defendant should be required to interpret and/or review its own records to make sense of Plaintiff's vague demand letter.

Menendez, No. 12-1780-SP-25, Final Judgment for the Defendant at 4-5.

Additionally, the facts of *Menendez* resemble the facts of the present case. In *Menendez,* Plaintiff's counsel mailed State Farm a demand letter and attached another letter requesting payment for travel to and from a specific address for 56 treatments with a named medical provider for a total of 168 miles. *See Menendez*, No. 12-1780-SP-25, May 23, 2014, Motion for Summary Judgment at Exhibit 1. The Plaintiff further requested 61 cents per mile. *Id.* The letter identified the medical provider's name but did not provide State Farm the address for the medical provider or any dates of service. *Id.* The trial court found that this information was insufficient to comply with

Florida Statute § 627.736(10). *Id.*

Although the facts are similar, the demand letter in the present case is less precise than the *Menendez* demand letter, which that court found to be deficient. In addition to not providing the address for the medical provider or any dates of service in his July 10, 2014, attachment to the demand letter, Plaintiff identified an incorrect medical provider for the alleged services rendered. The Parties did not introduce any evidence of the existence of Kendall Chiropractic or any medical services provided by an affiliate of Kendall Chiropractic. Based on the deficiency finding in *Menendez*, Plaintiff's demand letter containing even more erroneous information cannot be deemed valid.

The testimony provided to the Court supports the finding of a deficient demand letter. As evidenced by State Farm's representative, State Farm paid for the mileage that Plaintiff requested in the itemized August 7, 2014, letter. *See* Deposition of Anthony Romney attached to Defendant's Motion for Summary Judgment at Exhibit 1 and Plaintiff's Opposition to Defendant's Motion for Summary Judgment at Exhibit D. Further, Plaintiff testified at deposition that he (1) is unaware of Kendall Chiropractic, (2) had no recollection of the name and address of the actual medical provider, and (3) could not state with any degree of specificity how he came up with the amount of 61 cents per mile. *See* Deposition of David Rivera. The testimony on record belies a finding of a valid demand letter.

Finally, the Court recognizes the Ninth Circuit Court's impressive exploration of the legislative intent behind Florida Statute § 627.736(10) in *Progressive Express Insurance Company* v. *Michelet Polynice*, 12 Fla. L. Weekly Supp. 1015b (Fla. 9th Cir. Ct. July 1, 2005), but the facts are distinguishable from the present case. In *Polynice*, the Plaintiff's demand letter contained the dates of treatment, the total miles, and "the appropriate itemization of the benefits claimed as outstanding." *Id.* The Ninth Circuit also found that the Plaintiff provided the Defendant with mileage forms referencing the name of the medical provider, dates of treatment, and total number of miles—all of which matched the information provided in the demand letter. *Id.* Therefore, the demand letter in *Polynice* passed muster.

The demand letter in the present case does not comport with the legislative intent described in *Polynice*. A demand letter containing either a fictitious or erroneous name of a medical provider with no physical address for unspecified dates of treatment is insufficient to place an insurance company on notice of what bills or debts remain unpaid. The Court also notes that State Farm attempted to clarify the claim, but Plaintiff further muddied the waters by providing the August 7, 2014, letter in response to the request for clarification. Only four days after the August 7, 2014, letter, in which he requested payment for twelve visits, Plaintiff sent the demand letter with the July 10, 2014, letter attached, in which he requested payment for sixteen visits. The circumstances surrounding the demand letter in this case are a far cry from the demand letter and mileage forms considered by the *Polynice* court.

A plain reading of Plaintiff's demand letter, and attachment thereto, shows that no genuine issue of material fact exists as to the demand letter's failure to comply with Florida Statute § 627.736(10). The record evidence supports this finding. Wherefore, Defendant is entitled to judgment as a matter of law.

CONCLUSION

Based upon the foregoing, the Court finds that the Defendant State Farm Mutual Automobile Insurance Company's Motion for Final Summary Judgment is granted, and Final Judgment is hereby entered on behalf of Defendant, State Farm Mutual Automobile Insurance Company. The Plaintiff, David Rivera, shall take nothing by this action and the Defendant, State Farm Mutual Automobile Insurance Company, shall go hence without a day. The Court retains jurisdiction for the purpose of determining any motion by the Defendant to tax fees and costs.

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[1]Defendant also argued that [Editor's note: incomplete on court document.]

* * *

Insurance—Automobile—Windshield repair—Motion to dismiss or stay case and compel appraisal is denied—Allegations in amended complaint contain all necessary elements to support causes of action asserted

DR CAR GLASS, LLC., a/a/o Rafi Boas, Plaintiff. v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-014630-SP-26, Section SD05. August 17, 2020. Michaelle Gonzalez-Paulson, Judge. Counsel: Martin I. Berger, Berger & Hicks, P.A., Miami, for Plaintiff. Isaiah E. James, Cole, Scott & Kissane, P.A., Jacksonville, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT OR ALTERNATIVELY MOTION TO STAY AND COMPEL APPRAISAL

This cause came before the Court on August 6, 2020, on Defendant's Motion to Dismiss Plaintiff's Amended Complaint or Alternatively Motion to Stay and Compel Appraisal. The Court, having reviewed Defendant's Motion, Plaintiff's Response in Opposition, the Court file, and having heard argument of counsel, reviewed relevant legal authority, and been otherwise advised in the premises, the Court finds as follows:

This is a dispute under a policy for automobile comprehensive insurance regarding the manner and method by which Defendant must reimburse Plaintiff for the replacement of the insured's damaged windshield. Defendant issued a policy of insurance to the insured, Rafi Boas, which covered physical damages to the subject motor vehicle. On August 26, 2019, Plaintiff submitted its bill for the replacement of the damaged windshield to Defendant for payment. On September 9, 2019, Defendant underpaid Plaintiff's invoice, and sought to invoke the appraisal provision of the subject insurance policy.

On February 14, 2020, Plaintiff filed its Amended Complaint. Plaintiff's Amended Complaint alleges five counts seeking declaratory relief based upon alleged ambiguities and deprivations of rights contained in the subject insurance policy that leave Plaintiff unsure of its rights, specifically as they pertain to the appraisal clause and limit of liability sections of the policy. Plaintiff's Amended Complaint also, in the alternative, alleges one count for breach of contract. On February 26, 2020, Defendant filed its Motion to Dismiss Plaintiff's Amended Complaint or Alternatively Motion to Stay and Compel Appraisal. Defendant's Motion alleges that Plaintiff's lawsuit should be dismissed in its entirety because Plaintiff failed to participate in the appraisal process described in Defendant's insurance policy. Alternatively, Defendant is seeking for the Court to stay this matter and compel participation in Defendant's appraisal process.

A motion to dismiss tests the legal sufficiency of a complaint. *See Bess v. Eagle Capital, Inc.*, 704 So. 2d 621 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D2571a]. In ruling on a motion to dismiss, this Court is confined to the four comers of the complaint. *See Cook v. Sheriff of Collier County*, 573 So. 2d 406,408 (Fla. 2d DCA 1991); *Murphy v. Bay Colony Prop. Owners Ass'n,* 12 So. 3d 924, 926 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D1467a]. On a motion to dismiss, the moving party is deemed to admit all matters alleged in the complaint and the reasonable inferences arising therefrom and may not speculate as to whether the nonmoving party's allegations will ultimately be proven. *See Cook*, 573 So. 2d at 408; *Murphy*, 12 So.3d at 926; *Maciejewski v. Holland*, 441 So. 2d 703, 704 (Fla. 2d DCA 1983). The relevant inquiry is "not whether the allegations are true, or whether the pleader has the ability to prove them." *Sobi v. Fairfield*

Resorts, Inc., 846 So. 2d 1204, 1206 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1350a]. Rather, the sole question for the court is "whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested." *Cintron v. Osmose Wood Preserving, Inc.*, 681 So. 2d 859, 860-61 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D2249d]; *Barbado v. Green & Murphy, P.A.*, 758 So. 2d 1173, 1174 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1084a] (holding that on a motion to dismiss, all material allegations are accepted as true and speculation by the court as to whether the allegations will ultimately be proven is not permitted).

Upon review of Plaintiff's Amended Complaint, the Court finds that Plaintiff's allegations, which must be taken as true for the purposes of this analysis, in Counts I through VI, contain all necessary elements to support each cause of action.

Therefore, this action is not ripe for dismissal.

Accordingly, it is ORDERED and ADJUDGED, that Defendant's Motion to Dismiss Plaintiff's Amended Complaint or Alternatively Motion to Stay and Compel Appraisal is hereby DENIED.

* * *

Insurance—Personal injury protection—Attorney's fees—Confession of judgment—Where insurer brought action for declaratory relief against insured and her medical providers seeking determination that it had no obligations under policy and ratifying its decision to rescind policy, and insurer voluntarily dismissed actions against providers after it obtained default judgment against insured, providers are not entitled to attorney's fees under section 627.428—Neither providers nor insured obtained any judgment or decree against insurer entitling them to recover fees under section 627.428—Voluntary dismissal from which providers did not receive any benefit is not functional equivalent of confession of judgment

IMPERIAL FIRE & CASUALTY INSURANCE COMPANY, Plaintiff, v. HAYDEE ESTAFANIE CLAVIJO, et. al., Defendants. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-028249-CC-05, Section CC02. August 14, 2020. Lody Jean, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Benjamin Mordes, Jimenez, Hart & Mazzitelli, L.L.P., Miami, for Defendant Ceda Orthopedics & Interventional Medicine of South Miami, LLC. Matthew L. Lines, Deerfield Beach, for Defendant Baptist Hospital of Miami, Inc.

ORDER DENYING MOTION FOR ATTORNEY FEES

This cause came before the Court, on the motions for attorney fees of Ceda Orthopedics & Interventional Medicine of South Miami, LLC d/b/a Ceda Health, Ceda Orthopedics & Interventional Medicine of F.I.U. /Kendall, LLC, and Baptist Hospital (collectively, the Providers). Having heard argument, reviewed the pleadings and motions, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that the motions are DENIED, for the reasons explained below.

Plaintiff Imperial Fire and Casualty Insurance Company (Imperial), filed the instant Complaint for Declaratory Relief under Chapter 86 and section 627.409 of the Florida Statutes. Imperial sought Court determination that it had no obligations under the insurance policy previously sold to the insured, Defendant Haydee Estafanie Clavijo (Insured), essentially ratifying its decision to rescind the policy after it discovered that she had misrepresented relevant information about her criminal record when obtaining the policy.

In addition to Ms. Clavijo, Imperial named several other defendants in the declaratory action, each medical providers who had treated Ms. Clavijo following an automobile accident and who had obtained assignments of benefits from her under the insurance policy. A default judgment was entered against Ms. Clavijo on April 16, 2020, after she failed to respond or appear.[1] Also on April 16, but after obtaining the default final judgment, Imperial filed voluntary dismissals as to all remaining defendants, including the Providers. The Ceda Providers filed their motion for attorney fees on May 12, 2020, and Baptist filed its motion on May 18, 2020. The Court held hearings on these motions on June 25 and July 15, 2020.

The Providers, having been assigned the policy benefits and thus standing in the shoes of the insured, Ms. Clavijo, *see* Fla. Stat. section 627.736(8), argue that they are entitled to attorney fees under section 627.428 of the Florida Statutes, which awards fees to insureds who prevail in insurance contract disputes, and which is often implicated in personal injury protection (PIP) cases.[2] Citing the "confession of judgment" doctrine announced in *Wollard v. Lloyd's & Companies of Lloyd's*, 439 So.2d 217 (Fla. 1983), which interpreted section 627.428, the Providers argue that the Court should treat the voluntary dismissals as confessions of judgment, entitling their recovery of attorneys' fees.

The Third District explained the derivation of the confession of judgment doctrine:

> Section 627.428 was intended to discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their attorney's fees when they are compelled to defend or sue to enforce their insurance contracts. To that end, the Florida Supreme Court held in *Wollard*, that, although the statute requires the "rendition of a judgment" in favor of the insured, where an insurer pays the policy proceeds after a suit has been filed but before a judgment has been rendered, the payment of the claim is, indeed, the functional equivalent of a *confession of judgment* or a verdict in favor of the insured.
>
> As a result, when an insurer voluntarily pays the disputed loss after suit is filed, "[section 627.428] must be construed to authorize the award of an attorney's fee to an insured . . . even though technically no judgment for the loss claimed is thereafter entered favorable to the insured." *Wollard*, 439 So. 2d at 218

Do v. GEICO Gen. Ins. Co., 137 So. 3d 1039, 1043 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D455b] (citations, quotation marks and internal quotation marks omitted).[3]

Since *Wollard*, the confession of judgement doctrine has been expanded to cases where insurers have unsuccessfully contested their obligations in declaratory actions. The Providers rely on such cases here. *E.g.*, *O'Malley v. Nationwide Mutual Fire Insurance Company*, 890 So.3d 1163 (Fla. 4th DCA 2004) [30 Fla. L. Weekly D5b]; *Coppola v. Federated National Insurance Company*, 939 So.2d 1171 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D2658a]. In those cases, the insurers sought court decrees to avoid liability but notwithstanding such litigation, ultimately yielded, by providing the disputed insurance benefits to the insureds. In such circumstances, the courts held that the insureds were entitled to fees.

For example, in *O'Malley*, the insurer filed a declaratory action against the insured claiming there was no duty to defend or to provide disputed coverage. Nevertheless, the insurer *did* defend the insured in the related separate tort action, through and beyond trial, and ultimately secured a settlement and a dismissal with prejudice on behalf of the insured. The insurer thereafter voluntarily dismissed the declaratory action against the insured. Holding that the insured was entitled to attorney fees in defending against the declaratory action, the court explained that the voluntary dismissal was the functional equivalent of a confession of judgment. It noted that the insurer "furnished the insured precisely what [it] was contending the insured was not entitled to in its declaratory action." *Id.*, 890 So.3d at 1164

Similarly, in *Coppola,* the insured sought coverage from its insurance carrier after being sued in tort. In response, the insurer brought a separate declaratory action claiming the policy provided no coverage. The insured resisted the declaratory action and moved to dismiss. In the meantime, despite the pendency of the declaratory action, the insurance company went on to defend the insured against the tort claim. Subsequently, the insurer voluntarily dismissed the

declaratory action. The court held that since the insurer had provided a defense to the tort claim, something it sought but failed to achieve in the declaratory action, the insured had essentially prevailed and was thus entitled to attorney fees—just as in *O'Malley*.

The Providers further cite *Basik Exports & Imports, Inc. v. Preferred National Insurance Company*, 911 So.2d 291 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2359a], a case where attorney's fees were denied. They quote the following language, distinguishing *O'Malley* and another case where fees were awarded, to support their position: "[in the prior cases] the insurers, not the insureds, initiated the declaratory judgment actions. This forced the insureds to retain counsel and incur expense in defending these coverage disputes. It makes sense for the insurer to be responsible for fees when it voluntarily dismissed the declaratory judgment." *Id.* at 293. Providers thus suggest that once an insurer initiates a declaratory action *any* subsequent voluntary dismissal is itself enough to trigger entitlement to fees. But the Providers omit the next crucial line: "In both cases, the insurer initiated the action for declaratory relief, caused the insured to incur attorney's fees, *and then tried to get 'off-the-hook' for those fees by settling the underlying claims*." *Id.* (emphasis added). So *Basik* too requires there to be more than mere voluntary dismissal, e.g., the insurer wrongly attempted to evade valid claims and/or the insured ultimately received a benefit, such as being given the disputed coverage or defense.

The Third District has spoken on this issue. In *O.A.G. Corp. v. Britamco Underwriters*, 707 So. 2d 785, 787 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D208e], the court was similarly faced with an insurer who brought an action seeking a determination of no coverage. Its first complaint asserted fraud and recission claims in addition to the declaratory count. It voluntarily dismissed that complaint but shortly thereafter refiled a new case asserting only the declaratory claim. The insured sought fees after the voluntary dismissal in the first case, relying on *Wollard's* confession of judgment doctrine. The court disagreed, however, explaining, "the *Wollard* doctrine does not apply because Britamco did not decline to defend its position regarding coverage—it has not offered to settle or pay the claim. . . . Under Section 627.428, an insured must obtain some form of recovery due to the voluntary dismissal to be considered a prevailing party for attorney's fees. In this case, the insureds recovered nothing from Britamco's voluntary dismissal." (citations omitted).

The The Court has been unable to identify any recovery or benefit here either. Providers argue only that "the benefit bestowed on CEDA by way of the voluntary dismissal was a confession of judgment which entitled it to an award of attorney's fees." But this is circular logic—a confession of judgment is only imputed when a benefit has been achieved. And while it may be true, as the Ceda Providers argue, that the default judgment against Ms. Clavijo, does not prevent them from seeking recovery under the assigned policy benefits, it must be equally true that it does not *entitle* them to such recovery either. Such questions will presumably be resolved if and when they are presented in an appropriate case.[4] And so *O.A.G.* dictates the outcome here. As in *O.A.G.*, but unlike *O'Malley* and the others, Providers have demonstrated no benefit from Imperial's voluntary dismissal nor any improper efforts by Imperial to evade responsibility. Indeed, none of the defendants received any benefit from Imperial and Imperial has not agreed to defend any named party in any lawsuit. On the contrary, Imperial rescinded Ms. Clavijo's policy and brought this action seeking, successfully, a declaration that it did not have to insure her.

The Providers caution against relying on *O.A.G.* They say that it was decided by the wrong legal standard and is no longer good law. It is true that *O.A.G.* held that an order on attorney's fees were reviewable by *certiorari*, a more deferential standard than straight appeal, and also true that that holding was abrogated by *Caufield v. Cantele*, 837 So.2d (Fla. 2002) [27 Fla. L. Weekly S1046a] which held that such disputes were reviewable by direct appeal after all. They urge that in applying the wrong standard of review, *O.A.G.* is in doubt, since under the correct standard the outcome may have been different. Fortunately, this Court need not speculate, nor delve into the precedential value of holdings reached in a *certiorari* context, rather than under direct review. For the Third District has already resolved the issue, having since re-embraced *O.A.G.* and its holding, *see e.g.*, *Do v. GEICO*, 137 So.3d 1039 at 1045.

Do concerned the insured's stolen vehicle. He sued for recovery under his policy, which GEICO disputed, claiming that he was complicit in the theft. GEICO later asserted counterclaims including fraud and civil conspiracy. Before then, however, GEICO paid the vehicle's lienholder (Audi Bank) the full net value of the car. After prolonged inactivity the trial court granted both sides' motions to dismiss for lack of prosecution. The Third District held that the insured was entitled to fees as to his original complaint under the confession of judgment doctrine, given GEICO's payment from the policy. *Id.* at 1044. But it also held that the insured *was not* entitled for fees related to defending GEICO's counterclaim, explaining:

> Although *Wollard* requires GEICO's earlier payment to be treated as the functional equivalent of a confession of judgment in Do's favor, the trial court's later dismissal for lack of prosecution was not a determination on the merits. Because the order of dismissal was not a judgment in favor of the insured, or, under the circumstances of this case, its functional equivalent, we affirm the trial court's order denying Do's motion for fees and costs with respect to the counterclaims. *See Guarantee Ins. Co. v. Worker's Temporary Staffing, Inc.*, 61 So. 3d 1233, 1235 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D1092a] (concluding that insurer's voluntary dismissal without prejudice was not concession on the merits and therefore not a judgment or functional equivalent of a confession of judgment under section 627.428); *O.A.G. Corp*., 707 So. 2d at 787 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D208e], *abrogated on other grounds by Caufield v. Cantele*, 837 So. 2d 371 (Fla. 2002) [27 Fla. L. Weekly S1046a] (holding that insurer's voluntary dismissal did not constitute an adjudication on the merits and therefore was not a judgment or the functional equivalent of a confession of judgment under section 627.428).

Do, 137 So.3d 1039 at 1044-45 (citations omitted). *Do*'s citation to *O.A.G.*, and to *Guarantee Ins. Co.*, make clear that the law remains that voluntary dismissals do not constitute adjudications on the merits and therefore are not judgments or the functional equivalent of a confession of judgment, a holding which this Court is bound to follow.

Providers also argue that *O.A.G.* (and would presumably argue that *Do*) is further infirm given the Third District's more recent *en banc* decision in *De La Osa v. Wells Fargo Bank, N.A.*, 208 So.3d 259, 260 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D2771a] which, they argue, makes clear that dismissals without prejudice are treated like final judgments, and effectively embraces Judge Schwartz's dissent in *O.A.G.*, 707 So.2d at 788, where he maintained that after a voluntary dismissal the other party has effectively "won" that piece of the litigation. But that argument conflates finality with victory. *De La Osa* had nothing to do with the *Wollard* doctrine. It does nothing to undermine the well-established requirement that the insured benefit for the doctrine to apply. True, this case is over and therefore final, but there has been no decision on the merits with respect to these parties.

The plain reading of Fla. Stat. 627.428 requires that an insured (or, in conjunction with other provisions, an assigned beneficiary) obtain a judgment or decree against the insurer to recover attorney fees. Neither Ceda nor Baptist nor Ms. Clavijo have received such a judgment or decree in this case. Similarly, under the expanded

Wollard doctrine, a voluntary dismissal against the Providers here was not the functional equivalent of a confession of judgment that would entitle them to attorney fees.

Therefore, the Motions for Attorney Fees are respectfully DENIED.

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[1]The default judgment was amended and re-entered on June 10, 2020.

[2]Section 627.428 provides, in relevant part:

(1) Upon 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.

[3]The confession of judgement doctrine, and its deviation from the plain language of the statute, is not without its skeptics. *See e.g.*, *Mercury Ins. Co. v. Cooper*, 919 So. 3d 491, 495 (Shepherd, J., dissenting) [30 Fla. L. Weekly D2648a].

[4]Though not briefed by either side, Imperial's counsel explained that naming the Providers as defendants was to simply put "them on notice" as interested parties and also referred to them as "ancillary."

* * *

Insurance—Personal injury protection—Attorney's fees—Expert witnesses—Insurer's motion to dispense with expert witnesses on reasonableness of attorney's fees or to preclude taxation of experts' fees is denied—Award of fees must be supported by expert testimony even in cases that are quickly settled, and expert witnesses are entitled to be compensated—Medical provider's motion for section 57.105 sanctions against insurer for filing motion is denied where insurer has provided court orders granting motion

GR REHAB CENTER, INC., a/a/o Yulenia Alvarez, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-000592-SP-25, Section CG01. August 18, 2020. Linda Diaz, Judge. Counsel: Walter A. Arguelles, Arguelles Legal, P.L., Miami, for Plaintiff. Eric Fresco, Progressive PIP House Counsel, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR SANCTIONS PURSUANT TO FLA. STAT. 57.105 AND DEFENDANT'S MOTION TO DISPENSE WITH EXPERT WITNESSES AND/OR TO PRECLUDE TAXATION OF ATTORNEY FEE EXPERT WITNESS FEE FOR PURPOSE OF DETERMINING REASONABLENESS OF PLAINTIFF'S ATTORNEY'S FEES AND COSTS

THIS MATTER, having come before the Court for hearing on August 4, 2020, on Plaintiff's Motion for Sanctions and Defendant's Motion to Dispense with Expert Witnesses and/or to Preclude Taxation of Attorney Fee Expert Witness Fee for Purpose of Determining Reasonableness of Plaintiff's Attorney's Fees and Costs, upon agreement of counsel for each party, and the Court after being advised thereof, it is hereby ORDERED AND ADJUDGED as follows:

On or about January 06, 2019, the suit was filed on behalf of the Plaintiff in order to recover Personal Injury Protection (PIP) benefits for services rendered to Yulenia Alvarez in connection with an automobile accident which occurred on June 15, 2018. On May 01, 2019, the Defendant filed its Confession of Judgment and stipulated to Plaintiff's entitlement to reasonable attorney's fees and costs. On April 07, 2020, Defendant filed its Motion to Dispense with Expert Witnesses and/or to Motion to Preclude Taxation of Attorney Fee Expert Witness Fee for Purpose of Determining Reasonableness of Plaintiff's Attorney's Fees and Costs. In support of its motion, Defendant alleges that "minimal pleadings have been filed in this case" and thus expert witnesses should be dispersed with. Shortly thereafter, Plaintiff, pursuant to Fla. Stat. § 57.105, filed a Motion for Sanctions based on the premise that Defendant's motion is without merit as an award of attorney's fees must be supported by expert evidence.

This Court agrees with Plaintiff's proposition as to the requirement of expert testimony. "Florida law has a long-standing practice of requiring testimony of expert fee witnesses to establish the reasonableness of attorney's fees." *Ghannam v. Shelnutt*, 199 So.2d 295, 299 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D2626a], quoting, *Snow v. Harlan Bakeries, Inc.*, 932 So.2d 411, 412 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1128a]; *Straus v. Morton F. Plant Hosp. Foundation, Inc.*, 478 So. 2d 472 (Fla. 2nd DCA 1985); *Murphy v. Tallardy*, 422 So. 2d 1098 (Fla. 4th DCA 1982); see also *United Auto. Ins. Co. v. Hallandale Beach Orthopedics (a/a/o Linda Brown)*, 16 Fla. L. Weekly Supp. 731a (Broward Cir. Ct. AP 2009), the appellate court noted that "[s]ince plaintiffs in PIP cases are often required to provide expert testimony to prove the reasonableness of their rates and time spent, **even in cases that were settled quickly**, the sheer volume of cases requiring such testimony militates against other attorneys donating their time as a "matter of professional courtesy." (Emphasis added)

Moreover, if Plaintiff's expert requests payment, then Plaintiff's expert shall receive reasonable fees incurred in preparation for a hearing on attorney's fees and testimony provided during the hearing. *Stokus v. Phillips*, 651 So. 2d 1244, 1246 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D627c] ('We view [*Travieso v. Travieso,* 474 So. 2d 1184 (Fla. 1985)] to mean that an award of such fees is not discretionary if the testifying attorney expects to be compensated for his testimony."); *see also* § 92.231(2), Fla. Stat. (2020); "Any expert or skilled witness who shall have testified in any cause shall be allowed a witness fee including the cost of any exhibits used by such witness in an amount agreed to by the parties, and the same shall be taxed as costs."

Accordingly, it is ORDERED and ADJUDGED that as follows:

Plaintiff's Motion for Sanctions is hereby **DENIED** as Defendant has provided County Court Orders granting its Motion to Preclude Taxation of Attorney Fee Expert Witness Fee for Purpose of Determining Reasonableness of Plaintiff's Attorney's Fees and Costs. Defendant's Motion to Preclude Taxation of Attorney Fee Expert Witness Fee for Purpose of Determining Reasonableness of Plaintiff's Attorney's Fees and Costs is hereby **DENIED**.

* * *

Insurance—Property—Coverage—Insurer did not breach policy by denying coverage where policy unambiguously excluded coverage for loss caused directly or indirectly by any type of fungus, mold, mildew or wet rot, and it was undisputed that loss was caused by mold, mildew, fungi or wet rot

IKON RESTORATION SERVICES, INC., Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2017-008100-CC-05, Section CC02. August 18, 2020. Lody Jean, Judge. Counsel: Annette Del Aguila, Marin, Eljaiek, Lopez & Martinez, P.L., Miami, for Plaintiff. Miriam Merlo and Emily C. Smith, Gaebe Mullen Antonelli & DiMatteo, Coral Gables, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE having come before the Court on Defendant's, CITIZENS PROPERTY INSURANCE CORPORATION's, Motion for Final Summary Judgment, and the Court having reviewed all relevant pleadings and record evidence, having heard argument of counsel and being otherwise fully informed, and viewing the record evidence and making all reasonable inferences in the light most favorable to the Plaintiff, hereby GRANTS Final Summary Judgment in favor of the Defendant.

Undisputed Material Facts:

The Court finds the following issues of material fact are undisputed on summary judgment:

1. Plaintiff, Ikon Restoration Services, Inc., provided remediation

services for a loss which occurred at the property located at 5077 NW 7th Street, Unit #501, Miami, FL 33126 (the property), and insured by Defendant, Citizens Property Insurance Corporation.

2. As Plaintiff's Corporate Representative testified, mildew or fungi, wet rot, mold and mildew were present at the property. *See Deposition of Daniel Bello*, pp. 18-20, pp. 40-41.

3. As Plaintiff's Corporate Representative testified, the services provided by Plaintiff at the property were for the remediation of mold, mildew, fungi and/or wet rot at the property. *See Deposition of Daniel Bello*, pp. 14-15, p. 24.

4. As Plaintiff's Corporate Representative testified, Plaintiff did not determine the source of water, moisture or humidity at the property, other than determining that it was coming from 'an above source.' *See Deposition of Daniel Bello*, pp. 36-37, 39.

5. The insurance policy issued by Defendant for this property defines "Fungi" as follows: "**2.** "Fungi" means any type or form of fungus, including: **a.** Mold or mildew; and **b.** Any mycotoxins, toxins, spores, scents or byproducts produced or released by fungi."

6. The insurance policy issued by Defendant for this property insures against the certain perils stated in the section entitled "PERILS INSURED AGAINST."

7. The insurance policy issued by Defendant for this property sets forth certain exclusions under the section entitled "GENERAL EXCLUSIONS," and states, in relevant part:

> **GENERAL EXCLUSIONS**
>
> **A.** We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.
>
> . . .
>
> 10. "Fungi", Wet Or Dry Rot, Yeast Or Bacteria meaning:
>
> The presence, growth, proliferation, spread, or any activity of "fungi", wet or dry rot, yeast or bacteria.
>
> This Exclusion **10.** does not apply:
>
> a. When "fungi", wet or dry rot, yeast or bacteria results from fire or lightning; or
>
> b. To the extent coverage is provided for in the "Fungi", Wet Or Dry Rot, Yeast Or Bacteria Other Coverage with respect to loss caused by a Peril Insured Against other than fire or lightning.
>
> Direct loss by a Peril Insured Against resulting from "fungi", wet or dry rot, yeast or bacteria is covered.

8. The insurance policy issued by Defendant provides certain coverages under the section "Coverages," and under Subsection "E. Other Coverages," and states, in relevant part:

> **COVERAGES**
>
> **E. Other Coverages**
>
> . . .
>
> **5. Reasonable Repairs**
>
> In the event that a covered property is damaged by an applicable Peril Insured Against, we will pay the reasonable cost incurred by you for necessary measures taken solely to protect against further damage.
>
> . . .
>
> **9. "Fungi", Wet Or Dry Rot, Yeast Or Bacteria**
>
> **a.** We will pay up to $10,000 for:
>
> **(1)** The total of all loss payable under the Coverages section of your Policy caused by "fungi", wet or dry rot, yeast or bacteria;
>
> . . .
>
> **b.** The coverage described in a. only applies:
>
> **(1)** When such loss or costs are a result of a Peril Insured Against that occurs during the policy period; . . .

9. The insurance policy issued by Defendant sets forth certain conditions, in Section "CONDITIONS," under Subsection "D. Duties After Loss," and states, in relevant part:

> **CONDITIONS**
>
> **D. Duties After Loss**
>
> You must see that the following are done in the event of loss or damage to the covered property:
>
> . . .
>
> **2.** Property the property from further damage. If repairs to the property are required, you must:
>
> **a.** Make reasonable and necessary temporary repairs to protect the property; and
>
> **b.** Keep an accurate record of repair expenses.

FINDINGS

"[S]ummary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law." *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a]. Here, no genuine issue of material fact exists and, viewing the facts and making all reasonable inferences in the light most favorable to the Plaintiff, the Court finds as follows:

The Court finds that the above language cited in paragraphs (5)-(9) of this Order is clear and unambiguous. The Court further finds that Section "CONDITIONS," Subsection "D. Duties After Loss," does not create any ambiguity as to the coverage afforded under Section "COVERAGES" and does not create any ambiguity as to the exclusions set forth in Section "EXCLUSIONS." Florida law is clear that "coverage under an insurance contract is defined by the language and terms of the policy." *Swire Pacific Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 169 (Fla. 2003) [28 Fla. L. Weekly S307d]. *See Siegle v. Progressive Consumers Ins. Co*, 788 So. 2d 355, 359 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1506a]. "Where the language of the policy is plain and unambiguous, there is no need for judicial construction and the contract must be enforced as written." *Siegle*, 788 So. 2d at 359. (internal citations omitted).

The Court finds that, applying the clear and unambiguous language of the insurance policy to the undisputed material facts, the loss is excluded from coverage under the policy issued by Defendant. Under Florida law, "the burden rests with the insured, as an initial matter of law, to prove coverage for a claim under an insurance policy". *Citizens Prop. Ins. Corp. v. Manning*, 966 So. 2d 486, 488 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2458c]; *see also Exhibitor, Inc. v. Nationwide Mut. Fire Ins. Co.*, 494 So. 2d 288, 289 (Fla. 1st DCA 1986) ("In a suit to recover under an insurance policy, the insured must prove that the loss did occur and that it was within the coverage of the policy"). As an assignee of the Insured's benefits, Plaintiff steps into the shoes of the Insured as it pertains to coverage under the terms and conditions of the Insured's Policy with Defendant. The undisputed material facts in the present case are that this loss was caused by mold, mildew, fungi and/or wet rot. As set forth in Section "GENERAL EXCLUSIONS," the policy issued by Defendant does not insure for loss caused directly or indirectly by "Fungi," meaning any type or form of fungus, including mold and mildew, or wet rot. Therefore, because the loss was excluded under Section "GENERAL EXCLUSIONS" of the policy, Defendant did not breach the insurance policy by denying coverage.

The Court finds that, applying the clear and unambiguous language of the insurance policy to the undisputed material facts, the loss is not covered under Section "COVERAGES," Sub-subsections **E.5.** and/or **E.9.** under the policy issued by Defendant. Section "COVERAGES," Subsection "**E.** Other Coverages," Sub-subsection "**5.** Reasonable Repairs," and Sub-subsection "**9.** Fungi, Wet Or Dry Rot, Yeast Or Bacteria" each contain the explicit requirement that the loss be caused by a "Peril Insured Against" as defined in the policy. Here, there is no record evidence that the loss was caused by a "Peril Insured Against."

In the absence of any evidence that the loss was caused by a "Peril Insured Against," the loss is not covered under Subsection "E. Other Coverages." Therefore, Defendant did not breach the insurance policy by denying coverage.

For the reasons and authorities forth above, there are no disputed issues of material fact and that Defendant is entitled to entry of Final Summary Judgment in its favor as a matter of law. Accordingly, the Court hereby GRANTS Defendant's Motion and enters FINAL SUMMARY JUDGMENT in favor of Defendant, CITIZENS PROPERTY INSURANCE CORPORATION.

* * *

RAINBOW RESTORATION, LLC, a/a/o Elizabeth Aulicino, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-011308-CC-05, Section CC02. August 13, 2020. Lody Jean, Judge. Counsel: Michael D. Quintero, Cohen Law Group, Maitland, for Plaintiff. Miriam R. Merlo, Gaebe, Mullen, Antonelli & DiMatteo, Coral Gables, for Defendant.

ORDER ON DEFENDANT'S AMENDED MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE having come before this Court on August 5, 2020, on Defendant, Citizens Property Insurance Corporation's Amended Motion for Final Summary Judgment and the Court, after reviewing the record filings and having heard argument of counsel, finds that there is an absence of competent record testimony to support Plaintiff's Complaint for Breach of Contract. Accordingly, the Court grants summary judgment in favor of Defendant and against the Plaintiff. Accordingly, it is hereby ORDERED AND ADJUDGED:

1. Defendant's Amended Motion for Final Summary Judgement is GRANTED.

2. There exists no genuine issue of material fact.

* * *

Criminal law—Driving under influence—Evidence—Scientific testimony—Field sobriety exercises—Officer's testimony that defendant was drunk or under influence is admissible as lay opinion—Testimony about performance of field sobriety exercises, except horizontal gaze nystagmus test, is lay opinion testimony that does not require *Daubert* hearing—*Daubert* hearing is required prior to admission of testimony about HGN test—Testimony regarding how officer learned to conduct field sobriety exercises and number of indicators of impairment officer observed should not be excluded under section 90.403 where testimony does not create aura of scientific reliability, and probative value exceeds prejudicial effect

STATE OF FLORIDA, Plaintiff, v. JAMES HILBERT, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 14 CT 9721 NC. January 20, 2015. Erika Quartermaine, Judge. Counsel: Hagan Brody, State Attorney, for Plaintiff. Mark Lipinski, for Defendant.

ORDER ON DEFENDANT'S MOTION IN LIMINE

This matter is before the Court on the Defendant's Motion in Limine filed on October 14, 2014 and heard on December 3, 2015. The Court has considered the Motion in Limine, the Memorandum in support provided to the Court at the hearing, the State's Written Objection to Defendant's Motion in Limine filed on December 2, 2014 as well as the arguments of counsel and the record in this case.

In the Motion, the Defendant seeks to exclude all evidence related to field sobriety testing. The Defense argues: (1) that *State v. Meador,* 674 So. 2d 826, 831 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1152a] has been overruled to the extent that it holds that an officer can opine about a defendant's sobriety; (2) all evidence regarding field sobriety testing should be excluded because it is scientific nature thereby subjecting it to a Daubert analysis, now codified in section 90.702 of the Florida Statutes, and said testimony would not meet that standard; and (3) if this Court finds that the field sobriety tests are lay testimony then an officer's testimony about them should be excluded under section 90.403 of the Florida Statutes.

I.

The Court finds that the cases cited to by the Defendant for the proposition that *Meador* was effectively overruled are distinguishable and that *Meador* is still good law. Courts have long held that testimony that an individual was drunk or under the influence is admissible as a lay opinion just like testimony that a car is driving in excess of the speed limit, for example. *U.S. v. Marshall,* 173 F. 3d 1312 (11th Cir. 1999). While being under the influence is an element of the crime of driving under the influence, the Court finds that such testimony does not invade the province of the jury and would be practically impossible to remove from an officer's testimony. Therefore, the officer(s) can opine about whether an individual is under the influence.

II.

Standardized field sobriety exercises, excluding HGN, are lay opinions and do not require expert testimony. *State v. Meador,* 674 So. 2d 826, 831 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1152a] (characterizing these exercises as "simple" and "self-explanatory"). The Court is unaware of any decision in which a court has treated field sobriety testing (excluding HGN) as scientific. Therefore, the Court rejects the argument that field sobriety testing, excluding HGN, requires a Daubert hearing. HGN, however, is scientific test and a Daubert hearing is required. *Williams v. State,* 710 (So. 2d 24 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D752a] (applying *Frye,* the applicable standard at the time, and noting that a court may take judicial notice that HGN meets the applicable standard).

III.

The Court turns to whether testimony about field sobriety exercises should be excluded under § 90.403. The Supreme Court addressed this topic in *Meador,* 674 So. 2d at 832-33:

> [A]ttempts to attach significance to defendants' performance on these exercises beyond that attributable to any of the other observations of a defendant's conduct at the time of the arrest could be misleading to the jury and thus tip the scales so that the danger of unfair prejudice would outweigh its probative value. The likelihood of unfair prejudice does not outweigh the probative value as long as the witnesses simply describe their observations.

The Supreme Court then provided a nonexclusive list of words that should be excluded because these words give lay testimony "an aura of scientific validity" including: "test," "pass," "fail," or "points". *Id.* The Supreme Court placed no restriction on testimony regarding an officer's training and experience with respect to field sobriety testing.

The Court finds that none of the following create an "aura of scientific reliability" and the probative value exceeds any prejudicial effect: testimony regarding an officer's training as to how he or she conducts or learned to conduct the field sobriety exercises; the use of the word "clue"; or testimony regarding the number of indicators of impairment the officer observed. *State v. Feinstein,* 21 Fla. L. Weekly Supp. 587a (Fla. Broward Cty. Ct Dec 9. 2013). The Court notes however, that there are restrictions on the testimony regarding an officer's experience. *See, e.g., McKeown v. State,* 16 So. 3d 247 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1689a] (holding that the officer's testimony regarding the percentage of people he arrests after stopping them on suspicion of DUI was irrelevant).

Therefore, it is hereby **ORDERED** and **ADJUDGED** that the Motion is **DENIED** in part and **GRANTED** in part consistent herewith.

* * *

Criminal law—Boating under influence—Search and seizure—Field sobriety exercises—Officer who had reasonable suspicion of BUI based on defendant's navigation of boat, slurred speech, labored movements, and unsteadiness was entitled to compel defendant to perform field sobriety exercises—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. GREGORY STEPHEN NADEAU, Defendant. County Court, 12th Judicial Circuit in and for Manatee County. Case No. 2019 MM 2664AX. December 30, 2019. Heather Doyle, Judge.

ORDER DENYING MOTION TO SUPPRESS

THIS CAUSE came before the Court for hearing on the Defendant's Motion to Suppress Evidence, and the Court having received evidence, heard argument, reviewed the relevant legal authorities, and having been advised in the premises, accordingly finds as follows:

BACKGROUND

1. The Defendant is charged with Vessel DUI, Florida Statute 327.35(1), a second degree misdemeanor.

2. The Court heard this Motion to Suppress on December 19, 2019. At the hearing, the State presented the testimony of Officer Richard Klobuchar ("Officer") of the Florida Fish and Wildlife Conservation Commission for the Court's consideration.

3. The parties stipulated to the Officer's body camera video of the interaction with the parties as being a fair and accurate depiction of the events for the Court's consideration. The video was entered into evidence by stipulation and published to the Court. The parties published approximately the first 12 minutes of the video for the Court's consideration.

4. The Defense provided the testimony of the Defendant, Mr. Nadeau.

FINDINGS OF FACT

1. On June 23, 2019, at approximately 11 p.m., Officer Richard Klobuchar ("Officer") with the Florida Fish and Wildlife Conservation Commission ("FWC") was on patrol at the Regatta Pointe boat ramp in Palmetto, Florida.

2. The Officer testified that he has been an officer with FWC for four years. The officer testified that his background and training in DUI/BUI detection and enforcement consisted of a 40 hour DUI course at the Law Enforcement Academy he attended, as well as yearly DUI/BUI refresher training. The officer advised that prior to his contact with Mr. Nadeau, he completed "3-4 dozen" BUI investigations.

3. The Officer advised he observed a vessel in the water without its navigation lights illuminated. The vessel also had an expired registration sticker.

4. The Court finds that the Officer's testimony regarding his interaction with Mr. Nadeau as well as the events that transpired is consistent with the videotaped evidence and the Court further finds the Officer's testimony credible.

5. The Officer and video depict Mr. Nadeau steering the vessel to the shore.

6. The Officer testified that he made the following observations of the path of the vessel as Mr. Nadeau steered: (a) it was "tilted sideways" in between the two ramps and appeared not straight through the ramps as it was moving to shore, (b) its path of movement was not straight, (c) it bumped into the ramp; (d) it took longer than expected to get the boat out of the water.

7. A person with Mr. Nadeau advised the Officer that they had been at "Woody's" earlier. The Officer testified that "Woody's" is a bar and grill.

8. Once nearly on shore, the Officer testified he spoke to Mr. Nadeau about the navigation lights and registration. The Officer noted that Mr. Nadeau's speech was slurred, his movements were labored, and he was "unsteady". Although it is at times difficult to hear Mr. Nadeau at times on video, the testimony of the Officer is nevertheless consistent with its audible portions.

9. The video and testimony is consistent that the Officer told Mr. Nadeau to shut the vessel's motor off and then asked him "[H]ow much have you been drinking?"

10. The Officer testified that Mr. Nadeau responded something to the effect of "[A] good amount. I'm not driving though" or "A good amount. I'm not driving home." The Officer then makes a statement to Mr. Nadeau about "boating under the influence".

11. Mr. Nadeau testified during the hearing that he told the Officer he "had a couple". However, the Court finds the videotaped evidence is more consistent with the Officer's testimony as to this issue.

12. The Officer and the videotape are consistent that the Officer next states to Mr. Nadeau "I'm going to have you hop down and I'm gonna provide you SFST's, alright".

13. The Officer then states "I'm sorry, there is no way around this." The parties do not dispute that the statement was made, but the State contends the Officer directed the statement to a third party, not to Mr. Nadeau.

14. Mr. Nadeau testified that he heard the statement "I'm sorry, there's no way around this", that he felt compelled to do the Field Sobriety exercises, he did not feel free to leave, and felt he "didn't have a choice" but to do the field sobriety exercises that followed. The Court finds Mr. Nadeau provided credible testimony that he did not feel free to leave and that he felt he "didn't have a choice" but to do the field sobriety exercises. The Court assumes for the purposes of its ruling that the Defendant did in fact hear the statement "I'm sorry, but there's no way around this." The Court finds, however, that the Officer was clearly speaking to a third party, and not Mr. Nadeau, when the statement was made.

15. After the Officer made the statement to the third party, Mr. Nadeau does not verbally acknowledge hearing the statement and does not question the Officer about the statement during the portion of the videotape presented to the Court.

16. The Motion to Suppress articulates that Mr. Nadeau thereafter submitted to field sobriety exercises and was then arrested for Boating under the Influence.

Conclusions of Law

The Defense seeks suppression of all testimony and evidence "subsequent to the unlawful detention and arrest for BUI as it relates to the BUI detention and arrest". *See Defendant's Motion to Suppress* at 1. Specifically, the Defense argues that the Officer compelled the Defendant to perform the pre-arrest field sobriety exercises, did not obtain consent to obtain same, and that because of this, the results of the exercises were obtained unlawfully and should be suppressed.

In support of this position, the Defense cites numerous County and Circuit Court cases from other judicial circuits standing for the legal proposition that a Defendant's performance of field sobriety exercises must be a product of voluntary consent and compelling said exercises is unlawful. *See State v. Barker*, 13 Fla. L. Weekly Supp. 166b (Fla. 11th Jud. Cir. 2005); *State v. Flores,* 19 Fla. L. Weekly Supp. 485a (Fla. 16th Jud. Cir. 2011); *State v. Peruyera*, 12 Fla. L. Weekly Supp. 968b (Fla. 11th Jud. Cir. 2005). Applying this legal authority to the instant case, the Defense argues that the State failed to prove the Defendant voluntarily consented to performing field sobriety exercises and instead acquiesced to law enforcement authority.

The State argued that the law provided by the Defense was not binding on this Court and was instead persuasive authority. The State cited *State v. Lieffert,* 247 So.2d 18 (2nd DCA 1971) ("[p]olice officer, after having observed appellee drive in a weaving fashion and then noticing the smell of alcohol on his breath, had sufficient cause to believe that appellee had committed a crime in the operation of a motor vehicle and could require him to take part in such physical

sobriety tests") and *DHSMV v. Guthrie*, 662 So.2d 404 (lst DCA 1995) [20 Fla. L. Weekly D2480b] ("[t]he standard for compelling road sobriety tests is "reasonable suspicion,") in its argument in favor of denying the Motion to Suppress.

After reviewing the binding and persuasive authorities relating this issue, this Court finds as a matter of law that a law enforcement officer may compel a subject to perform field sobriety exercises if the officer has reasonable suspicion that the subject is DUI (here BUI). In addition to the cases cited above by the State that stand for this proposition, the 12th Judicial Circuit addressed this point of law while acting in its appellate capacity in *State v. Blanchette,* 20 Fla. L. Weekly Supp. 1042a (Fla. 12th Jud. Cir. 2008)("[I]f an officer is entitled to conduct field sobriety tests on the basis of reasonable suspicion, then whether the officer requests or directs field sobriety tests is also immaterial."). *See also Fieselman v. State*, 566 So.2d 768 (Fla. 1990) (holding that opinions of the circuit court acting in its appellate capacity are "binding on all county courts within the circuit").

Applying the testimony in the hearing to the applicable law in this case, the Court finds that the State proved that the Officer possessed the requisite reasonable suspicion of BUI prior to approaching the Defendant regarding SFST's. Therefore, the State has proven that the Officer could compel the Defendant to perform the SFST's. The Court further finds that the Officer did in fact *compel* the Defendant to perform SFST's, and that the Defendant did not voluntarily consent.

Therefore the Defendant's Motion to Suppress is hereby **DENIED**.

* * *

Criminal law—Evidence—Scientific—Field sobriety exercises are not scientific evidence—Motion in limine denied

STATE OF FLORIDA, v. NATHAN MICHAEL FISHER, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Criminal Justice Division. Case No. 15CT026230A, Division B. March 14, 2016. Eric Myers, Judge.

ORDER DENYING DEFENDANT'S MOTION IN LIMINE TO EXCLUDE FIELD SOBRIETY EXERCISES FROM TRIAL

THIS CAUSE having been heard by the Court upon the Defendant's MOTION IN LIMINE TO EXCLUDE FIELD SOBRIETY EXERCISES FROM TRIAL, and the Court after hearing argument of counsel, and being otherwise fully advised in the premises therein, it is hereby:

ORDERED AND ADJUDGED that the Defendant's MOTION IN LIMINE TO EXCLUDE FIELD SOBRIETY EXERCISES is hereby DENIED. The Court finds that the Field Sobriety Exercises (excluding the Horizontal Gaze Nystagmus) are not scientific and do not fall within the purview of Fl. Stat. 90.702; as a result, the Court denies the Defendant's request for a *Daubert* Hearing prior to trial.

* * *

Insurance—Automobile—Windshield repair—Evidence—Expert testimony—Proffered expert witness satisfies *Daubert* standard—Motion to preclude expert witness is denied

GLASSCO, INC., a.a.o. J. Bazan, GLASSCO, INC., a.a.o. I. Lamboy, GLASSCO, INC., a.a.o. R. Camagho, GLASSCO, INC., a.a.o. B. Barnett, GLASSCO, INC., a.a.o. S. Adkins, GLASSCO, INC., a.a.o. C. Beauford, GLASSCO, INC., a.a.o. D. Tanoo, et al., GLASSCO, INC., a.a.o. D. Matz, GLASSCO, INC., a.a.o. J. Kevins, GLASSCO, INC., a.a.o. N. Joseph, GLASSCO, INC., a.a.o. A. Maldonado, and GLASSCO, INC., a.a.o. C. Marks, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Small Claims Division. Case Nos. 16-CC-026608, 16-CC-031286, 16-CC-029315, 16-CC-029301, 16-CC-034403, 16-CC-034756, 16-CC-036273, 16-CC-037057, 16-CC-037082, 16-CC-037125, 16-CC-039072, 17-CC-000870, Division M. July 27, 2020. Miriam Valkenburg, Judge. Counsel: Anthony T. Prieto, Morgan & Morgan, P.A., Tampa; Christopher P. Calkin and Mike N. Koulianos, Law Offices of Christopher P. Calkin, P.A., Tampa; and David M. Caldevilla, de la Parte & Gilbert, P.A., Tampa, for Plaintiff. Melissa M. Buza, Philistine Hamdan, and Nicholas R. Cavallaro, Law Office of David S. Dougherty, Tampa, for Defendant.

ORDER DENYING "DEFENDANT'S AMENDED MOTION TO PRECLUDE PLAINTIFF'S EXPERT WITNESS AND MEMORANDUM OF LAW"

THIS CAUSE came before this Court on June 17, 2020 by "Zoom" video conference concerning the "Defendant's Amended Motion to Preclude Plaintiff's Expert Witness and Memorandum of Law" filed on May 1, 2020 by the Defendant, Geico General Insurance Company. The Court, having considered by motion, the response in opposition filed on June 8, 2020 by the Plaintiff, Glassco, Inc., a.a.o., J. Bazan, et al., the Defendant's supplemental memorandum filed on June 11, 2020, the arguments of counsel, and the evidence presented by the parties, and being otherwise advised in the premises,

ORDERED AND ADJUDGED as follows:

1. The Court finds that Plaintiff's expert witness, Barrett Smith, is qualified to provide expert opinion testimony at trial in these cases pursuant to Section 90.702, Florida Statutes. Mr. Smith has an overabundance of knowledge and experience in the fields of pricing and valuation of automobile repairs, including windshield glass replacement and installation, which will assist the trier-of-fact in understanding the evidence or in determining a fact in issue. Among other things, Mr. Smith has 40 years of experience in the automotive repair field; he worked for Progressive Insurance Company for five years where he determined the value of claims; he managed and/or owned multiple automotive repair automotive facilities; he has an AA degree; he has knowledge of various estimating systems; and he has previously been accepted by the courts as an expert witness.

2. The Court finds that Mr. Smith's expected expert testimony satisfies the *Daubert*[1] standards codified in Section 90.702, Florida Statutes. Mr. Smith's expected expert testimony, which relies on published suggested retail pricing data and the results of surveys of various similarly situated windshield shops, is the product of reliable principles, and he applied those principles in a reliable manner to the facts.

3. Notably, each of these cases are small claims matters and will be decided by non-jury trial, where this Court will be the trier-of-fact. As the trier-of-fact, this Court will determine the credibility and persuasiveness of the experts testimony based on direct examination, cross-examination, and any competing evidence presented at trial.

4. Accordingly, the "Defendant's Amended Motion to Preclude Plaintiff's Expert Witness and Memorandum of Law" is hereby **DENIED**.

5. The Clerk is hereby directed to file a copy of this Order in each of the above-styled cases.

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

* * *

Insurance—Automobile—Windshield repair—Policy provision limiting insurer's liability for windshield repair to prevailing competitive price means price that repair service would bring in competitive market, not price set in agreement between insurer and a particular provider or proposed rate not negotiated with any provider—Plaintiff repair shop met initial burden to establish prevailing competitive price and proved breach of contract claims

GLASSCO, INC., a.a.o. J. Bazan, GLASSCO, INC., a.a.o. I. Lamboy, GLASSCO, INC., a.a.o. R. Camagho, GLASSCO, INC., a.a.o. B. Barnett, GLASSCO, INC., a.a.o. C. Beauford, GLASSCO, INC., a.a.o. D. Tanoo, et al., GLASSCO, INC., a.a.o. D. Matz, GLASSCO, INC., a.a.o. J. Kevins, GLASSCO, INC., a.a.o. N. Joseph, GLASSCO, INC., a.a.o. A. Maldonado, and GLASSCO, INC., a.a.o. C. Marks, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Small Claims Division. Case Nos. 16-CC-026608, 16-CC-031286, 16-CC-029315, 16-CC-029301, 16-CC-034756, 16-CC-036273, 16-CC-037057, 16-CC-037082, 16-CC-037125, 16-CC-039072, 17-CC-000870, Division M. August 20, 2020. Miriam Valkenburg, Judge. Counsel: Anthony T. Prieto, Morgan & Morgan, P.A., Tampa; Christopher P. Calkin and Mike

N. Koulianos, Law Offices of Christopher P. Calkin, P.A., Tampa; and David M. Caldevilla, de la Parte & Gilbert, P.A., Tampa, for Plaintiff. Melissa M. Buza, Philistine Hamdan, Nicholas R. Cavallaro, and Joseph D. Nall, Law Office of David S. Dougherty, Tampa, for Defendant.

FINAL JUDGMENT

THIS CAUSE came before the Court on August 17, 2020 and August 18, 2020 for a non-jury trial utilizing "Zoom" video conferencing. After observing and assessing the demeanor and credibility of the witnesses, weighing the evidence presented, considering the arguments of counsel and legal authority, and being otherwise advised in the premises, the Court makes the following findings of fact and conclusions of law:

Background and Summary of the Evidence

1. This non-jury trial of these eleven cases results from this Court's January 4, 2020 order consolidating these cases for purposes of trial. Each case involves the same Plaintiff, Glassco, Inc. (hereinafter "Glassco"), as the assignee of 11 different insureds from 11 different insurance claims made during 2016. Each insured is covered by a policy of insurance with the same Defendant, GEICO General Insurance Company (hereinafter "GEICO"). Glassco replaced the windshield on each of the 11 vehicles insured by GEICO and, pursuant to an assignment of benefits, billed GEICO directly for the glass replacement.

2. It is undisputed that GEICO paid Glassco less than the amount invoiced. Glassco is claiming entitlement to full payment pursuant to the insurance policies and in all 11 cases has sued GEICO for declaratory judgment and breach of contract. The declaratory judgment count in each action was dismissed without prejudice prior to trial. As such, Glassco proceeds only on the breach of contract claims in each action and seeks damages equaling the difference between the amount it invoiced and the amount paid by GEICO. GEICO, in turn, responds that its liability is limited to the amount it paid under the policy.

3. These consolidated windshield loss cases are governed by the appellate decision in *Government Employees Ins. Co. v. Superior Auto Glass of Tampa Bay, Inc., a.a.o. Matthew Dick*, 26 Fla. L. Weekly Supp. 876a (Fla. 13th Jud. Cir. Ct. App. Div. March 27, 2018). In *Dick*, the appellate court held that the "prevailing competitive price" provision in the "Limit of Liability" section of the subject insurance policy "means the price the service would bring in a competitive market, not the price set in an agreement between GEICO and a particular provider." *Id.* The appellate court also indicated the prevailing competitive price is not a proposed rate that has not been negotiated with anyone. *See Id.*

4. At trial, the Plaintiff called four witnesses: Michael Slaman, co-owner of Bond Auto Glass; Shelton Radebaugh, owner of Lloyd's of Shelton Auto Glass; John Bailey, owner of Glassco; and Barrett Smith, Glassco's expert witness. All four witnesses testified on billing practices in the windshield replacement industry and how prices are established.

5. Mr. Slaman, Mr. Radebaugh, and Mr. Bailey all testified that in determining pricing, they consider: a) cost of the material/glass (b) labor and (c) the cost of kits (urethane adhesive, clips, molding). All of these costs vary depending upon the make, model, year of the vehicle, and the number of kits used during the replacement of the windshield. The established prices for windshield services are also based on their experience in the glass industry, the market, and their competitors. Their testimony reflects that the prices invoiced are also set by considering the amount that the majority of insurance carriers will accept and pay without dispute.

6. While, both Mr. Slaman and Mr. Radebaugh are direct competitors of Glassco, they each testified that Glassco's pricing structure was consistent with other repair and/or replacement facility competitors in the market.

7. Mr. Bailey, Mr. Slaman, and Mr. Radebaugh also testified regarding the acceptance of their invoiced pricing by the majority of insurance carriers in the market. Mr. Slaman and Mr. Radebaugh testified that, considering the 50-60 insurance carriers they invoiced, in 2016 90-95% of the invoiced prices were accepted by the carrier(s) and were paid in full. Mr. Bailey also testified that in 2016, of all of the invoices his company submitted to its customers,[1] (approximately 100 insurance carriers it billed), 95% of the invoiced prices were accepted and paid in full without dispute. Further Mr. Bailey testified that the pricing is negotiated in that the invoices are submitted to the customer and the company accepts the invoiced price and pays the bill in full or rejects the invoiced pricing.

8. The Court notes that the testimony of Mr. Slamon, Mr. Radebaugh, and Mr. Bailey indicates that there really are no cash transactions for these types of services and, in their business, the insurance companies are effectively their customers in that they agree to accept the invoiced pricing or reject the pricing.

9. The testimony of Plaintiff's expert witness, Mr. Smith, reflects that he was retained to "perform comparative market research regarding the products and services provided in windshield replacement service" and to tender an opinion "as to the prevailing competitive price of the goods and services (glass, labor, and kit) in dispute." *See* Plaintiff's Exhibit 13b "Expert's Report". At trial, Mr. Smith corroborated the prior testimony of the witnesses that Glassco's prices were competitive and prevailing. Mr. Smith based his opinion on his individual research of the market (which included a survey of 24 glass repair facilities and their pricing), his 40 years of experience in the automotive industry, his prior experience as a field adjuster for the insurance industry, and his work as an umpire in dispute resolution. In determining usual and customary prices, Mr. Smith also took into consideration the cost of glass, labor and material in his analysis. His findings also revealed that Glassco's prices were at the lower range in the market.

10. GEICO called Susana Eberling, its corporate representative, who is assigned to glass litigation claims. Ms. Eberling's testimony was very limited in scope. Ms. Eberling concluded that GEICO paid according to the "prevailing competitive price;" however, she did not provide any testimony relative to the establishment of the "prevailing competitive price" or to rebut Plaintiff's evidence with regard to establishment of the "prevailing competitive price."[2] Much of Ms. Eberling's testimony related to GEICO's relationship and glass pricing agreement with its affiliate SGC/Safelite.

11. The following exhibits were admitted into evidence:

a. Plaintiff composite exhibits 1a-4a and 6a-12a: The 11 invoices (hereinafter "the Invoices") and assignments of benefits (hereinafter "the AOBs") that were furnished to GEICO as Plaintiff's billing;

b. Plaintiff exhibits 1c-4c and 6c-12c: The 11 subject insurance policies (hereinafter "the Policies") for Plaintiff's assignors/GEICO's covered claimants;

c. Plaintiff's exhibit 13a: Barrett Smith's curriculum vitae;

d. Plaintiff's composite exhibit 13b: Barrett Smith's expert report and survey summary; and

e. Plaintiff's exhibit 13c: The 11 invoices that were furnished to GEICO as Plaintiff's billing (duplicative of Plaintiff's exhibits 1a-4a and 6a-12a).

Burden of Proof Regarding "Prevailing Competitive Price"

12. It should be noted that the parties disputed their respective burdens of proof concerning the "prevailing competitive price" issue. The Defendant relied on *Auto Glass America a.a.o. Nelson Cordero v. Geico Gen. Ins. Co.,* Case No. 17-CC-19839, "Final Judgment for the Defendant" (Hillsborough County Ct. July 31, 2018) for the proposition that the Plaintiff bears the burden of proving that its prices

did not exceed the "prevailing competitive price." In contrast, the Plaintiff relied on *State Farm Mut. Auto. Ins. Co. v. Curran*, 135 So. 3d 1071, 1079 (Fla. 2014) [39 Fla. L. Weekly S122a], *St. Paul Mercury Ins. Co. v. Coucher*, 837 So. 2d 483, 487 (Fla. 5th DCA 2002) [28 Fla. L. Weekly D131b], and other appellate decisions for the proposition that the "prevailing competitive price" provision in the "Limit of Liability" section of the subject insurance policy is an affirmative defense for which the Defendant bears the burden of proof.

13. As the issue was not raised until the eve of trial, the Court did not rule on or consider argument on the burden of proof issue prior to trial. As such, both parties proceeded and presented their cases without a ruling on same and with the knowledge that either party may be determined to have the burden of proof on this issue.

14. The Court agrees with Defendant and finds that Plaintiff has the burden of proof on the issue. In breach of contract cases, it is elementary that the burden is on the plaintiff to prove all elements of its claim. *Ferguson Enters., Inc. v. Astro Air Conditioning and Heating, Inc.*, 137 So. 3d 613, 615 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D936a] (citing *Havens v. Coast Florida, P.A.*, 117 So. 3d 1179, 1181 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D1273b]). To prevail on its claim, plaintiffs are required to prove (1) a valid contract; (2) a material breach; and (3) damages. The second and third elements—"material breach" and "damages" are inextricably intertwined for these cases because Glassco must prove GEICO materially breached the Policies by not paying in accordance with its policies—that GEICO did not pay the "prevailing competitive price." To do this, Glassco must offer substantial, competent evidence to establish its prima facie case for what the prevailing competitive price is because this is also the only measure from which damages can be ascertained. Glassco must establish where its charges are in relation to the prevailing competitive price in order to fix damages. Glassco's charge is not per se the "prevailing competitive price." Just as GEICO's payment amount is not automatically the "prevailing competitive price." If Glassco meets this burden of establishing the "prevailing competitive price" is more than GEICO's reimbursement and that its invoiced amount is in line with that pricing, it will have established a prima facie case for all elements of its breach of contract claim. The burden would then shift to GEICO to rebut that evidence.

15. However, given that this issue is contested, and the Court did not rule on the issue prior to trial, the Court has also considered the evidence placing the burden on the Defendant, and in these cases, the same result is ultimately achieved. Defendant did not present any evidence to either establish the "prevailing competitive price" or to rebut the Plaintiff's establishment of same.

Conclusion

16. In each case, regardless of which of the two standards for burden of proof on the issue of the "prevailing competitive price" is applied, this Court finds that the greater weight of the evidence demonstrates that, according to the requirements articulated in *Dick*, the "prevailing competitive price" is more than the amount GEICO paid as reimbursement for the services at issue, and that Plaintiff's invoiced amount did not exceed the "prevailing competitive price."

17. Therefore, in each case, Plaintiff's claim for breach of contract has been established—a valid contract existed (the subject insurance policies); the Defendant materially breached the insurance policy by paying less than the "prevailing competitive price;" and the Plaintiff incurred damages, which are measured by the difference between the Plaintiff's invoiced amount and the Defendant's partial payment.

Based on the foregoing, it is therefore **ORDERED AND ADJUDGED**:

1. In each of the above-styled consolidated cases, final judgment is hereby entered in favor of the Plaintiff, Glassco, Inc., and against the Defendant, Geico General Insurance Company, as follows:

a. In Case No. 16-CC-026608, the Plaintiff is awarded and shall recover damages from the Defendant the amount of $310.86, plus prejudgment interest since July 14, 2016 through the date of this judgment, plus post-judgment interest, at the interest rates established pursuant to Section 55.03(1), Florida Statutes, for all of which, let execution issue.

b. In Case No. 16-CC-029301, the Plaintiff is awarded and shall recover damages from the Defendant the amount of $347.46, plus prejudgment interest since August 3, 2016 through the date of this judgment, plus post-judgment interest, at the interest rates established pursuant to Section 55.03(1), Florida Statutes, for all of which, let execution issue.

c. In Case No. 16-CC-029315, the Plaintiff is awarded and shall recover damages from the Defendant the amount of $451.47, plus prejudgment interest since August 3, 2016 through the date of this judgment, plus post-judgment interest, at the interest rates established pursuant to Section 55.03(1), Florida Statutes, for all of which, let execution issue.

d. In Case No. 16-CC-031286, the Plaintiff is awarded and shall recover damages from the Defendant the amount of $393.25, plus prejudgment interest since August 18, 2016 through the date of this judgment, plus post-judgment interest, at the interest rates established pursuant to Section 55.03(1), Florida Statutes, for all of which, let execution issue.

e. In Case No. 16-CC-034756, the Plaintiff is awarded and shall recover damages from the Defendant the amount of $353.44, plus prejudgment interest since September 15, 2016 through the date of this judgment, plus post-judgment interest, at the interest rates established pursuant to Section 55.03(1), Florida Statutes, for all of which, let execution issue.

f. In Case No. 16-CC-036273, the Plaintiff is awarded and shall recover damages from the Defendant the amount of $493.61, plus prejudgment interest since September 27, 2016 through the date of this judgment, plus post-judgment interest, at the interest rates established pursuant to Section 55.03(1), Florida Statutes, for all of which, let execution issue.

g. In Case No. 16-CC-037057, the Plaintiff is awarded and shall recover damages from the Defendant the amount of $642.13, plus prejudgment interest since October 4, 2016 through the date of this judgment, plus post-judgment interest, at the interest rates established pursuant to Section 55.03(1), Florida Statutes, for all of which, let execution issue.

h. In Case No. 16-CC-037082, the Plaintiff is awarded and shall recover damages from the Defendant the amount of $379.54, plus prejudgment interest since October 4, 2016 through the date of this judgment, plus post-judgment interest, at the interest rates established pursuant to Section 55.03(1), Florida Statutes, for all of which, let execution issue.

i. In Case No. 16-CC-037125, the Plaintiff is awarded and shall recover damages from the Defendant the amount of $364.17, plus prejudgment interest since October 4, 2016 through the date of this judgment, plus post-judgment interest, at the interest rates established pursuant to Section 55.03(1), Florida Statutes, for all of which, let execution issue.

j. In Case No. 16-CC-039072, the Plaintiff is awarded and shall recover damages from the Defendant the amount of $378.75, plus prejudgment interest since October 24, 2016 through the date of this judgment, plus post-judgment interest, at the interest rates established pursuant to Section 55.03(1), Florida Statutes, for all of which, let execution issue.

k. In Case No. 17-CC-000870, the Plaintiff is awarded and shall recover damages from the Defendant the amount of $579.75, plus prejudgment interest since November 30, 2016 through the date of this judgment, plus post-judgment interest, at the interest rates established pursuant to Section 55.03(1), Florida Statutes, for all of which, let

execution issue.

2. The Court reserves jurisdiction to determine entitlement to and amount of any claims for attorneys' fees and costs in each of these matters.

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[1]The Court notes the term "customer" as used by the witness in this context is a reference to the insurance carriers not the insureds. The witnesses' testimony reflects that cash transactions for these services are virtually non-existent. The transactions almost always involve insurance carriers and the insured is not shown the pricing that will be billed to the insurance company.

[2]Ms. Eberling's testimony did establish that GEICO is not contesting that Glassco is competent and conveniently located or disputing the quality of the work performed by Glassco.

* * *

Insurance—Automobile—Windshield repair—Appraisal— Prohibitive cost doctrine—Repair shop is not entitled to evidentiary hearing on whether appraisal would be a prohibitive cost—Prohibitive cost doctrine is not applicable to contractual appraisal clauses concerning state court breach of contract issue—Demand for appraisal is granted, and case is dismissed for failure to fulfill appraisal condition precedent

AUTO GLASS AMERICA, LLC, a/a/o Guadalupe Magana, Plaintiff, v. ALLSTATE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 19-CC-033007, Division S. March 10, 2020. Lisa Allen, Judge. Counsel: Kevin William Richardson, Kevin W. Richardson, PLLC, Tampa, for Plaintiff. Timothy Alan McHaffie II, Law Offices of Robert J. Smith, Tampa, for Defendant.

Order Denying Plaintiff's Motion for Evidentiary Hearing and Granting Defendant's Motion to Dismiss and Compel Appraisal

This matter came before the Court at hearing on February 21, 2020 upon Defendant's Motion to Dismiss Complaint, or in the alternative, Motion to Abate or Stay and Compel Appraisal, Plaintiff's Motion for Evidentiary Hearing, Plaintiff's Notice of Objection and Intent to Respond to Defendant's Pending Motion and Due Process Request for Hearing and Defendant's Notice of Filing Certification of Business Records. Upon review of the pleadings, argument of counsel, and being otherwise fully advised in the premises, the Court finds that Plaintiff's Motion for an Evidentiary Hearing to determine whether compelling appraisal would be inappropriate pursuant the Prohibitive Cost Doctrine should be denied and Defendant's Motion to Dismiss and Compel Appraisal should be granted.

I. Background

This is an action for damages in an amount less than $500, exclusive of interest, costs and attorneys' fees. Accordingly, this is a small claims case governed by the Florida Small Claims Rules. Guadalupe Magana was insured under a policy of motor vehicle insurance issued by Defendant. Coverage of the same is not in dispute. There is a dispute however as to the "cost to repair or replace" charged in the area where the windshield was repaired or replaced. Allegedly the insured assigned his or her rights and benefits to this after-loss claim to Plaintiff. The policy at issue contains an appraisal clause that may be invoked by either party if the parties cannot agree on the amount of loss.

II. Plaintiff's Argument for Evidentiary Hearing Based on Prohibitive Cost Doctrine

After Defendant filed a Motion to Dismiss and Demand for Appraisal, Plaintiff filed a Motion for Evidentiary Hearing to determine whether participating in the contractually mandated appraisal process contained within the Policy would be a "prohibitive cost." In support of Plaintiff's Motion for Evidentiary Hearing, Plaintiff cites *Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79 (2000), *Fi-Tampa, LLC v. Kelly-Hall* 135 So.3d 563 (Fla. 2nd DCA 2014) [39 Fla. L. Weekly D748a], *Zephyr Haven Health & Rehab Ctr., Inc. v. Hardin,* 122 So.3d 916 (Fla. 2nd DCA 2013) [38 Fla. L. Weekly D2070a], *Cohen v. D.R. Horton, Inc.,* 121 So.3d 1121 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D1800a], and *Fi-Evergreen Woods, LLC v. Estate of Vrastil,* 118 So.3d 859 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D1710g].[1] The Prohibitive Cost Doctrine is derived from the U.S. Supreme Court's ruling in *Green Tree.* In *Green Tree*, the U.S. Supreme Court recognized 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. See *Cohen,* 121 So.3d 1121, 1123 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D1800a], citing *Green Tree* at 90.

Plaintiff contends appraisal is inappropriate in this case based on the argument that the Prohibitive Cost Doctrine renders the Defendant's appraisal provision unenforceable. Plaintiff argues that the appraisal provision is not enforceable under the Prohibitive Cost Doctrine because "the cost of enforcement will approach or exceed the amount of the claim," or in the alternative, "the expected cost of appraising the specific claim is greater than litigating it and that the cost of appraisal would be prohibitively expensive," consequently prohibiting the benefits of bringing such claims in these type of cases. [Plaintiff's Motion for Evidentiary Hearing, Paragraphs 2, 7]. Plaintiff further argues that the Policy's appraisal provision requires Plaintiff to: appoint and pay a competent and impartial appraiser, equally share other appraisal expenses, and if Plaintiff's and Defendant's chosen appraisers have any differences, the Plaintiff and Defendant must share the costs of hiring an umpire to decide any differences. Plaintiff did not offer any other legal arguments in opposition to Defendant's Motion to Dismiss other than asserting that Plaintiff is entitled to an evidentiary hearing to determine whether compelling Plaintiff to participate in appraisal would be a prohibitive cost.

III. Defendant's Argument of Inapplicability of Prohibitive Cost Doctrine in State Court Actions

Defendant argues that Plaintiff is not entitled to an evidentiary hearing to determine whether participating in the contractually mandated appraisal process contained within the Policy would be a "prohibitive cost" because the Prohibitive Cost Doctrine does not apply to a state court action as stated by the Florida Supreme Court in *McKenzie Check Advance of Florida, LLC v. Betts,* 112 So.3d 1176, 1186 (2013) [38 Fla. L. Weekly S223a]. Defendant further argues that the policy contains an appraisal clause, which is a mandatory condition precedent to both filing and maintaining the subject lawsuit, citing *Preferred Mut. Ins. Co. v. Martinez*, 643 So.2d 1101, 1102 (Fla. 3d DCA 1994), *Transamerica Ins. Co. v. Weed*, 420 So.2d 370 (Fla. 1st DCA 1982), *Opar v. Allstate Ins.* Co., 751 So.2d 758, 759 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D545a], *U.S. Fire Ins. Co. v. Franko,* 443 So.2d 170 (Fla. 1st DCA 1983), and *United Community Insurance Company v. Lewis,* 642 So.2d 59 (Fla. 3d DCA 1994).

IV. Opinion

Plaintiff's argument that it is entitled to an evidentiary hearing to consider whether the costs of participating in an appraisal would exceed the likely expense of litigation is unpersuasive for two reasons. First, the policy at issue contains an appraisal provision, not an arbitration provision. Second, the Prohibitive Cost Doctrine does not apply to contractual appraisal clauses relating to a state court breach of contract issue.

A. Appraisal versus Arbitration

Black's Law Dictionary defines the word "appraisal" as follows: "1. The determination of what constitutes a fair price for something or how its condition can be fairly stated; the act of assessing the worth, value, or condition of something. 2. The report of such a determination; specif., a statement or opinion judging the worth, value, or

condition of something." Black's Law Dictionary (11th Ed. 2019). Black's Law Dictionary defines the word "arbitration" as follows: "A dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute. The parties to the dispute may choose a third party directly by mutual agreement, or indirectly, such as by agreeing to have an arbitration organization select the third party." Black's Law Dictionary (11th Ed. 2019). Each case cited by Plaintiff in support of its entitlement to an evidentiary hearing relates to an arbitration clause. Plaintiff has not provided any case law supporting the argument that an evidentiary hearing is necessary prior to compelling appraisal. Florida appellate courts have consistently recognized that an "appraisal" process is materially different from an "arbitration" process. *See, e.g., Allstate Insurance Co. v. Suarez,* 833 So.2d 762, 765 (Fla. 2002) [27 Fla. L. Weekly S1028a] (Florida Supreme Court held appraisal clauses call for an informal, independent determination of value by appraisers, while arbitration calls for a formal trial-like hearing and resolution with notice and due process.); *Cotton States Mut. Ins. v. D'Alto,* 879 So.2d 67 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D1751c]; *Nationwide Mut. Fire Ins. Co. v. Schweitzer,* 872 So.2d 278 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D659e] (recognizing that "an appraisal provision is not an agreement to arbitrate," and therefore, "an order granting or denying an appraisal is not appealable as an order involving entitlement to arbitration"). In *Suarez,* the Florida Supreme Court further explained that a panel of appraisers could not be compelled to apply the Florida Arbitration Code, because an agreement to submit to an appraisal is not the equivalent of an agreement to resolve a dispute by arbitration. *Suarez*, 833 So.2d 762, 766. Moreover, the arbitration process is expressly governed by the Federal Arbitration Act or the Florida Arbitration Act. There is no similar legislative act controlling the simple act of obtaining an appraisal on tangible property.

B. Florida Law Supports Enforcement of Contractual Appraisal Provisions

There does not appear to be any binding legal precedent in Florida supporting the application of the Prohibitive Cost Doctrine to an appraisal provision contained in a contract concerning non-federal statutory issues. There is substantial case law, however, supporting the enforcement of appraisal clauses in insurance policies. "The prospect of an attorney's fee award under section 627.428 should prompt insurers to process and pay claims timely. We recognize also that the appraisal process provides a mechanism to resolve claims promptly and discourages insureds from racing to the courthouse to file needless lawsuits." *First Floridian Auto & Home Insurance Company v. Myrick,* 969 So.2d 1121 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2672a]. "We also find that it maintains the better policy of this state to encourage insurance companies to resolve conflicts and claims quickly and efficiently without judicial intervention. Arbitration and appraisal are alternative methods of dispute resolution that provide quick and less expensive resolution of conflicts. Hopefully both will serve to suppress the ever increasing cost of insurance protection." *Nationwide Property & Casualty Insurance v. Bobinski,* 776 So.2d 1047 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D368a]. "[W]hen the insurer admits that there is a covered loss, but there is a disagreement on the *amount* of loss, it is for the appraisers to arrive at the amount to be paid. In that circumstance, the appraisers are to inspect the property and sort out how much is to be paid on account of a covered peril." *Johnson v. Nationwide Mut. Ins. Co*., 828 So.2d 1021, 1025 (Fla. 2002) [27 Fla. L. Weekly S779a].

C. The Florida Supreme Court Declined to Apply the Prohibitive Cost Doctrine to State Court Issues

Notably, in *McKenzie Check Advance of Florida, LLC v. Betts,* 112 So.3d 1176, 1186 (2013) [38 Fla. L. Weekly S223a], the Florida Supreme Court rejected the application of the federal Prohibitive Cost Doctrine to state court issues, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *McKenzie,* 112 So.3d 1176, 1185. Furthermore, the Florida Supreme Court specifically stated, "*Green Tree* and similar decisions are limited to *federal* statutory rights". *McKenzie* at 1186.[2] Thus, this Court declines to apply the Prohibitive Cost Doctrine to this state court action based on a breach of an insurance policy that does not contain an arbitration clause.

For the reasons stated above, Plaintiff's Motion for Evidentiary Hearing based on the Prohibitive Cost Doctrine is denied; Defendant's Demand for Appraisal is granted; therefore, this case is dismissed without prejudice for failure to fulfill a condition precedent.[3] Accordingly, it is ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion for Evidentiary Hearing is DENIED.
2. Defendant's Motion to Dismiss Complaint and Motion to Compel Appraisal are GRANTED.
3. This case is DISMISSED without prejudice.
4. The Clerk is directed to CLOSE this case.

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[1]All four of the cited Florida cases concern motions to compel contractual arbitration clauses.

[2]At hearing, Plaintiff argued that there is no conflict in the holdings found in *McKenzie* and *Zephyr Haven* because the Florida Supreme Court's decision in *McKenzie* was entered on April 11, 2013, and the 2nd DCA's opinion in *Zephyr Haven* was entered on September 27, 2013. Nevertheless, the holding in *McKenzie* is binding on all lower courts, including the 2nd DCA, the 13th Judicial Circuit and the Hillsborough County Court. *See also, e.g. Sachse Construction and Development Corporation v. Affirmed Drywall, Corp.,* 251 So.3d 1005 (Fla. 2nd DCA 2018) [43 Fla. L. Weekly D1622e].

[3]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. 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 2010) [37 Fla. L. Weekly D712b].

* * *

Insurance—Res judicata—Insured's voluntary dismissal of previous suit against insurer, to which medical provider that is assignee of insured was not party, does not bar provider's suit against insurer

OCEAN CHIROPRACTIC AND HEALTH CENTER, INC., a/a/o Ronald Bennett, Plaintiff, v. CENTURY-NATIONAL INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 2017-SC-001670. August 13, 2020. Melanie Surber, Judge. Counsel: Robert B. Goldman, Florida Advocates, Dania Beach, for Plaintiff. William J. McFarlane, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court on August 5, 2020, upon the Defendant's Motion for Summary Judgment, and the Court having heard argument of counsel and being otherwise fully advised, it is hereby

ORDERED that Defendant's Motion is **DENIED**, in reliance upon *Brito v. Heritage Property & Casualty Ins. Co*., 276 So.3d 990 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1898b].

Defendant argued that this lawsuit is barred under the doctrine of *res judicata*, and that Ronald Bennett's voluntary dismissal with prejudice of a prior lawsuit filed against Century-National Insurance Company in St. Lucie County, to which Ocean Chiropractic and Health Center, Inc. was not a party, constitutes an adjudication on the merits in this case.

In *Brito*, the Third District Court of Appeal addressed the privity requirement or "identify of persons and parties to the action" neces-

sary to establish *res judicata*, rejecting the insurer's argument that an assignor and its assignee are "privies" as a matter of law. In that case, the insureds hired a mold testing company after their home was damaged as the result of a roof leak. The insureds executed an assignment of benefits in favor of the mold testing company. The assignment was only for the benefits and proceeds under any applicable insurance policies payable to the mold testing company, that pertained to the total invoice amount for the services performed by the mold testing company. After the insurer denied the claim, the insureds sued the insurer in circuit court. The mold testing company filed a separate small claims lawsuit in county court. After a jury verdict and the entry of a final judgment in favor of the insurer and against the mold testing company on the assigned invoice claim, the insurer then filed a motion for summary judgment against the insureds in the circuit court case, contending that the insured's claim was barred by collateral estoppel and res judicata. The trial court granted that motion.

The Third District Court of Appeal reversed, finding that the assignee (mold testing company) and partial assignor (the insureds) were not "privies"; i.e., the parties were not identical for purposes of *res judicata*, because the mold testing company had obtained a limited assignment of the insureds' policy rights, not a complete assignment of all rights and coverages. Just as the mold testing company had obtained a limited assignment in *Brito*, Ocean Chiropractic & Health Center's assignment from Ronald Bennett was similarly limited, as he had assigned his claims to proceeds, but only to the extent of his charges.

Further, the *Brito* Court rejected the insurer's argument that an assignor and its assignee are "privies" as a matter of law, where the mold testing company had acquired its limited rights before either lawsuit was filed. The Court recognized that "the argument and case law advanced by the insurer may be applicable in a case in which the assignee acquires its interests after the judgment in the first suit has been entered." *Citing Allstate Ins. Co. v. Warren*, 125 So.2d 886, 888-89 (Fla. 3d DCA 1961); *Barnett Bank of Clearwater, N.A. v. Rompon* , 359 So.2d 571, 572 (Fla. 2d DCA 1978).

* * *

Insurance—Personal injury protection—Request for information or documentation—Where medical provider failed to respond to insurer's pre-suit request for information, condition precedent to suit was not satisfied—PIP statute does not require that request for information be sent within specific time period

JOSEPH FISCHETTI, P.A., a/a/o Cassandra Thorpe, Plaintiff, v. GARRISON PROPERTY & CASUALTY INS. CO., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. CONO18007969, Division 70. May 7, 2020. John D. Fry, Judge. Counsel: Dylan J. Shore, Ian Bressler Law, P.A., Wellington, for Plaintiff. Christopher S. Dutton and Laura M. Myers, Dutton Law Group, P.A., Tampa, for Defendant.

[Rehearing Denied July 13, 2020.]

FINAL ORDER GRANTING DEFENDANT'S 57.105 MOTION FOR SANCTIONS

This cause having come before this Honorable Court on December 18, 2019, and the Court having heard argument of counsel, the Court finds the following:

Fla. Stat. §627.736(6)(b) does not require a request for information to be sent to a provider from an insurance company within a specific period of time. In conjunction with there not being a specific time period for a request, it doesn't obviate the Plaintiff's obligation to comply with the request for information required to comply with the request pursuant to Fla. Stat. §627.736(6)(b).

The Plaintiff's failure to submit additional documents or respond, and then file the instant lawsuit, required a judicial review of both the request and whether it created a condition precedent to the filing of this lawsuit. In this particular case, the Court finds that a request was made. The Plaintiff failed to respond to that request, which creates a legal question of whether the request was appropriate and a predicate to the filing of the suit.

The Court finds that the request, pursuant to Fla. Stat. §627.736(6)(b), was legally sufficient which created a bar to the filing of the suit. As such, the Court rules for the Defendant in this matter.

ORDERED AND ADJUDGED that the Court enters a FINAL ORDER in this matter and will enter an Order Preliminary, subsequent to the signing of this Order.

* * *

Insurance—Personal injury protection—Discovery—Depositions—Motion for protective order preventing medical provider from deposing litigation adjuster regarding insurer's deficient demand letter defense is granted where insurer has already responded to four sets of discovery on purely legal issue of deficient letter, no additional discovery is needed on issue, and provider has already deposed insurer's corporate representative—No merit to argument that provider needs to depose adjuster regarding waiver and estoppel where provider did not plead waiver and estoppel as to demand letter defense

PGA CHIROPRACTIC HEALTH CENTER, P.A., Patient Phillip Waldrop, Plaintiff, v. ALLSTATE INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County, County Civil Division RD. Case No. 50-2016-SC-000809-XXXX-SB. June 25, 2020. Reginald R. Corlew, Judge. Counsel: Chad L. Christensen, for Plaintiff. Rachel M. LaMontagne, Ryan M. McCarthy, and Raul L. Tano, Shutts & Bowen LLP, Miami, for Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENDANT'S MOTION FOR PROTECTIVE ORDER AND PLAINTIFF'S AMENDED MOTION TO COMPEL DEPOSITION APPEARANCE OF AFFIANT

THIS CAUSE came before the Court on June 18, 2020, on Defendant's Motion for Protective Order and Plaintiff's Amended Motion to Compel Deposition Appearance of Affiant; and, the Court having reviewed the motions and supplemental authority, heard the argument of counsel, and being otherwise fully advised in the premises, renders these findings of fact and conclusions of law:

Material Facts

Plaintiff filed this breach-of-contract action for personal injury protection ("PIP") benefits on January 20, 2016. Subsequently, Allstate moved to amend its answer and affirmative defenses. Specifically, Allstate asserted affirmative defenses alleging Plaintiff's pre-suit demand letter was deficient as a matter of law for failure to comply with section 627.736(10), Florida Statutes; therefore, Plaintiff failed to satisfy a condition precedent to filing this lawsuit. The Court granted this motion. Plaintiff never filed a reply to the amended answer and affirmative defenses.

Allstate moved for summary disposition or summary judgment as to Plaintiff's deficient pre-suit demand on November 6, 2019. In support of its summary-judgment motion, Allstate filed the affidavit of Allstate litigation adjuster, Ashley Raison ("Raison Affidavit"). On January 9, 2020, long after Allstate had moved for summary judgment on the deficient-demand issue, the Court ordered the parties to schedule Allstate's deficient-demand motion for summary judgment.

Yet on January 21, 2020, Plaintiff filed a motion, seeking a continuance or extension as to the deficient-demand hearing. It claimed a need for additional discovery.[1] The record evidences a pattern of delay from Plaintiff—Plaintiff has moved for multiple extensions of time during the four-plus year duration of this case: (1) motion for extension of time to respond to proposal for settlement; (2) motion for extension of time to respond to Allstate's discovery; (3) motion for extension of time to comply with order compelling better

discovery responses to Allstate's discovery; and, (4) motion to continue summary-judgment hearing and/or motion for extension of time to comply with order dated January 9, 2020 in order to complete discovery. The Court also issued a notice of lack of prosecution on March 6, 2019.

Ultimately, in furtherance of its claimed need for additional discovery, Plaintiff filed its amended motion to compel deposition appearance of affiant on May 14, 2020. Allstate filed its motion for protective order on May 29, 2020, asserting the deficient-demand issue is properly adjudicated as a matter of law, and that Allstate has already responded to four sets of written discovery in this case,[2] including a request for admissions, interrogatories, and request for production on the deficient-demand issue.

The parties argued Allstate's motion for protective order and Plaintiff's amended motion to compel deposition appearance of affiant on June 18, 2020.

Conclusions of Law

A. **The Court has broad discretion to enter a protective order.**

Under Rule 1.280(c), Florida Rules of Civil Procedure, the Court may render a protective order to protect a party "from annoyance, embarrassment, oppression or undue burden or expense." Here, a protective order is warranted to protect Allstate from annoyance and undue expense because: (1) Plaintiff has served and Allstate has responded to four sets of written discovery, including interrogatories, a request for production, and request for admissions on the deficient-demand issue—the precise issue on which Plaintiff seeks to depose Allstate's affiant; (2) the issue of whether Plaintiff's pre-suit demand letter is deficient for failure to comply with section 627.736(10), Florida Statutes is purely legal and no additional discovery is necessary; and, (3) Plaintiff already deposed Allstate's Corporate Representative in 2017.

A trial court is given wide discretion in dealing with discovery matters, and unless there is a clear abuse of that discretion, the appellate court will not disturb the trial court's order. *Nucci v. Target Corp.*, 162 So. 3d 146, 152 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D166a].

B. **Whether Plaintiff's pre-suit demand letter is deficient for failure to comply with section 627.736(10), Florida Statutes is properly adjudicated as a matter of law.**

Allstate maintains that Plaintiff's pre-suit demand letter is deficient as a matter of law for failure to comply with section 627.736(10), Florida Statutes.

Well-settled law, including rulings from this Court, provides this issue is properly resolved by summary judgment. *See MRI Associates of America, LLC v. State Farm Fire and Casualty Co.*, 61 So. 3d 462 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b]; *Lake Worth Emergency Chiropractic Center, P.A. (a/a/o Ryan Garter) v. State Farm Mutual Automobile Ins. Co.*, 22 Fla. L. Weekly Supp. 65a (15th Cir. Ct. (App.) (2014)); *Fountain Imaging of West Palm Beach, LLC (a/a/o Charlotte Jennings) v. Progressive Express Ins. Co.*, 14 Fla. L. Weekly Supp. 614a (15th Cir. Ct. (App.) 2007); *Precision Diagnostic of Lake Worth, LLC (a/a/o Violette Timoleon) v. State Farm Mut. Auto. Ins. Co.*, 21 Fla. L. Weekly Supp. 357a (Judge Corlew, Fla. 15th Jud. Cir. Cty. January 10, 2014).

C. Plaintiff's motion to compel and the Raison Affidavit are devoid of any disputed issues of material fact to warrant a deposition on the purely legal deficient-demand issue.

i. The Raison Affidavit does not present a genuine issue of material fact.

The Raison Affidavit, filed in support of Allstate's deficient-demand motion for summary judgment principally authenticates Allstate's summary-judgment evidence. Exhibit A is identified as a true and accurate copy of Allstate's policy. Composite Exhibit B is identified as true and accurate copies of the explanation of benefits forms and payout ledger. And Exhibit C is identified as a true and correct copy of Plaintiff's demand letter received by Allstate. Other than authenticating the summary-judgment evidence, the Raison Affidavit sets forth background statements as to the affiant and Allstate and further recites information already in the record through pleadings and discovery.

Plaintiff seeks to depose Allstate's affiant on an affidavit that presents no disputed issues of material fact. As the scope of the deposition would be limited to that affidavit, a protective order is warranted.

(ii.) Plaintiff's motion to compel does not identify a disputed issue of material fact.[3]

Plaintiff's motion to compel sets forth mere conclusory statements. Specifically, Plaintiff's motion to compel states, in pertinent part: (1) "The deposition of Defendant's affiant is absolutely necessary in order to move foreard [sic] with dispositive motions"; (2) "That the Plaintiff is hereby requesting the assistance of the Court in setting the Deposition of the affiant, Ashley Raison for a date and time certain, to enable Plaintiff to continue to prosecute this claim, in order to get the Plaintiff's medical benefits paid by the Defendant"; and, (3) "As a result of the Defendant's failure to comply with Plaintiff's reasonable request(s) to schedule the deposition, Plaintiff has been severely prejudiced and prevented from properly proceeding with this claim."

Because Plaintiff fails to point to a disputed issue of material fact in the Raison Affidavit, or any tenable basis for the deposition, a protective order is proper. No testimony is necessary on this legal issue.

(iii.) Plaintiff did not plead waiver or estoppel as to Allstate's deficient-demand affirmative defenses.

While not asserted in its motion to compel, at the June 18, 2020 hearing, Plaintiff argued the need to depose Allstate's affiant based on the waiver and estoppel allegations in Plaintiff's reply. However, although Plaintiff filed a reply to Allstate's original answer and affirmative defenses, Plaintiff did not file a reply to Allstate's amended answer and affirmative defenses. Thus, Plaintiff waived those allegations based on its failure to file a reply to Allstate's deficient-demand affirmative defenses. A deposition on unpled allegations cannot create a genuine issue of material fact. *See Congress Park Office Condos II, LLC v. First-Citizens Bank & Trust Co.*, 105 So. 3d 602 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D145a] (affirming summary judgment, despite outstanding discovery, because the discovery would not have created a genuine issue of material fact as it was on defenses not pled).

The pleadings speak for themselves here—Plaintiff did not plead waiver and estoppel as to Allstate's deficient-demand affirmative defenses.[4] The Florida Supreme Court has held that a party is bound by its own pleadings. *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowman Instrument Corp.*, 537 So. 2d 561, 563 (Fla. 1988); *Bank of Am. v. Asbury*, 165 So. 3d 808, 809 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D1230a] ("[l]itigants in civil controversies must state their legal positions within a particular document, a pleading, so that the parties and the court are absolutely clear what the issues to be adjudicated are."); *Advanced Chiropractic and Rehabilitation, Inc (a/a/o Aldwin Brana) v. Allstate Property and Casualty Ins. Co.*, 26 Fla. L. Weekly Supp. 771c (Judge Corlew, Fla. 15th Jud. Cir. Cty. November 6, 2018)).

It is error to permit a plaintiff to proceed on unpled issues. *See Quality Type & Graphics v. Guetzloe*, 513 So. 2d 1110, 1111 (Fla. 5th DCA 1987); *Sunbeam Television Corp. v. Mitzel*, 83 So. 3d 865, 875

(Fla. 3d DCA 2012) [37 Fla. L. Weekly D183a]. Plaintiff is bound by its pleadings; thus, it has not pled anything in response to the deficient-demand affirmative defenses.

D. Plaintiff cannot use discovery to thwart summary judgment. The Court has already ordered Allstate's deficient-demand motion for summary judgment be set and heard. Plaintiff is not permitted to thwart adjudication of summary judgment with discovery. Summary judgment may be granted, even though discovery has not been completed, when the future discovery will not create a disputed issue of material fact. *See In re the Estate of Carlos Rumaldo Herrera v. Berlo Industries Inc.*, 840 So. 2d 272 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D217b] (rejecting the argument that summary judgment was error because discovery was not completed because "future discovery would not yield any new information that the trial court either did not already know, or needed to make its ruling."). Here, the deposition of Allstate's affiant would not yield any new information because the affidavit presents information already in the record.

Ruling

In making its ruling, the Court must take this 2016 case in the posture that it is in. Based on the foregoing findings of fact and conclusions of law, it is hereby **ORDERED AND ADJUDGED**:

1. Defendant's Motion for Protective Order is **GRANTED**.

2. Plaintiff's Amended Motion to Compel Deposition Appearance of Affiant is **DENIED**.

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[1]Plaintiff has already deposed Allstate's Corporate Representative on January 12, 2017.

[2]Allstate has conceded relatedness and medical necessity, with the exception of CPT code A4595, which Allstate contends was improperly unbundled and thus non-compensable. Allstate has filed a summary-judgment motion on this issue.

[3]Plaintiff's cited cases are inapposite. Additionally, the trial court orders from other cases that Plaintiff filed in support of its motion to compel are not binding. Plaintiff failed to explain the similarities between those cases and this one.

[4]The Court does not reach the merits of Plaintiff's argument as to waiver and estoppel because they were not pled as to the deficient-demand affirmative defenses.

* * *

Insurance—Personal injury protection—Discovery—Depositions—Motion for protective order barring medical provider from deposing insurer's corporate representative is granted where deposition testimony is not necessary to adjudicate issues of deficient demand letter and improper unbundling of CPT codes

CENTRAL PALM BEACH PHYSICIANS AND URGENT CARE, INC. d/b/a TOTAL MD, Patient Daniel Santucci, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County, County Civil Division RS. Case No. 50-2019-SC-004371-XXXX-SB. June 30, 2020. Marni A. Bryson, Judge. Counsel: Chad L. Christensen, for Plaintiff. Rachel M. LaMontagne, Ryan M. McCarthy, and Raul L. Tano, Shutts & Bowen LLP, Miami, for Defendant.

ORDER ON JUNE 9, 2020 HEARING

THIS CAUSE, came before the Court on June 9, 2020, on the following motions: (1) Allstate's Motion for Leave to Amend Answer and Affirmative Defenses; (2) Allstate's Motion for Enlargement of Time to Comply with Court Order; (3) Allstate's Motion to Compel Answers to Interrogatories; (4) Allstate's Motion for Protective Order; (5) Plaintiff's Motion to Compel Appearance of Fla. R. Civ. Pro. 1.310(B)(6) Representative(s) for Deposition; and, the Court having reviewed the motions, heard the argument of counsel, and being otherwise fully advised in the premises, it is hereby **ORDERED AND ADJUDGED:**

1. Allstate's Motion for Leave to Amend Answer and Affirmative Defenses is **GRANTED**. *See* Rule Fla. R. Civ. P. 1.190(a) ("Leave of court shall be given freely when justice so requires."); *New River Yachting Center, Inc. v. Bacchiocchi*, 407 So. 2d 607 (Fla. 4th DCA 1981) ("As a general rule, refusal to allow amendment of a pleading constitutes an abuse of discretion unless it clearly appears that allowing the amendment would prejudice the opposing party; the privilege to amend has been abused; or amendment would be futile."). Because Plaintiff failed to make the requisite showing of abuse, prejudice, and futility, Allstate's Amended Answer and Affirmative Defenses is deemed filed as of the date of this Order.

2. Allstate's Motion for Enlargement of Time to Comply with Court Order is **GRANTED**. All summary judgment motions must be filed within 45 days and heard within 90 days of this Order.

1. Allstate's Motion to Compel Answers to Interrogatories is **MOOT**. Plaintiff served unverified Answers to Allstate's Interrogatories on June 8, 2020, at 10:03 p.m.—the evening before the hearing. Allstate reserves the right to move to compel compliant Answers to Interrogatories.

1. Allstate's Motion for Protective Order is **GRANTED** and Plaintiff's Motion to Compel Appearance of Fla. R. Civ. Pro. 1.310(B)(6) Representative(s) for Deposition is **DENIED**. Deposition testimony is not necessary to adjudicate the two legal issues presented in this case:

1. **Whether Plaintiff failed to satisfy a condition precedent, as a result of its deficient pre-suit demand**. *See MRI Associates of America, LLC v. State Farm Fire and Casualty Co.*, 61 So. 3d 462 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b] (finding that whether plaintiff's pre-suit demand is compliant is a summary-judgment issue, and "[t]he statutory requirements surrounding a demand letter are significant, substantive preconditions to bringing a cause of action for PIP benefits); *Lake Worth Emergency Chiropractic Center, P.A. (a/a/o Ryan Garter) v. State Farm Mutual Automobile Ins. Co.*, 22 Fla. L. Weekly Supp. 65a (15th Cir. Ct. (App.) (2014)) (affirming summary judgment in favor of the insurer based on demand letter's failure to comply with section 627.736(10)); *Fountain Imaging of West Palm Beach, LLC (a/a/o Charlotte Jennings) v. Progressive Express Ins. Co.*, 14 Fla. L. Weekly Supp. 614a (15th Cir. Ct. (App.) 2007) (affirming the trial court's summary judgment in favor of the insurer and holding that the provider's demand did not satisfy the demand letter requirements of the PIP statute); *Precision Diagnostic of Lake Worth, LLC (a/a/o Violette Timoleon) v. State Farm Mut. Auto. Ins. Co.*, 21 Fla. L. Weekly Supp. 357a (Fla. 15th Jud. Cir. Cty. January 10, 2014) (granting summary judgment in favor of the insurer based on plaintiff's deficient pre-suit demand).

2. **Whether Plaintiff improperly unbundled CPT code A4556, rendering it noncompensable**. Consistent with this Court's prior ruling, this is a legal issue that requires no further fact discovery in this case. *See Central Palm Beach Physicians & Urgent Care d/b/a Total MD (a/a/o Stephane Morgan) v. Allstate Fire and Casualty Ins. Co.*, Case No. 50-2017-SC-004021 (Palm Beach County Court, September 9, 2019) ("This Court finds that Plaintiff's sole theory of breach, compensability of the Plaintiff's billing of HCPCS Code A4556 on 2/23/15, presents solely a pure issue of law to be adjudicated by way of summary judgment, requiring no fact discovery.") (citing *State Farm Mutual Automobile Insurance Company v. R.J. Trapana, M.D. P.A. (a/a/o Noemi Marquez)*, 23 Fla. L. Weekly Supp. 98a (Fla. 17th Cir. Ct. (App.) (2015)) (holding the improper billing and unbundling defense were legal issues and thus the county court erred in failing to grant the insurer's summary-judgment motion)).

* * *

Small claims—Arbitration—Civil procedure—Invocation of one or more additional Rules of Civil Procedure

NICHOLAS COADY, Plaintiff, v. EXPERIAN INFORMATION SOLUTIONS, INC., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE20015817, Division 53. September 16, 2020. Robert Lee, Judge. Counsel: Daniel Tam, Miami Beach, for Plaintiff. Andrew Juan Turnier, Miami, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO SET ASIDE ORDER REFERRING CASE TO ARBITRATION

This matter having come before the Court for consideration of the Plaintiff's Motion, and the Court's having been sufficiently advised in the premises, it is hereby ORDERED that

The Plaintiff's Motion is DENIED. In the case traveling under the Small Claims Rules, the Court is not limited to the option of invoking all or none of the Rules of Civil Procedure. The Court may invoke "1 or more additional Rules of Civil Procedure." Rule 7.020(c). In this case, by issuing its Order Referring Case to Arbitration,the Court has necessarily invoked the Rules set forth in the Order.

* * *

Criminal law—Driving under the influence—Evidence—Experts—Physical roadside tests—Officer's lay opinions regarding physical roadside tests does not rise to level of expert testimony—Defendant not entitled to *Daubert* hearing

STATE OF FLORIDA, Plaintiff, v. SEISNARINE MOONILAL, Defendant. County Court, 17th Judicial Circuit in and for Broward County, Criminal Division. Case No. 13-003923MM10A. March 24, 2014. Mindy Solomon, Judge.

ORDER

The defendant is not entitled to a *Daubert* hearing regarding the physical roadside tests based on the applicable caselaw. The officer's lay opinions regarding the physical roadside tests does not rise to the level of expert testimony.

The court will not limit the officer's testimony regarding his training and experience as this goes to the credibility of the witness for the jury to weigh.

* * *

Criminal law—Search and seizure—Motion to suppress—Sufficiency—Lack of particularity of facts and specific legal issues—Denial without prejudice to refiling

STATE OF FLORIDA, Plaintiff, v. KATHERINE ANN BURNS, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 2020-CT-014985-AXXX-XX. July 24, 2020. Aaron Peacock, Judge. Counsel: Nicole Hosey, Assistant State Attorney, for Plaintiff. Joe Easton, for Defendant.

ORDER GRANTING IN PART AND DENYING IN PART STATE'S MOTION TO SUMMARILY DENY THREE GROUNDS IN DEFENDANT'S MOTION TO SUPPRESS

This cause came to be heard before the Court on July 21, 2020 on the State's *Motion to Summarily Deny Three Grounds in Defendant's Motion to Suppress.* Nicole Hosey, Esq. and Ben Fox, Esq. appeared on behalf of the State of Florida and Joe Easton, Esq. represented the Defendant. The Court having reviewed the State's Motion, heard and evaluated the arguments of counsel, and being otherwise fully advised in the premises, finds as follows:

The State's *Motion to Summarily Deny Three Grounds in Defendant's Motion to Suppress* is **granted in part and denied in part** based on the authority of rules 3.190(g)(2) & (3), Florida Rules of Criminal Procedure, and the reasoning of *State v. Christmas,* 133 So.3d 1093 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D280d]. Specifically, it is **ORDERED AND ADJUDGED** as follows:

1. State's motion to summarily deny the alleged illegal traffic stop on the ground that Defendant's motion lacked particularity of facts and specific legal issues is **GRANTED**, without prejudice to re-file this ground. In the argument section, the Defendant only cited general law on encounters with citizens. Such an argument does not satisfy Fl. R. Crim. P. 3.190 and the authorities cited on the record. The Defendant also did not provide specific factual reasoning as to why the traffic stop was illegal which is also required under Fl. R. Crim. P. 3.190 and the authorities cited on the record.

2. State's motion to summarily deny on the ground there was no reason for suppression or factual basis provided in Defendant's Motion no reasonable suspicion for the DUI investigation is **DENIED**.

3. State's motion to summarily deny the allegation of no probable cause for DUI or authority to arrest on the ground that the Defendant's motion lacked particularity of facts and specific legal issues is **GRANTED**, without prejudice to re-file this ground. In the argument section, the Defendant only alleged that the burden is on the State to establish probable cause due to a warrantless arrest. Such an argument does not satisfy Fl. R. Crim. P. 3.190 and the authorities cited on the record. The Defendant also did not provide specific factual reasoning as to why probable cause did not exist to arrest her which is also required under Fl. R. Crim. P. 3.190 and the authorities cited on the record.

* * *

Criminal law—Search and seizure—Motion to suppress—Sufficiency—Motion to suppress is not legally sufficient where motion does not include particular evidence sought to be suppressed, lacks facts, and addresses legal issues only in conclusory manner

STATE OF FLORIDA, Plaintiff, v. MARCOS LUIS SANTOS, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2018-CT-049262-AXXX-XX. July 27, 2020. Aaron Peacock, Judge. Counsel: Barbara McIsaac, for Plaintiff. Johnathan Burns, for Defendant.

ORDER GRANTING STATE'S MOTION TO SUMMARILY DENY DEFENDANT'S MOTION TO SUPPRESS

This cause came to be heard before the Court on July 16, 2020 on the Defendant's *Motion to Suppress* and on the State's *Motion to Strike or Summarily Deny Defendant's Motion to Suppress*. Barbara McIsaac, Esq. appeared on behalf of the State of Florida and Johnathan Burns, Esq. represented the Defendant. The Court having reviewed the State's Motion, having heard and evaluated the arguments of counsel, and being otherwise advised in the premises, finds as follows:

The State's *Motion to Summarily Deny* is ***granted*** based on the authority of Florida Rules of Criminal Procedure 3.190(g)(2) & (3), and on the reasoning of *State v. Christmas*, 133 So.3d 1093 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D280d].

Subdivision (g)(2) of rule 3.190 states: "Every motion to suppress evidence shall state clearly the particular evidence sought to be suppressed, the reasons for suppression, and a general statement of the facts on which the motion is based." Subdivision (g)(3) of rule 3.190 states, in pertinent part: "Before hearing evidence, the court shall determine if the motion is legally sufficient. If it is not, the motion shall be denied."

The only facts alleged in the Defense's motion are as follows: "On or about October 14, 2018, Brevard Sheriff Deputy Robert Wagner #0121, approached Mr. Santos and asked the Defendant to submit to Field Sobriety Exercises without any indication of an illegal driving pattern." And then there is a list of conclusory grounds for suppression (a through k) that do not directly relate to the facts alleged.

The Court finds that the Defense's *Motion to Suppress* is not legally sufficient, as required by rule 3.190(g)(3), and therefore it must be summarily denied without the necessity of hearing evidence. This is because the motion does not include the particular evidence sought to be suppressed; the facts in the motion are particularly lacking; and the motion does not address specific legal issues, other than in conclusory fashion.

In the *Christmas* case, the Defense argued the lack of qualification of the K9 unit at the hearing on the motion to suppress but did not put those facts or that argument in its motion. The trial court had the State proceed on the motion to suppress but the State did not put on evidence addressing the issue of the dog's reliability because the State

had no notice that this issue would be litigated. This led to the motion to suppress being granted in that case. But the State in *Christmas* was put in a position of defending an argument without notice. For this reason, the Fourth District Court of Appeal reversed the suppression order.

The State in the instant case is properly trying to avoid the same type of notice problem as that which occurred in *Christmas*. Here, based on the 923 arrest report, there are multiple issues that could be litigated in the Defense's motion to suppress (e.g., legality of the Defendant's driving pattern, reliability of the informant who called 911, was this even a stop as opposed to a consensual encounter?, etc.) without any proper facts or specific legal argument to put the State on notice of such issues.

For these reasons, it is **ORDERED AND ADJUDGED** that the State's *Motion to Strike or Summarily Deny the Defendant's Motion to Suppress* is **GRANTED** without prejudice to the Defense to re-file its motion in compliance with 3.190(g)(2).

* * *

Criminal law—Evidence—Medical records—Motion to exclude from evidence records of hospital to which defendant involved in accident was transported at deputy's direction to receive medical clearance prior to transport to jail is denied—Where there was no evidence that defendant did not need medical treatment and should not have been required to be examined and cleared before being transported to jail, it would be invasion of province of executive branch for court to order that arrestee cannot be required to be medically cleared prior to transport to jail

STATE OF FLORIDA, Plaintiff, v. ABELA JOSEPH, Defendant. County Court, 20th Judicial Circuit in and for Collier County. Case No. 19CT1325. July 21, 2020. Blake Adams, Judge.

ORDER DENYING DEFENDANT'S MOTION IN LIMINE

THIS CAUSE comes before the Court on Defendant's "First Motion in Limine," e-filed by counsel on March 9, 2020. Having reviewed the motion, the case file, applicable law, and having conducted an evidentiary hearing on the motion on July 2, 2020, the Court finds the following:

1. In his motion, Defendant seeks to exclude any and all evidence obtained at Physician's Regional Hospital on June 1, 2019, related to the examination and treatment of Defendant as a result of Deputy Corwin's instructions to EMS to transport Defendant to the hospital to receive medical clearance of Defendant prior to transporting him to the Naples Jail Center.

2. At the evidentiary hearing, Deputy Corwin testified that he thought it was standard practice to have an arrestee involved in a motor vehicle accident receive medical clearance by a doctor prior to being transported to the jail. He also testified that he had no interaction with the hospital staff as it related to Defendant in the case at bar. Director Katina Bouza of the Collier County Sheriff's Office Corrections Department testified that there is no written policy or standarc practice that arresting officers are required to get medical clearance of an arrestee involved in a motor vehicle crash prior to transporting the arrestee to the jail. However, she testified that in order to be allowed entry into the custody of the jail, the arrestee is interviewed and examined by a nurse or other medical personnel to determine if there has been any trauma or injuries that may necessitate medical clearance before entry into the jail is allowed. Zinna Rodriguez of Armor Correctional Health Services which contracts with the Naples Jail Center to provide medical services to inmates testified that there is no policy that all arrestees involved in a motor vehicle crash have to be medically cleared by a doctor prior to entry into the jail. She further testified that all arrestees are medically interviewed and examined, and that this process determines whether an arrestee needs medical clearance from a doctor prior to entry into the jail.

3. Section 395.3025(4)(a), Fla. Stat., provides that upon an issuance of a subpoena patient records may be disclosed in a criminal action. In the case at bar, the State filed a motion on August 15, 2019, seeking a subpoena for Defendant's medical and EMS records. A hearing was held on the motion on August 23, 2019. Following the hearing, the Court granted the motion in part and ordered that the Emergency Medical Services records and Physicians Regional Hospital records of Defendant regarding his treatment on June 1-2, 2019, be furnished to the Court for an in camera review. Following the in camera review, the Court determined that the records were relevant to the case at bar and disclosed the records to the parties.

4. The Defense argues that the medical records should be excluded from trial because its disclosure would constitute a violation of Defendant's privacy rights because Deputy Corwin did not follow the Sheriff's Office policy as it relates to arrestees not needing medical clearance prior to being interviewed by a jail medical staff member and because there is no standard practice as it relates to requiring arrestees involved in a motor vehicle crash to be medically cleared by a doctor prior to arrest and entry into the jail.

5. The State argues that this case is similar to that found in *State v. Tuttle,* 20 Fla. L. Weekly Supp. 108a (Fla. 20th Cir. Ct. June 11, 2011). In *Tuttle,* the arrested defendant was involved in a motor vehicle crash, cleared by EMS on the scene, and transported to the jail. At the jail, the defendant refused to be examined by the jail medical staff and was denied entry into the jail until medically cleared by a doctor. The defendant was then transported to a hospital, examined, and then returned to the jail for entry. During the hospital visit, medical blood was drawn, and upon the toxicology results, determined that the defendant was over the legal blood alcohol level. The trial court subsequently granted the defendant's motion to suppress the medical records determining

> that there was no articulable medical issue presented to necessitate the transportation of Appellee to the hospital since Appellee had already been placed in custody and medically cleared by emergency medical personnel at the scene of the incident; that there was no evidence that an established protocol existed to allow jail personnel to determine not to permit entry of a person into custody; and that there was no articulable reason to prevent unbridled discretion of jail personnel to require an arrestee's transport to a medical facility when no medical necessity is presented.

Tuttle, 20 Fla. L. Weekly Supp. 108a. The appellate court determined that the trial court had "no legal or medical authority to support such findings and" reversed. *Id.* In its decision, the Court stated, "The separation of powers principle prohibits the trial court from requiring strict medical or booking procedures or dictating the manner in which health care providers for a jail carry out the Sheriff's duty to provide medical care to arrestees or inmates in its custody." *Id.* (citing *Bradshaw v. Sandler,* 955 So. 2d 1219, 1221 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1239b]).

6. The difference between the facts in *Tuttle* and the case at bar is that, here, Deputy Corwin determined that Defendant should get medical clearance before taking Defendant to the jail. Another difference is that since the *Tuttle* opinion the Collier County Sheriff's Office seems to have implemented a written policy that an arrestee should receive medical clearance from a doctor if a medical staff member determines the need exists prior to entry into the jail. However, in *Tuttle,* the defendant argued "that there was adequate evidence presented to the court to make a factual determination that Appellee did not need any medical treatment and should not have been required to be examined and cleared by an emergency room medical professional prior to being booked into the custody of the

jail." The appellate court rejected this argument stating, "Health care determinations of an arrestee or inmate should be made by medical care providers that are in the best position to make these factual determinations, not patrol deputies or the judiciary."

7. In the case at bar, there was no evidence presented that Defendant did not need any medical treatment and should not have been treated nor been required to be examined or cleared by a doctor prior to being transported to the jail other than Deputy Corwin's testimony that Defendant had been cleared by EMS at the scene. Despite there being no written policy or standard practice for a deputy to require an arrestee to be examined by a doctor prior to transport to the jail, this Court agrees with the Court in *Tuttle* that it would be an invasion into the province of the executive branch to order otherwise. Additionally, Defendant in the case at bar could have refused treatment by EMS or Physicians Regional Hospital then been transported to the jail to be examined by jail medical staff prior to entry into the custody of the jail or for jail medical staff to determine if medical clearance by a doctor was required prior to entry into the jail.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's motion in limine is DENIED without prejudice.

* * *

Criminal law—Driving under influence—Search and seizure—Detention—Signs of impairment observed by stopping deputy provided reasonable suspicion to detain defendant for DUI investigation—Twenty-two minute detention while awaiting arrival of Spanish-speaking officer was not unreasonably long

STATE OF FLORIDA, v. YOANKI JUAN QUINTERO ARANGO, Defendant. County Court, 20th Judicial Circuit in and for Lee County. Case No. 19-CT-504526. August 3, 2020. Archie B. Hayward, Judge. Counsel: Brandon M. Greenberg, Assistant State Attorney, Office of the State Attorney, Fort Myers, for State. Rene Suarez and Chris Brown, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE comes before the Court on Defendant's "Motion To Suppress All Evidence Obtained As A Result Of An Illegal Detention," filed February 21, 2020. Having reviewed the motion, the case file, the applicable law, and having heard argument and presentation of evidence by the parties on July 20, 2020, the Court finds as follows:

1. Defendant argued that the evidence related to his arrest for driving under the influence (DUI) must be suppressed because he was detained for an unreasonable time during the DUI investigation while the officer on the scene waited for an officer who spoke Spanish.

2. The State argued that law enforcement may detain an individual if it is believed a crime was committed, and the length of the detention was reasonable for the time it took the Spanish speaking officer to travel to the scene.

3. At the hearing, the State called Deputy Smith and Deputy Rojas. Deputy Smith testified that he had worked for the Lee County Sheriff's Office for seven years. He had training and experience in DUI investigations. He did not speak any Spanish. On the night of the stop, he was on speed enforcement patrol. He observed a black truck he estimated was speeding based on his training and experience. He testified that he visually estimated the vehicle's speed to be 75 miles per hour, in a 45 mile per hour zone[1]. He confirmed the excessive speed with the radar, which indicated 68 miles per hour. As soon as he pulled out, the black truck pulled over. He turned on his lights to effectuate the stop. Defendant was the driver, and his demeanor was sluggish, he moved slow, and he had watery and bloodshot eyes. Deputy Smith noted that observing Defendant in court, his movements were not sluggish. He could communicate with Defendant, who spoke broken English. Defendant indicated his primary language was Spanish. Defendant's speech was slurred, and Deputy Smith observed an odor of alcohol coming from Defendant. Deputy Smith testified that he called on the radio for an officer to come assist with translation, because he wanted to make sure Defendant was fully understanding what was happening during the DUI investigation. He put out that general call on the radio at about 1:26 A.M. Someone arrived at 1:48 A.M. He told Defendant to remain in his vehicle. Deputy Smith stated that he was busy filling out the forms and documents for the stop, running registration, identification and license, writing the citation, and reading reports. He was repeatedly interrupted by Defendant getting out of his vehicle and trying to speak to him, and each time he had to stop what he was doing, talk to Defendant, and get Defendant back in his vehicle. Then Deputy Rojas arrived, and they began field sobriety exercises.

4. On cross-examination, Deputy Smith testified that he ran Defendant's information through the Lee County Sheriff's Office system, ELVIS, FCIC and NCIC. He did not remember if he also ran DAVID. It usually takes about 12 seconds for the results to come back, but the time depends on whether there is lag and the request has to be run again. He did not recall what results came back. The results do not come back just for that individual, since the systems always give results for every similar name, date of birth, and so on. He had to scroll through each report's results to see if any were for Defendant. When he initially spoke to Defendant, there were words Defendant indicated he did not understand. Deputy Smith testified that he always calls another officer to assist with Spanish and read informed consent. The time of 1:57 A.M. on the citation was the arrest time, and that was the time the Clerk's office required them to put on citations. He stated that he wanted Defendant to remain in his vehicle because it was a safety issue. Defendant had not been patted down and the vehicle had not been searched. Further, Defendant kept interrupting him and keeping him from finishing his paperwork and reading the reports. Deputy Smith testified that it would be hard to have an officer interpret over the phone, because he would be unable to hold the phone, flashlight, take notes on what was happening, and maintain safety.

5. Deputy Rojas testified that he had worked for the Lee County Sheriff's Office for three years. He speaks Spanish, and is routinely called by other officers to translate for them. He did not know the exact time he arrived on scene. He did not recall if other officers were there. Defendant indicated he was more comfortable speaking Spanish with him. He observed an odor of alcohol coming from Defendant. He read Defendant implied consent in Spanish. He did not recall if he read *Miranda.* On cross-examination, Deputy Rojas testified that he sometimes translates for other officers over the phone.

6. In determining whether a stop should be suppressed, the only determination is generally whether probable cause existed for the stop. *Holland v. State,* 696 So. 2d 757, 759 (Fla. 1997) [22 Fla. L. Weekly S387a]. A violation of a traffic law provides sufficient probable cause to render any subsequent search and seizure reasonable. *Id.* Once a police officer stops a car for a traffic infraction, the officer is then justified in detaining the driver "only for the time reasonably necessary to issue a citation or warning, . . ., unless he ha[s] a reasonable suspicion of criminal activity." *Sanchez v. State,* 847 So. 2d 1043, 1046 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1239b], *quoting State v. Moore,* 791 So. 2d 1246, 1249 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D2037d]. Whether an officer's suspicion is reasonable is determined by the totality of the circumstances that existed at the time and is based solely on the objective articulable facts known to the officer. *LaFontaine v. State,* 749 So. 2d 558, 560 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D225a] *citing Travers v. State,* 739 So. 2d 1262 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D1930b]; *McCloud v. State,* 491 So. 2d 1164 (Fla. 2d DCA 1986).

7. Here, the Court finds that the signs of impairment observed by Deputy Smith were reasonable suspicion Defendant was committing DUI in order to detain him for a DUI investigation. The Court also finds that the detention for a DUI investigation assisted by the translation of a Spanish speaking officer was not unreasonably long. The wait for a translator was for Defendant's benefit, and Deputy Smith testified that he always calls a Spanish speaking officer to translate, to ensure defendants understand what is happening. Deputy Rojas testified that Defendant indicated he was more comfortable proceeding with him translating. Defendant presented no legal authority that requires translation to occur over the phone if the officer on the scene has safety concerns.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's motion to suppress is DENIED.

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[1]The probable cause affidavit indicated he estimated the speed to be 70 miles per hour.

* * *

Criminal law—Evidence—Field sobriety exercises—Horizontal gaze nystagmus test and seated exercises

STATE OF FLORIDA, Plaintiff, v. SCOTT D. ZAJACZKOWSKI, Defendant. County Court, 20th Judicial Circuit in and for Collier County, Criminal Action. Case No. 11-2013-MM-001167-AXXX-XX. June 25, 2014. James M. McGarity, III, Judge.

ORDER GRANTING IN PART AND DENYING IN PART THE DEFENDANT'S MOTION IN LIMINE #2 (Meador objection)

THIS MATTER having come on to be heard on the Defendant's Motion in Limine #2 (*Meador* objection), and the Court having considered the motion, case law, and arguments of counsel hereby determines that:

IT IS ORDERED that the Defendant's Motion in Limine #2 (*Meador* objection) is GRANTED IN PART, in that: (1) the STATE OF FLORIDA (hereafter "State") may not elicit scientific evidence regarding the Horizontal Gaze Nystagmus exercise at trial; (2) the State may not elicit testimony using the terms "test", "pass", "fail", or "points" at trial; and (3) the State may not elicit testimony quantifying the results of the Defendant's performance on the seated field sobriety exercises.

AND IT IS ORDERED that the Defendant's Motion in Limine #2 (*Meador* objection) is DENIED IN PART, in that: (1) the State may elicit testimony using the terms "tasks", "exercises", "clues", "indicators", and/or "signs of impairment"; (2) the State may elicit testimony regarding the arresting officer's training to administer the seated field sobriety exercises; and (3) the State may elicit testimony regarding the instructions the arresting officer gave regarding the seated field sobriety exercises.

* * *

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MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Bar associations and organizations—A judge may retain membership and serve on a committee for the Federal Bar Association—Judge may make educational presentations to law enforcement agents on subject the judge mastered while serving as a prosecutor and may participate in educational programs involving those same subjects, so long as the time devoted to these endeavors does not interfere with the performance of the judge's official duties or call into question the judge's impartiality

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2020-20. Date of Issue: August 11, 2020.

ISSUES

MAY A JUDGE RETAIN MEMBERSHIP IN AND SERVE ON A COMMITTEE FOR A FEDERAL BAR ASSOCIATION?

ANSWER: Yes.

MAY A JUDGE CONTINUE TO MAKE EDUCATIONAL PRESENTATIONS TO LAW ENFORCEMENT AGENTS ON A SUBJECT THE JUDGE MASTERED WHILE SERVING AS A PROSECUTOR?

ANSWER: Yes, so long as the judge refrains from doing so in a manner that could cause the judge's impartiality to be questioned.

MAY A JUDGE CONTINUE TO PARTICIPATE IN EDUCATIONAL PROGRAMS INVOLVING THOSE SAME SUBJECTS?

ANSWER: Yes, so long as the time devoted to these endeavors does not interfere with the performance of the judge's official duties or call into question the judge's impartiality.

FACTS

A newly-appointed judge asks if it is permissible to continue to engage in certain activities associated with the judge's prior employment as a federal prosecutor. During that time the judge developed an expertise in the False Claims Act, 31 U.S.C. §§3729-3733, which is aimed at suppressing false claims submitted to the federal government. Specifically, the judge inquires (a) whether the judge may continue membership on the board of a Federal Bar Association division related to the Act in question; (b) whether the judge may still make presentations to law enforcement on the topic, as the judge did prior to taking the bench; and (c) whether the judge may engage in Continuing Legal Education, webinars, and other educational presentations regarding the Act.

The new judge has assured this Committee that the judge's field of expertise is not on a subject that would come before a state trial judge and that the activities in question would not be so time-consuming as to interfere with the judge's current responsibilities.

DISCUSSION

The judge's proposed conduct is governed by Canon 4 of the Code of Judicial Conduct, which encourages Florida's judges "to engage in activities to improve the law, the legal system, and the administration of justice." These include speaking, writing, lecturing, teaching, and participating in "quasi-judicial activities concerning the law, the legal system, [and] the administration of justice." Canon 4B. Moreover, judges are "encouraged to serve as a member, officer, director, trustee, or non-legal advisor of an organization or governmental entity devoted to the improvement of the law, the legal system, the judicial branch, or the administration of justice." Canon 4D. While Canon 4 does not grant *carte blanche* to all such activities, its restrictions are reasonable. They include avoidance of anything that might cast reasonable doubt on the judge's impartiality or independence, interfere with the judge's proper performance of judicial duties, or lead to frequent disqualification.

The Federal Bar Association is a voluntary association founded in 1920 and "is dedicated to the advancement of the science of jurisprudence and to promoting the welfare, interests, education, and professional development of all attorneys involved in federal law." **https://www.fedbar.org/about-us/**. Its membership is not limited to prosecutors. This Committee concludes that continuing membership and active participation in the activities available to members of this association fall squarely within the scope of what is permitted, even encouraged by, Canon 4. This is consistent with numerous prior opinions such as Fla. JEAC Op. 1998-18 [6 Fla. L. Weekly Supp. 306a] (approving of a judge remaining active in a local voluntary bar association) and Fla. JEAC Op. 2000-28 [8 Fla. L. Weekly Supp. 57b] (participation in a local bar association's campaign practices subcommittee). Moreover, an analogy may be drawn between the judge's proposed conduct and the participation of Florida judges in such official committees as those entrusted with drafting jury instruction or rules of court procedure.

With respect to educational presentations primarily geared toward prosecutors or law enforcement agents, this Committee has interpreted Canon 4 as allowing a judge to teach in a police academy at a local junior college, though cautioning the judge to "be careful not to answer hypothetical questions, not to comment on pending cases, and not to make remarks that could result in disqualification." Fla. JEAC Op. 2005-04 [12 Fla. L. Weekly Supp. 507a]. It is safe to assume that the inquiring judge in Op. 05-04 would be teaching police trainees who might someday appear in court before that same judge. In the present case no federal prosecutors will be handing cases before the judge and, in the event federal agents (such as FBI agents) were to appear as witnesses it would be in connection with local or state personnel and would not involve the federal statute that was the judge's specialty. This lessens the likelihood that the judge's educational efforts will lead to motions to disqualify, but the judge should remain mindful of the opinion's guidance.

We have also approved of a judge teaching law and trial skills at the annual Dependency Summit sponsored by the Florida Department of Children and Families. *See* Fla. JEAC Op. 2008-21 [15 Fla. L. Weekly Supp. 1238b]. Dependency is a subject that would come before a state court judge. We recommended that "the judge should ensure that the course is intended to provide an educational benefit for all attendees. The course should not be designed or taught in a manner that would appear to constitute a training session for DCF attorneys. To tailor the course solely for the benefit of DCF attorneys would tend to cast reasonable doubt on the judge's capacity to act impartially as a judge." Again, this may be less of a concern when the judge is instructing federal officials on federal statutory and case law and procedure.

In sum, this Committee has generally indicated that judges may participate in educational offerings by groups even if those groups may be perceived as advocates, such as the Academy of Florida Trial Lawyers, so long as the judge does so in a properly dignified manner and betrays no suggestion of bias. Fla. JEAC 1987-3.

Finally, we find no impediment to the judge participating in functions designed to provide legal education, either as a participant or as an attendee earning CLE credit for the judge's personal benefit

REFERENCES

Florida Code of Judicial Conduct, Canons 4, 4B, 4D
Fla. JEAC Opinions 1987-3, 1998-18, 2000-28, 2005-04, 2008-21

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Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Work habits—Judge may write and publish non-fiction biography of noted attorney, which includes accounts of criminal events and judicial decisions that may reflect negatively on the judicial system in place at the time of the events, as long as the book and recounting of historical events does not cast reasonable doubt on judge's capacity to act impartially as a judge, demean the office, or interfere with judicial duties—Judge may post release date of book on Facebook or other social media—Judge, who is author, may participate in book promotions and speaking engagements in Florida and other states if such events comply with the Canons, including the avoidance of intermingling promotion activities with the responsibilities of a judge and/or demeaning the prestige of the judiciary

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2020-21. Date of Issue: August 11, 2020.

ISSUES

May a judge write and publish a biography of a noted attorney?

ANSWER: Yes. As long as the book does not cast reasonable doubt on the judge's capacity to act impartially as a judge, demean the office, or interfere with judicial duties.

May such a work of non-fiction include accounts of criminal events and judicial decisions that may reflect negatively on the judicial system in place at the time of the events?

ANSWER: Yes. As long as the recounting of said historical events does not cast reasonable doubt on the judge's capacity to act as a judge, demean the office, or interfere with judicial duties.

May a judge post the release date of the book on Facebook or other social media?

ANSWER: Yes.

May the judge who is the author participate in book promotions and speaking engagements about the book in Florida or other states?

ANSWER: Yes, as long as such events comply with the Canons including the avoidance of intermingling promotion activities with the responsibilities of a judge and/or demeaning the prestige of the judiciary.

FACTS

The inquiring judge wishes to publish a biography of a notable criminal attorney who handled a number of high-profile cases, primarily in California, during a career that spanned several decades ending in the late 1960s. The subject attorney is no longer alive. The contents of the book will recount the career of the attorney and the facts surrounding some of his celebrated cases as well as the resulting trials. While the events chronicled in the book took place several decades ago, some accounts will likely cast a few of the judicial decisions in a negative light. The book will refrain from expressing opinions on those decisions beyond what is documented in the historical record. The judge further plans to promote the book on social media and with selected book signings and speaking engagements.

DISCUSSION

Issue 1:

This committee is asked with increasing regularity if a judge may write a book, article, or other publication on a variety of topics. Be they works of fiction, non-fiction, educational or charitable, the rules are largely the same. Canon 5B of the Florida Code of Judicial Conduct encourages judges, as a part of their "avocational" activities, to "write, lecture, teach and participate in other extrajudicial activities." In Fla. JEAC Op. ***95-37***, citing the Commentary to Canon 4B, we recognized that a judge is "in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice." To that end, writing informative books and articles is encouraged. We agreed that it was permissible for a judge to write a biweekly column concerning issues related to attorney's fees. Id. We find that there are no ethical impediments to a judge writing a book or article, regardless of the genre and have said as much on many occasions. See Fla. JEAC Op. ***73-08*** (A judge may write an article in Spanish for a Spanish newspaper.); Fla. JEAC Op. ***76-17*** (A judge may author a procedural manual for publication and sale); Fla. JEAC Op. ***78-12*** (A judge may write a procedural manual with a member of the bar); Fla. JEAC Op. 82-05 (A judge may write and have published a children's book that teaches parents and children the consequences of crime); Fla. JEAC Op. ***88-14*** (A judge may author a book dealing with the defense of child abuse cases); Fla. JEAC Op. ***93-52*** (A majority of the Committee concluded that it is permissible for a judge to co-author a chapter for a Florida Bar's Continuing Legal Education course with a practicing criminal defense lawyer); Fla. JEAC Op. ***98-01*** (A judge may write a crime novel); Fla. JEAC Op. ***10-12*** [17 Fla. L. Weekly Supp. 857a] (A judge may publish a children's book).

However, we have cautioned in the past, as we do now, that in writing any literary materials, judges should be mindful of the issues created by taking any definitive positions. See Fla. JEAC Op. ***07-21*** [15 Fla. L. Weekly Supp. 295a] (We caution the inquiring judge, however, to be careful not to comment on pending cases, not to answer hypothetical questions in a way that appears to commit to a particular position, and not to make any other remarks that could lead to the judge's disqualification or be construed as an indication as to how the judge would rule in a particular case); Fla. JEAC Op. ***00-02*** [7 Fla. L. Weekly Supp. 363b] (When publishing an article on new legislation the judge should be mindful to avoid expressing the judge's views as opposed to educating on the status of the law); Fla. JEAC Op. ***99-14*** (Judge writing an article is cautioned not to intimate how the judge would rule on matters that may come before the judge or upon matters pending before any court); Fla. JEAC Op. ***81-12*** (Judge appearing on a television program offering a guest editorial should not indicate how the judge would rule in any particular scenario or cast doubt on the judge's ability to rule impartially).

The basis of all the cited opinions are the restrictions included in several Canons. Canon 1 provides: "A Judge Shall Uphold the Integrity and Independence of the Judiciary." Fla. Code Jud. Conduct, Canon 1. Canon 2A states that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Fla. Code Jud. Conduct, Canon 2A. Similarly, Canon 2B states: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others[.]" Fla. Code Jud. Conduct, Canon 2B. Finally, Canon 6 provides: "Fiscal Matters of a Judge Shall be Conducted in a Manner That Does Not Give the Appearance of Influence or Impropriety[.] . . ." Fla. Code Jud. Conduct, Canon 6.

Thus, the committee again finds no prohibition on a judge writing a biography, non-fictional or otherwise, as long as the effort is within the confines of the relevant Canons and prior opinions cited.

Issue 2:

A slightly more vexing question is posed regarding the content of the book.[1] This particular inquiry concerns a work of non-fiction. As such, the judge advises that the events and material presented will be historic in nature and supported by appropriate sources and research. Further, some of the judicial rulings recounted could be, with the hindsight of time, considered erroneous or possibly worse. The concern that a book about the life and work of this particular attorney may reflect negatively on the judiciary or law enforcement existing at the time of events are, ostensibly, a matter of historical record. We concede that any work of non-fiction allows an author to present

"facts" in one light or another but normally the format would not lend itself to a judge/author offering commentary that would cast doubt on his or her present day duties and obligations, particularly with events are in the somewhat distant past. Were it otherwise, court rulings could never be second guessed by the legal profession, even with aim of improving the law. With the assurances the judge will abide by the guidance cited above and as required by the Canons, we see no problem in publishing such a work, even if it is "critical" of some decisions.

Issues 3:

We dispense with the issue of announcing the release date on social media with little commentary. We have noted that if a judge is permitted to publish a book, the judge may "post a photo of the judge on the author page, participate in book signings and have it disclosed in a press release that the author is a judge." *Id.* (citing Fla. JEAC Op. ***10-12***) [17 Fla. L. Weekly Supp. 857a]. The mere act of informing people that a book from a judge is forthcoming is not prohibited as long as it complies with the Canons and guidance noted herein.

Issue 4:

The book signings and speaking tours that often accompany promotion of a publication do require additional diligence. The judge must not allow the promotion of the book to demean the judge's office or call into question the judge's impartiality. Additionally, neither the judge, the judge's assistant, nor any member of the judge's family may sell the book to members of the bar. As advised in Fla. JEAC Op. 19-18 [27 Fla. L. Weekly Supp. 336a] "The form of advertisement or promotion chosen by the judge or the judge's publisher must not be presented in ways that: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) undermine the judge's independence, integrity, or impartiality; (3) demean the judicial office; (4) interfere with the proper performance of judicial duties; (5) lead to frequent disqualification of the judge; or (6) appear to a reasonable person to be coercive. Fla. Code Jud. Conduct, Canons 4A, 5A."

When promoting a book, a judge must also take precautions to make certain the judge does not intermingle the promotion or sale of the book with court related obligations. *In re Hawkins*, 151 So.3d 1200 (Fla. 2014) [39 Fla. L. Weekly S652a]. In *In re Hawkins*, Judge Hawkins operated a private business from which she sold religious themed items among them a book she authored. *Id.* at 1203. The supreme court found violations of several of the Canons because "clear and convincing evidence demonstrated that [Judge Hawkins] regularly used court resources, including the services of her judicial assistant, [to conduct the judge's private] business at work and during working hours." *Id.* at 1212. The evidence included lawyers and other court personnel purchasing the book at the courthouse. *Id.* Additionally, speaking engagements for the private business were coordinated using the judge's work phone, work computer and were handled by her judicial assistant. *Id.* Judge Hawkins linked the sale of her business products to her judicial office by appearing on the business website wearing the judge's judicial robe, exploiting the judge's judicial position for personal gain. *Id.*

The overriding caution the committee wishes to convey to the judge, whether it involves the pursuit of a book promotion or any other extra-judicial activity, is the precept expressed in Canon 3A. Specifically, "*The judicial duties of a judge take precedence over all the judge's other activities*". The plain language of such a directive requires no further explanation from us.

In conclusion, if the judge follows the parameters set forth in the Canons and the cited opinions, the judge may write, publish, and promote the biography as described in the inquiry.

REFERENCES

Fla. Code Jud. Conduct, Canons 1,2A, 2B, 3A,4A, 4B, 5A, 6 Fla. JEAC Ops. **10-12**, **07-21**, **07-04**, **00-02**, **99-14**, **98-01**, **95-37**, **93-52**, **88-14**, **83-07**, **82-05**, **81-12**, **78-12**, **76-17**, **73-08, 19-18, 20-01**
In re Hawkins, 151 So. 3d 1200 (Fla. 2014)

[See Canons of Uniformity.]

[1]The committee has not been provided with the specific content of the book.

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