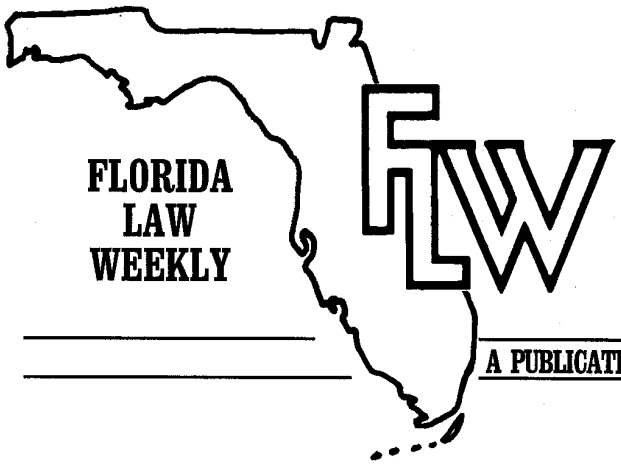
Volume 28, Number 7, November 30, 2020



SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 565-637

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.

- **HEALTH MAINTENANCE ORGANIZATIONS—CONTRACTS—IMPLIED—UNJUST ENRICHMENT—QUANTUM MERUIT— OUT-OF-NETWORK PROVIDERS. The circuit court denied a motion to dismiss an amended complaint brought by an out-of-network emergency medical provider against a health maintenance organization based on the HMO's alleged underpayment of claims submitted by the provider. The court rejected the HMO's argument that the claims at issue were required to be attached to the complaint. The HMO was on sufficient notice of the identity of the claims, and the provider's action was based on the HMO's alleged violation of section 641.513, the parties' implied-in-fact contract, and equitable rights. The complaint was not insufficient for failing to allege the plaintiff's compliance with the statutory requirement that all claims against HMOs for underpayment be submitted within twelve months of payment where the complaint generally averred that all conditions precedent had been performed, waived, or otherwise satisfied. The provider sufficiently stated a cause of action for breach of a contract implied-in-fact, and the court found no merit to the defendant's argument that Florida HMO law prohibits implied-in-fact contracts between HMOs and out-of-network providers. The court further held that the provider could assert both unjust enrichment and quantum meruit claims against the HMO at the same time, and that the correct measure of damages for those claims was the difference between the fair value of services rendered and the amount the HMO paid for those services. Finally, the court held that the provider had sufficiently stated a cause of action for declaratory relief based on the parties' dispute whether the HMO's rates violated state law and the rates at which the HMO was required to reimburse the provider.** *INPHYNET SOUTH BROWARD, LLC v. AVMED, INC. Circuit Court, Seventeenth Judicial Circuit in and for Broward County. Filed August 31, 2020. Full Text at Circuit Courts-Original Section, page 611a.*

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

Bold denotes decision by circuit court in its appellate capacity.

TORTS (continued)

VENUE

ZONING

* * *

TABLE OF CASES REPORTED

TABLE OF CASES REPORTED (continued)

TABLE OF CASES REPORTED (continued)

* * *

TABLE OF STATUTES CONSTRUED

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

FLORIDA CONSTITUTION

Art. X, sec. 4 Surf Consultants III (LLC) v. Gil CO 625a

FLORIDA STATUTES

47.051 S. Viroja, P.A. v. United Automobile Insurance Company CO 629a
51.011(1) (2018) Family First Health Plans, Inc. v. MROD Realty Corp. **15CIR 595b**
83.44 245 C&C, LLC v. Cano **11CIR 581a**
83.64 245 C&C, LLC v. Cano **11CIR 581a**
83.64(1)(f) 245 C&C, LLC v. Cano **11CIR 581a**
83.64(3) 245 C&C, LLC v. Cano **11CIR 581a**
86.091 (2001) Physicians Group, L.L.C. v. Direct General Insurance Company CO 626a
90.612(2) (2019) Wilson v. State **6CIR 572a**
90.702 Mendez v. American Integrity Insurance Company of Florida **9CIR 578a**
90.704 Mendez v. American Integrity Insurance Company of Florida **9CIR 578a**
95.11(3)(k) Portfolio Recovery Associates, LLC v. Fluman CO 618b
163.3215(2) Cuesta v. City of Miami 11CIR 602a
163.3215(3) Cuesta v. City of Miami 11CIR 602a
196.195(3) Abdullah v. Henriquez **13CIR 593b**
222.25(1) Surf Consultants III (LLC) v. Gil CO 625a
316.1925(1) State v. Olcott CO 615b
316.1932(1)(b)2 (2018) State v. Wynn **4CIR 565b**
316.1934(5) State v. Wynn **4CIR 565b**
316.605(1) State v. Morrison CO 623b
316.605(1) (2017) Morales v. State **11CIR 590a**
320.02(1) State v. Morrison CO 623b
320.0605(1)(a) State v. Morrison CO 623b
322.263(2) Selland v. State, Department of Highway Safety and Motor Vehicles **1CIR 565a**
559.715 Portfolio Recovery Associates, LLC v. Fluman CO 618b
627.428 Beaches Open MRI of Boynton Beach, LLC v. State Farm Mutual Automobile Insurance Company CO 630a
627.736(5)(a)1.f Performance Health and Chiropractic, Inc. v. Progressive American Insurance Company CO 635a
627.736(5)(a)5 (2012) Fusion Chiropractic PLLC v. Geico General Insurance Company CO 632a
627.736(5)(d) Performance Health and Chiropractic, Inc. v. Progressive American Insurance Company CO 635a
627.736(6)(b) New Life Rehab Medical Center v. United Automobile Insurance Company CO 624a
627.736(6)(c) New Life Rehab Medical Center v. United Automobile Insurance Company CO 624a
627.736(6)(f) Emergency Physicians, Inc. v. USAA Casualty Insurance Company CO 620a; Emergency Medical Associates of Tampa Bay LLC v. USAA General Indemnity Company CO 621a
627.736(8) Beaches Open MRI of Boynton Beach, LLC v. State Farm Mutual Automobile Insurance Company CO 630a
627.7407(2) Beaches Open MRI of Boynton Beach, LLC v. State Farm Mutual Automobile Insurance Company CO 630a
633.202 Casa del Mar Condominium Association, Inc. v. Key Biscayne Fire Rescue Department **11CIR 585a**

TABLE OF STATUTES CONSTRUED (continued)

FLORIDA STATUTES (continued)

633.208(5) Casa del Mar Condominium Association, Inc. v. Key Biscayne Fire Rescue Department **11CIR 585a**
641.3155(17) InPhyNet South Broward, LLC v. AvMed, Inc. 17CIR 611a
641.513(5) InPhyNet South Broward, LLC v. AvMed, Inc. 17CIR 611a
713.015(1) Poinciana Development Group LLC v. Marchetta 11CIR 601a
713.015(2)(b) Poinciana Development Group LLC v. Marchetta 11CIR 601a
718.112(2)(l) Casa del Mar Condominium Association, Inc. v. Key Biscayne Fire Rescue Department **11CIR 585a**
800.03 (2017) Marable v. State **11CIR 591b**

RULES OF CIVIL PROCEDURE

1.140(d) Family First Health Plans, Inc. v. MROD Realty Corp. **15CIR 595b**
1.510(c)(1) Mendez v. American Integrity Insurance Company of Florida **9CIR 578a**
1.510(e) Mendez v. American Integrity Insurance Company of Florida **9CIR 578a**

RULES OF CRIMINAL PROCEDURE

3.191 State v. Taylor CO 617a

* * *

TABLE OF CASES TREATED

Case Treated / In Opinion At

Allstate Fire & Casualty Insurance Company v. Perez, 111 So.3d 960 (Fla. 2DCA 2013)/CO 635a
Andres v. State, 254 So.3d 283 (Fla. 2018)/**6CIR 572a**
Brindise v. U.S. Bank Nat'l Ass'n., 183 So.3d 1215 (Fla. 2DCA 2016)/CO 618b
Bristol West Ins. Co. v. MD Readers, Inc., 52 So.3d 48 (Fla. 4DCA 2010)/CO 628b
Carson v. Rossignol, 559 So.2d 433 (Fla. 4DCA 1990)/**15CIR 595b**
Chevaldina v. R.K./FL Mgt., Inc., 133 So.3d 1086 (Fla. 3DCA 2014)/**11CIR 588b**
Crooks v. State, 710 So.2d 1041 (Fla. 2DCA 1998)/CO 618a
Danis Indus. Corp. v. Ground Improv. Techniques, Inc., 645 So.2d 420 (Fla. 1994)/CO 630a
Days Inns Acquisition Corp. v. Hutchinson, 707 So.2d 747 (Fla. 4DCA 1997)/**15CIR 595b**
Department of Revenue v. Howard, 916 So.2d 640 (Fla. 2005)/**13CIR 593b**
Detournay v. City of Coral Gables, 127 So.3d 869 (Fla. 3DCA 2013)/11CIR 602a
Diaz v. State, 139 So.3d 431 (Fla. 3DCA 2014)/**6CIR 572a**
Farley v. Chase Bank, U.S.A., N.A., 37 So.3d 936 (Fla. 4DCA 2010)/CO 618b
Florida Department of... see, Department of...
Geico Ind. Co. v. Accident & Injury Clinic, Inc., 290 So.3d 980 (Fla. 5DCA 2019)/CO 632a
Geralds v. State, 674 So.2d 96 (Fla. 1996)/**4CIR 567a**
Gonzalez v. State, 541 So.2d 1354 (Fla. 3DCA 1989)/**11CIR 591b**
Green v. State Farm Mutual Automobile Insurance Company, 225 So.3d 229 (Fla. 4DCA 2017)/CO 628b
Greenwich Ass'n, Inc. v. Greenwich Apartments, Inc., 979 So.2d 1116 (Fla. 3DCA 2008)/11CIR 602a
Hoskins v. State, 965 So.2d 1 (Fla. 2007)/**6CIR 572a**
Infantes v. State, 941 So.2d 432 (Fla. 3DCA 2006)/**6CIR 572a**
Ivey v. Allstate Ins. Co., 774 So.2d 679 (Fla. 2000)/CO 630a
Julian v. Julian, 188 So.2d 896 (Fla. 2DCA 1966)/**11CIR 581a**
Liebman v. City of Miami, 279 So.3d 747 (Fla. 3DCA 2019)/11CIR 602a
Logue v. Book, 297 So.3d 605 (Fla. 4DCA 2020)/**11CIR 588b**
Merkle v. Health Options, Inc., 940 So.2d 1190 (Fla. 4DCA 2006)/17CIR 611a
National Collegiate Student Loan Trust 2007-1 v. Lipari, 224 So.3d 309 (Fla. 5DCA 2017)/CO 618b
Old Republic Ins. Co. v. Monsees, 188 So.2d 893 (Fla. 4DCA 1966)/CO 630a
Pagan v. Sarasota County Pub. Hosp. Bd., 884 So.2d 257 (Fla. 2DCA 2004)/CO 626a
Palmer v. Palmer, 109 So.3d 257 (Fla. 1DCA 2013)/11CIR 602a

TABLE OF CASES TREATED (continued)

TABLE OF CASES TREATED (continued)

* * *

Volume 28, Number 7
November 30, 2020
Cite as 28 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Hardship license—Hearing officer did not depart from essential requirements of law by denying hardship license to licensee who continued to drive despite having revoked license—Driving while license is suspended or revoked supports finding of disrespect for law and indifference to safety and welfare of others—Petition for writ of certiorari is denied

MARSHALL CHASE SELLAND, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 1st Judicial Circuit (Appellate) in and for Escambia County. Case No. 2020 CA 000348, Division N. August 20, 2020. Counsel: Elana J. Jones, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING AMENDED PETITION FOR WRIT OF CERTIORARI

(BERGOSH, J.) THIS CAUSE is before the Court upon an Amended Petition for Writ of Certiorari and Petitioner's Brief in Support of Amended Petition for Writ of Certiorari, both filed by and through counsel on April 14, 2020. Petitioner seeks review of the Final Order Denying Early Reinstatement, issued on February 12, 2020, sustaining the administrative suspension of Petitioner's driver's license under section 322.2615, Florida Statutes.

Petitioner alleges he was designated a habitual traffic offender under section 322.264, Florida Statutes, based on three charges, and his license was suspended for five years beginning on September 12, 2016, through September 11, 2021. On February 12, 2020, a hearing was held to determine if he should be issued a hardship license under section 322.271, Florida Statutes. By the order of February 12, 2020, a hardship license was denied, the hearing officer finding as follows:

> A review of your pending court cases revealed evidence of driving while under current revocation as recently as January 31, 2020. Florida Statute 322.263(2) offers the following: "Deny the privilege of operating motor vehicles on public highways to persons who, by their conduct and record, have demonstrated their indifference for the safety and welfare of others and their disrespect for the laws of the state and the orders of the state courts and administrative agencies."

Petitioner asserts there was no evidence of any such indifference for the safety and welfare of others and of disrespect for the law, and the denial does not follow the essential requirements of law.

A circuit court's review of an administrative agency decision is limited to the following three part standard of review:

> (1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence.

See Haines City Community Development v. Heggs, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a].

The record supports the hearing officer's finding that Petitioner drove while his license was revoked as recently as January 31, 2020. For example, when asked how he had been getting around since revocation in 2016, Petitioner stated he had been driving the entire time, and he further stated he had driven almost every day up until January 31, 2020. (Petitioner's Exhibit A, at pp. 13-16.)

Petitioner argues that his offenses are not sufficient to uphold a finding of indifference for the safety and welfare of others. However, the issuance and revocation of a driver's license is done in the interest of public safety. *See Zarsky v. State,* 300 So. 2d 261, 263 (Fla. 1974) (revocation of a driver's license is as an aspect of protecting the public); *City of Miami v. Aronovitz,* 114 So. 2d 784, 787 (Fla. 1959) (finding that the requirement of a driver's license is "an essential segment of our laws for the control and prevention of traffic accidents and fatalities"); *Smith v. City of Gainesville,* 93 So. 2d 105, 107 (Fla. 1957) (finding revocation of a driver's license is an administrative remedy for the public protection); *Jones v. State,* 71 So. 3d 173, 178 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D2120a] (upholding the trial court's finding that driving without a license endangers the public); § 322.42, Fla. Stat. (stating that chapter 22 "shall be liberally construed to the end that the greatest force and effect may be given to its provisions for the promotion of public safety"). *See also* § 907.041(4)(c)4., Fla. Stat. (providing that conditions supporting a finding of a threat of harm to the community include driving with a suspended or revoked driver license). Therefore, driving while one's license is suspended or revoked would demonstrate an indifference for the safety and welfare of others.

As to the second prong of the hearing officer's finding under section 322.263 (2), Petitioner alleges one out of the three citations upon which revocation was based was unknowing, and he asserts that the two other offenses do not demonstrate disrespect for the law.

The offenses of driving while license suspended or revoked both address the evil of defiance of the law. *See Duff v. State,* 942 So. 2d 926, 931 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D2823a]. The Court disagrees with Petitioner's assertion and finds that driving in disregard of two suspensions supports a finding of disrespect for the law. *See generally Brown v. State,* 569 So. 2d 1223, 1224 (Fla. 1990) (finding that disrespect for the law is an inherent component of every criminal offense).

Based upon the above, the record shows the hearing officer did not depart from the essential requirements of law and that competent, substantial evidence supports the denial of hardship license or reinstatement of Petitioner's driving privilege.

Accordingly, it is

ORDERED AND ADJUDGED the Amended Petition for Writ of Certiorari and Petitioner's Brief in Support of Amended Petition for Writ of Certiorari are DENIED.

* * *

Criminal law—Driving under influence—Evidence—Breath test—Inspection and maintenance of breath testing machine—Substantial compliance with administrative rules—Where it is uncontroverted that Intoxilyzer used to test defendant's breath on December 10 was inspected on November 9, but was not inspected in December or in January, state failed to demonstrate substantial compliance with requirement that machine be inspected at least once each calendar month—Trial court erred in suggesting that there is inflexible rule requiring state to produce inspection reports for month before, month of, and month after breath test in order to demonstrate substantial compliance with monthly inspection requirement—Trial court erred in suggesting that when law enforcement has not substantially complied with administrative requirements of implied consent law for approved breath test, breath test results are nonetheless admissible if state satisfies three-prong test outlined in *Bender*—Even though breath test affidavit may satisfy all requirements for admissibility as exception to hearsay rule, test results presented in affidavit are still not admissible under exclusionary rule of implied consent law

STATE OF FLORIDA, Appellant, v. MICHAEL DAVID WYNN, Appellee. Circuit Court, 4th Judicial Circuit (Appellate) in and for Nassau County. Case No. 45-2020-AP-3, Division B. L.T. Case No. 45-2018-CT-1388. August 19, 2020. On appeal from the County Court, in and for Nassau County, The Honorable Wesley R. Poole, Judge. Counsel: Sarah Ann Bell, Office of the State Attorney, Yulee, for Appellant. Susan Z. Cohen, Epstein & Robbins, Jacksonville, for Appellee.

OPINION

(JAMES H. DANIEL, J.) This is an appeal of the county court's order granting, in part, Michael David Wynn's motion to suppress the

results of his breath alcohol test. For the reasons set forth below, this Court affirms the county court's order.

Procedural Background

On December 10, 2018, officers from the Nassau County Sheriff's Office (NCSO) conducted a breath test of Michael David Wynn to determine his breath alcohol level. Officers used an Intoxilyzer 8000 machine with the serial number 80-001281 to conduct the test. Mr. Wynn's breath test indicated his breath alcohol level was over the legal limit and the State charged him with driving under the influence. Through counsel, Wynn moved to suppress the results of his breath test, contending the NCSO failed to conduct monthly inspections of the machine used for his breath test as required by Rule 11D-8.006 of the Florida Administrative Code.

The trial judge conducted an evidentiary hearing on Wynn's motion and granted his requested relief, in part, by finding the State failed to demonstrate substantial compliance with the monthly inspection requirement. In its order, the county court cited *State v. McGrath,* 3 Fla. L. Weekly Supp. 121a (Fla. Duval Cty. Ct. Feb. 22, 1995), for the proposition that the State must produce agency inspection reports from the month before, the month of, and the month after a breath test in order to show substantial compliance with the monthly inspection requirement in the administrative rule. Because the State did not provide inspection reports from December 2018 and January 2019—the month of and the month after Wynn's test—the court ruled the State could not move Wynn's test results into evidence via a test affidavit, but that the results would still be admissible if the State satisfied the three-prong predicate set forth in *State v. Bender,* 382 So. 2d 697 (Fla. 1980).

On appeal, the State argues the county court erred in its reliance on *McGrath* and that it demonstrated substantial compliance with Rule 11D-8.006 by submitting the most recent agency inspection report for the intoxilyzer machine. Alternatively, the State argued it satisfied the admissibility requirements for its breath test affidavit under section 316.1934(5), Florida Statutes, thereby establishing a presumption as to the validity of Wynn's breath test results. Wynn counters that submitting the most recent inspection report is not sufficient proof of substantial compliance with the administrative rule's monthly inspection requirement and section 316.1932(1)(b)2, Florida Statutes, requires exclusion of Wynn's breath test results regardless of whether the State presented evidence of Wynn's breath alcohol level through an otherwise admissible breath test affidavit.

Standard of Review

"A motion to suppress involves mixed questions of law and fact. In reviewing the trial court's ruling on such a motion, an appellate court must determine whether competent, substantial evidence supports the lower court's factual findings, but the trial court's application of the law to the facts is reviewed *de novo*." *State v. Murray,* 51 So. 3d 593, 594 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D88b] (internal citations omitted). The trial court's ruling on a motion to suppress comes to the appellate court "clothed with a presumption of correctness" and the appellate court "must interpret the evidence and reasonable inference and deductions in a manner most favorable to sustaining the trial court's ruling." *Owen v. State,* 560 So. 2d 207, 211 (Fla. 1990).

Analysis

In order for a breath test to be valid, Florida's implied consent statute requires the testing be done in substantial compliance with Florida Department of Law Enforcement (FDLE) approved regulations:

> An analysis of a person's breath, in order to be considered valid under this section, must have been performed substantially according to methods approved by the Department of Law Enforcement. For this purpose, the department may approve satisfactory techniques or methods. Any insubstantial differences between approved techniques and actual testing procedures in any individual case do not render the test or test results invalid.

§ 316.1932(1)(b)2., Fla. Stat. (2018). The FDLE's approved regulations under the implied consent law are contained in Chapter 11D-8 of the Florida Administrative Code. Rule 11D-8.006 specifically mandates that an agency official shall inspect breath testing instruments "at least once each calendar month" in accordance with agency inspection procedures. FLA. ADMEN. CODE 11D-8.006(1). The failure to substantially comply with FDLE agency requirements for breath testing, including monthly inspections, is grounds for exclusion of a defendant's breath test results. *See Robertson v. State,* 604 So. 2d 783 (Fla. 1992) (recognizing that the implied consent law includes an exclusionary rule); *State v. Bodden,* 877 So. 2d 680, 684-685 (Fla. 2004) [29 Fla. L. Weekly S153a]; *State v. Bender,* 382 So. 2d 697 (Fla. 1980); *Beasley v. Alitel of Delaware,* 449 So. 2d 365 (Fla. 1st DCA 1984); *Jenkins v. State,* 924 So. 2d 20, 29, 31 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D271a]. *See also State v. Murray,* 51 So. 3d 593, 595 (Fla. 5th DCA 2011)) [36 Fla. L. Weekly D88b] (acknowledging the exclusionary rule contained within the implied consent law).

At the suppression hearing, there was no factual dispute about when the monthly agency inspections of the intoxilyzer machine did or did not occur. Immediately prior to the hearing on Wynn's motion to suppress, the trial court held a *Richardson*[1] hearing where the parties agreed the court would exclude from evidence the December 2018 agency inspection report. Additionally, the parties did not dispute the absence of an inspection report for January 2019. Thus, it is uncontroverted that the intoxilyzer used to test Wynn's breath alcohol level underwent an inspection on November 9, 2018, that officers used the intoxilyzer to test Wynn's breath on December 10, 2018, and that no inspection took place in December 2018 or in January 2019. Additionally, the parties agreed that the NCSO shipped the intoxilyzer to its manufacturer in January 2019 for maintenance because the machine would not "power on" properly.

On these uncontested facts, the State failed in its obligation to demonstrate substantial compliance with the monthly inspection requirement in rule 11D-8.006(1). Although the rule does not require inspections be performed every thirty days, it does specify that each breath machine shall be inspected at least one time each calendar month. The evidence showed only one inspection report thirty-one days before Wynn submitted to the breath test and no inspections in the following two months. Thereafter, the machine was sent for repairs because it would not power on. Under the circumstances, the trial court properly determined the State's failure to present evidence of inspection reports for December and January was not insubstantial.

The State emphasizes it provided the inspection report for the month immediately prior to Wynn's breath test and downplays the importance of providing reports for the months immediately after. Aside from providing no authority for its position, the State ignores the potential relevance post-testing inspection reports can have towards ensuring the reliability of an intoxilyzer machine. Testing reliability is one of the main purposes behind the implied consent law. *See State v. Miles,* 775 So. 2d 950, 956 (Fla. 2000) [25 Fla. L. Weekly S1082a] (The implied consent law provides "for the presumption of correctness of test results so long as the state complies with the relevant statute and rules, thereby satisfying the purpose of the statute in ensuring reliability of the tests and the safety of tested individuals.") The applicable administrative rule does not require any regular or routine inspection date for a machine and as long as inspections are done in back-to-back calendar months, theoretically, law enforcement could satisfy the requirements of the rule with inspections in some months spaced almost sixty days apart. Naturally, in terms of

reliability, the importance of inspecting a machine during the month of or the month after a breath test can increase as more time passes between the breath test and the inspection in the preceding month. And in this case, where law enforcement inspected the intoxilyzer machine thirty-one days before Wynn took his breath test and the record is devoid of any inspection reports for the month of Wynn's breath test and the month after, the record clearly supports the trial court's determination that the State failed to demonstrate substantial compliance with the inspection requirements in Rule 11D-8.006(1).

In reaching its conclusion, however, the county court cited *State v. McGrath,* 3 Fla. L. Weekly Supp. 121a (Fla. Duval Cty. Ct. Feb. 22, 1995), for the proposition that the State must produce inspection reports from the month before, the month of, and the month after a breath test in order to demonstrate substantial compliance. The county court wrote:

> Here, the State failed to provide proof of monthly inspections for the month of and the month following Defendant's test. There is also proof that the instrument was not performing properly as of January 14, 2019, the month after Defendant's test. Given the evidence presented, the [court] cannot find substantial compliance with Rule 11D-8.006, F.A.C. Since the State did not prove that the defendant's breath test was inspected in the month of and the month following Defendant's test, the State must satisfy the three-prong predicate set forth in *State v. Bender,* 382 So. 2d 697 (Fla. 1980).

Order on Def.'s Mot. to Suppress at 3. *McGrath* was an order joined by all sitting county court judges in Duval County at that time and purportedly sets forth an inflexible rule mandating the State present the three sequential inspection reports for the months surrounding a breath test to demonstrate substantial compliance with the testing methods under the implied consent statute. Certainly, furnishing a three-month sequence of reports that envelope a particular breath test would be strong evidence of substantial compliance with Rule 11D-8.006, but there is nothing in the text of the rule or the implied consent law that mandates such a formulaic method of proof. For example, if the State produced passing inspection reports for eleven consecutive months before a breath test, and the last inspection was performed seven to ten days before a DUI arrest, a defendant would be hard-pressed to argue the State did not demonstrate substantial compliance with the administrative rule even though the State produced no inspection report for the month after. While the county court in this case correctly determined that the State failed to demonstrate the NCSO substantially complied with the inspection requirements in Rule 11D-8.006(1), its reliance on *McGrath* to reach that result was misplaced. Nevertheless, this court must still affirm the trial court's decision because it was the correct result. *See Muhammad v. State,* 782 So.2d 343, 359 (Fla.2001) [26 Fla. L. Weekly S224c] ("[T]he trial court's ruling on an evidentiary matter will be affirmed even if the trial court ruled for the wrong reasons, as long as the evidence or an alternative theory supports the ruling.")

Additionally, the county court's direction that Wynn's breath test results could still be admissible if the State satisfied the three prong test in *State v. Bender,* supra, does not square with the aforementioned exclusionary rule contained within the implied consent law at section 316.1932(1)(b)2., Florida Statutes, and recognized in cases such as *Robertson,* supra, and *Bodden,* supra. *Bender* addressed the constitutionality of the presumptions and the approved testing methods contained in the newly enacted implied consent law. *Bender* recognized that, before the legislature passed the implied consent law specifying what testing methods were approved, law enforcement used multiple types of testing equipment and procedures to obtain breath and blood alcohol levels with the results admissible only if the State established "(1) the test was reliable, (2) the test was performed by a qualified operator with the proper equipment and (3) expert testimony was presented concerning the meaning of the test." *Bender,* 382 So. 2d at 699. At the time the Florida Supreme Court decided *Bender* in 1980, however, the implied consent law had no exclusionary rule like that contained in section 316.1932(1)(b)2, which was not added until 1988. Ch. 88-82, §1, Laws of Fla. Thus, *Bender* had nothing to do with excluding breath or blood alcohol test results for non-compliance with testing protocols mandated by the implied consent statute and there is no alternative method of proof under the "three prong test" outlined in *Bender.* To the extent the county court's order suggests otherwise, it is not accurate. If law enforcement has not substantially complied with the administrative requirements of the implied consent law for an approved test, then 316.1932(1)(b)2 excludes all evidence of a defendant's breath test result no matter what method of proof the State uses.

The State suggests, on the contrary, that it could admit Wynn's breath test result affidavit because it satisfied the requirements of section 316.1934(5), Florida Statutes. This statute provides that an affidavit containing the test results of a person's breath or blood alcohol content is admissible under the hearsay rule exception for public records, and is presumptive proof of the test results, when the affidavit contains all of the statutorily-required information. There is no dispute the State in this case met all of the requirements for its breath test affidavit to qualify as an exception to the hearsay rule, including the date of the most recent required maintenance on the machine used to test Wynn's breath alcohol content. However, those test results presented by affidavit are still not admissible under the exclusionary rule in section 316.1932(1)(b)2 when they were obtained using a machine that the State failed to prove was in substantial compliance with the inspection and maintenance requirements of the implied consent law. Otherwise, section 316.1932(1)(b)2 would be superfluous.

In sum, because the State failed to show substantial compliance with Rule 11D-8.006, it may not rely on the presumptions of the implied consent law to move Wynn's breath test results into evidence, period. *See* § 316.1932(1)(b)2., Fla. Stat. (2018). The trial court correctly determined, on this record, that the State failed in its obligation to show the machine used to test Wynn was properly inspected on a monthly basis, albeit for a slightly different reason than is outlined in this order. In view of the above, the county court's "Order on Defendant's Motion to Suppress" entered on October, 15, 2019, is **AFFIRMED**.

---

[1]*See Richardson v. State,* 246 So. 2d 771 (Fla. 1971).

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle—Stop—Continued detention—Defendant's stop-and-start driving as she entered agricultural inspection station was not sufficient to give officer reasonable suspicion to detain defendant for DUI investigation—No abuse of discretion in denying state's motion to continue suppression hearing to allow testimony from second officer present in inspection station where state did not seek continuance until moments before end of hearing, and officer would not be available to testify on next day—Fact that granting motion to suppress was tantamount to granting motion to dismiss does not render ruling improper

STATE OF FLORIDA, Appellant, v. CHRISTY LYNN SMITH, Appellee. Circuit Court, 4th Judicial Circuit (Appellate) in and for Nassau County. Case No. 45-2020-AP-2, Division B. L.T. Case No. 45-2018-CT-828. June 25, 2020. On appeal from the County Court, in and for Nassau County, The Honorable Wesley R. Poole, Judge. Counsel: Sarah Ann Bell, Office of the State Attorney, Yulee, for Appellant. Susan Z. Cohen, Epstein & Robbins, Jacksonville, for Appellee.

OPINION

(JAMES H. DANIEL, J.) This is an appeal of the county court's order

granting Christy Lynn Smith's amended motion to suppress her statements made to law enforcement officers, her performance on field sobriety tests, and her breath test results. For the reasons set forth below, this Court affirms the county court's order.

Procedural Summary

On July 28, 2018, Corporal Michael Elder of the Florida Department of Agriculture was working at an inspection station located along Interstate-95 in Nassau County. At approximately 6:17 PM, Corporal Elder observed Christy Lynn Smith stop her motor vehicle in the ramp leading from the highway to the inspection station. The driver of a semi-tractor trailer traveling behind Smith's vehicle honked his horn at Smith. Smith then pulled her vehicle forward, but stopped again. From inside the inspection station, Corporal Elder waived at Smith to direct her to move her vehicle from the ramp. Smith complied. She positioned her vehicle next to the inspection station window where Corporal Elder was located. Corporal Elder attempted to talk with Smith, but he was unable to hear her over the noise from nearby traffic.

While Corporal Elder was still inside the inspection station, Agriculture Department Officer Asaro asked to see Smith's driver's license. Corporal Elder then exited the station and approached the driver's side of Smith's vehicle. Corporal Elder asked Smith whether she was okay and if she was lost. Before going to get his DUI checklist, Officer Asaro directed Corporal Elder to not let Smith leave the scene. Corporal Elder then observed a bottle of wine on the passenger's side floorboard. He asked Smith whether she had been drinking. Smith denied that she had been. Corporal Elder also noticed that Smith's speech was slurred. He later testified that Smith was not steady on her feet and that she had difficulty with field sobriety tests.

Ultimately, the State charged Smith with driving under the influence. Smith's amended motion to suppress asked the trial court to exclude from evidence any statements Smith made to law enforcement officers, the results of her field sobriety tests, and the results of her blood alcohol breath tests. *Inter alia,* Smith argued that Corporal Elder and Officer Asaro "did not have reasonable suspicion, probable cause, or any legal justification to seize and detain" her.

The county court held an evidentiary hearing on Smith's motion to suppress. Corporal Elder testified at the hearing, but Officer Asaro did not. After the hearing, the court granted Smith's motion. As such, the court excluded from evidence Smith's statements to officers, her performance on field sobriety exercises, and her breath test results. In its order, the court wrote:

> In the instant case, the only evidence presented by the State was the testimony of Cpl. Elder. Cpl. Elder did not make the decision to conduct a DUI investigation, did not conduct the investigation, and did not make the decision to arrest the defendant. The only observation made by Cpl. Elder, prior to Officer Asaro detaining Defendant and commencing his DUI investigation, was the traffic infraction. He did not observe any other signs of impairment. He did not observe the slurred speech and bottle of wine until after Officer Asaro had detained Defendant and commenced his DUI investigation. Cpl. Elder observed no odor of alcohol, no confusion, no staggering, no fumbling for documents, no jerky or bouncy eyes, no constricted pupils, and no trembling or jittery actions. There was a plausible explanation for the defendant's stopping on the exit ramp.
>
> Officer Asaro did not testify. The Court acknowledges that the State made an *ora tenus* request to bifurcate the hearing, to allow the State to present Officer Asaro's testimony. This request was not made, however, until after the State had presented all of its evidence, made its initial argument, and the defendant had presented her argument. The State's explanation for the late request was that the witness had been subpoenaed by another court, in another circuit, and was not available for this hearing. The state did not request a continuance of this hearing prior to the hearing, but chose to proceed without Asaro's testimony.
>
> On the evidence presented, the Court must conclude that Officer Asaro's decision to conduct the DUI investigation was based on a hunch the defendant might be impaired, and not on a reasonable suspicion of same.

On appeal, the State raises three issues. First, the State argues that it established the reasonable suspicion necessary for a DUI investigation and the probable cause needed to arrest Smith. Second, the State claims the county court abused its discretion by not granting the State's request to bifurcate the suppression hearing. Finally, the State maintains that granting the motion to suppress amounted to an improper dismissal of the case and was unduly harsh. This Court will examine each of the State's arguments in turn.

Standard of Review

"A motion to suppress involves mixed questions of law and fact. In reviewing the trial court's ruling on such a motion, an appellate court must determine whether competent, substantial evidence supports the lower court's factual findings, but the trial court's application of the law to the facts is reviewed *de novo*." *State v. Murray,* 51 So. 3d 593, 594 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D88b] (internal citations omitted). The trial court's ruling on a motion to suppress comes to the appellate court "clothed with a presumption of correctness" and this Court "must interpret the evidence and reasonable inference and deductions in a manner most favorable to sustaining the trial court's ruling." *Owen v. State,* 560 So. 2d 207, 211 (Fla. 1990).

Issue One: Reasonable Suspicion

The State first argues that Corporal Elder's testimony established both reasonable suspicion to conduct a traffic stop and DUI investigation and the probable cause needed for a warrantless arrest.

As an initial matter, this Court agrees with Smith that the issue of probable cause is not subject to appellate review because the trial court did not rule on that issue. In pertinent part, the county court's order says, "Given the Court's conclusion that the DUI investigation was not based on a reasonable suspicion, it is not necessary to address the remaining issues raised in Defendant's motion." Because the county court did not decide the issue of probable cause when ruling on Smith's motion, that issue is not subject to appellate review. *See* § 924.051(1)(b), Fla. Stat. (2020) (" 'Preserved' means that an issue, legal argument, or objection to evidence was timely raised before, *and ruled on* by, the trial court . .") (emphasis added); *see, e.g., Wallen v.* State, 984 So. 2d 655, 656 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D1635b] (holding that an appellant did not preserve an alternative argument for appellate review because he did not secure a trial court ruling on that argument.). With the issue of probable cause thus laid aside, the issue is whether, based on the evidence adduced at the hearing, the State established the reasonable suspicion necessary to detain Smith for a DUI investigation.

An officer may temporarily detain a person if the officer "has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime. In order not to violate a citizen's Fourth Amendment rights, an investigatory stop requires a well-founded, articulable suspicion of criminal activity. Mere suspicion is not enough to support a stop." *Popple v. State,* 626 So. 2d 185, 186 (Fla. 1993) (internal citations omitted). When assessing whether an officer had reasonable suspicion to conduct an investigatory stop, a court should only consider events that took place before the stop. *See State v. Taylor,* 826 So. 2d 399, 405 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D1669a] ("The state may not rely on facts discovered or noticed after a stop to justify the stop.").

Based on the evidence before it, the county court found that Corporal Elder's only observation of Smith prior to Officer Asaro

detaining her was Smith's driving performance on the exit ramp. Corporal Elder "did not observe any other signs of impairment" and he "did not observe the slurred speech and bottle of wine until after Officer Asaro had detained Defendant and commenced his DUI investigation." There is competent, substantial evidence in the record to support these factual findings by the county court. *See Thorpe v. Myers,* 67 So. 3d 338, 341 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1524b] (a reviewing court defers to the lower court's findings of fact when they are supported by competent, substantial evidence); *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957) (competent, substantial evidence is "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion."); *Banks v. State,* 732 So. 2d 1065, 1067 (Fla. 1999) [24 Fla. L. Weekly S177a] ("Competent substantial evidence is tantamount to legally sufficient evidence, and the appellate court will assess the record evidence for its sufficiency only, not its weight.").

Applying the law *de novo* to the facts found by the trial court, this Court agrees that the State did not establish reasonable suspicion at the hearing. Smith's stop-and-start driving along the inspection station's ramp did not create a reasonable suspicion that Smith was driving while under the influence of alcohol. Indeed, Corporal Elder testified that it was not unprecedented for a car to enter the inspection station and that motorists had previously driven through the station when they were lost. In sum, this Court affirms the county court's conclusion that Corporal Elder had a hunch—but not a reasonable suspicion—that Smith was driving under the influence of alcohol. As such, stopping Smith to conduct a DUI investigation was unreasonable under the Fourth Amendment. *See Popple,* 626 So. 2d at 186.

Issue Two: Request to Bifurcate the Evidentiary Hearing

The State next argues that the county court abused its discretion by denying the State's oral request to bifurcate the suppression hearing so that another State witness could testify at a later date.

The potential witness at issue is Officer Asaro. The State concedes it was aware of Asaro's unavailability prior to the October 14, 2019 evidentiary hearing; however, it did not believe that Asaro's testimony would be necessary. Thus, the State proceeded to the hearing with Corporal Elder as its only witness. The State reports that it moved to bifurcate the hearing "[o]nce it became clear that Judge Poole was going to require the testimony of Investigator Asaro . . . ." In response, Smith points out that the State only moved to bifurcate the hearing after the close of evidence and after each side presented its arguments. Indeed, when asked by the court, the State said it had no other witnesses after Corporal Elder.

"The granting or denying of a continuance is within the sound discretion of the trial court." *Kelley v. State,* 974 So. 2d 1047, 1051 (Fla. 2007) [32 Fla. L. Weekly S675a]. "A court's ruling will be sustained absent an abuse of discretion—[i.e.,] it will be sustained unless no reasonable person would take the view adopted by the trial court." *Id.* Here, this Court finds no abuse of discretion by the county court.

Just prior to the hearing's conclusion, the following exchange between the State and the court took place:

> MS. BELL [For the State]: Your Honor, without having heard testimony from Officer Asaro, the State would request that we bifurcate this hearing to allow us to bring in that testimony from his perspective directly as opposed to just relying on what Officer Elder had testified to.
>
> THE COURT: Well, knowing what the issues were here today, knowing—and I assume he was subpoenaed for the week, for the trial week, why didn't you have him here today?
>
> MS. BELL: Yes, Your Honor, if I could speak to that. I did speak with Investigator Asaro. He is under a subpoena in Ft. Lauderdale from the 7th through the 25th of October and the trial subpoena applied to the trial days and given that we just learned of this hearing from final pretrial to be set for the 14th of October, which is today's date, unfortunately he was not available on such short notice to testify, and in fairness the State would ask that we set the hearing to proffer his testimony.
>
> THE COURT: Well, why then didn't you ask for a continuance if you knew the witness wasn't available? Why didn't you ask for a continuance before the hearing began and you introduced your evidence?
>
> MS. BELL: Your Honor, in all fairness of keeping the case moving through the criminal justice system, knowing that trial is set for the 24th and knowing that this was an older motion from June, the State just, respectfully, proceeded forward trying to keep the case flow in the system properly.
>
> THE COURT: Okay. I had interrupted you. Go ahead and finish your argument.
>
> MS. BELL: No, we would just ask that we be allowed to take further testimony from Investigator Asaro and hold hearing, if possible, on the 23rd of October, which is the day before this case is set for—for trial.
>
> THE COURT: And that, I don't think, is going to be possible because we have pretrials in the morning and already have two hearings in the afternoon. Okay. I will take your arguments under advisement and get an order out, hopefully tomorrow, so everyone will know. Okay?
>
> MS. BELL: Thank you, Your Honor.
>
> THE COURT: All right.
>
> (End of hearing.)

To prevail on a motion for continuance, the moving party must demonstrate: "(1) prior due diligence to obtain the witness's presence; (2) that substantially favorable testimony would have been forthcoming; (3) that the witness was available and willing to testify; and (4) that the denial of the continuance caused material prejudice." *Geralds v. State,* 674 So. 2d 96, 99 (Fla. 1996) [21 Fla. L. Weekly S85c]. Here, based on the record, it does not appear that the State exercised due diligence to secure Officer Asaro's presence at the hearing. The State did not ask the court to extend the evidentiary hearing into a second date to accommodate Officer Asaro's availability until the very end of the hearing. Furthermore, it does not appear that Officer Asaro was available because Smith's trial was set to begin on October 24th and Officer Asaro was under a subpoena in Fort Lauderdale through October 25th. On these facts, it was not an abuse of discretion for the county court to deny the State's request for a bifurcated hearing. *See, e.g., State v. McCarthy,* 585 So. 2d 1167 (Fla. 4th DCA 1991) (holding that it was not an abuse of discretion for the trial court to deny the State's motion to continue a suppression hearing after two witnesses failed to appear and the State could not guarantee their appearances at a later date); *Barclay v. Rivero,* 388 So. 2d 321 (Fla. 3d DCA 1980) (finding no abuse of discretion in the trial court denying a continuance when the moving party represented that it was ready for trial, then orally moved for a continuance moments before the trial began based on a witness' unavailability, and could not guarantee the witness' availability at a particular time in the future.).

As for the State's contention that it waited for Judge Poole to make clear that Officer Asaro's testimony was necessary, it is axiomatic that a court has no duty to inform the State what evidence it must produce in order to prevail at a hearing. *See, e.g., R.O. v. State,* 46 So. 3d 124, 126 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2320a] ("A court may not ask questions or make comments in an attempt to supply essential elements to the State's case."); *J.F. v. State,* 718 So. 2d 251, 252 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1992a] ("[T]he trial court departs from a position of neutrality, which is necessary to the proper functioning of the judicial system, when it *sua sponte* orders the production of evidence that the state itself never sought to offer into

evidence."). The State came to the hearing with only Corporal Elder's testimony and did not request an additional hearing date to present its case until mere moments before the hearing's conclusion. It was not an abuse of discretion for the court to refrain from awarding the State a second bite at the evidentiary apple. *See Richards v. State,* 288 So. 3d 574, 576 (Fla. 2020) [45 Fla. L. Weekly S8a] ("Generally, a party does not get the proverbial 'second bite at the apple' when it fails to satisfy a legal obligation the first time around.").

Issue Three: Improper Dismissal

Third and finally, the State argues that granting the motion to suppress was tantamount to granting a motion to dismiss the case, which was an unduly punitive result under the circumstances. The State maintains that less punitive, more viable alternatives were available to the county court.

This Court agrees with Smith that granting a motion to suppress frequently amounts to the State being unable to move forward with a given criminal prosecution. Such does not *ipso facto* render the county court's ruling improper or demonstrate that the court abused its discretion. As set forth above, the court correctly found a lack of reasonable suspicion in this case and did not abuse its discretion by denying the State's last-minute request to bifurcate the hearing to a later date. The fact that the court's decision had the practical result of undermining the State's ability to prosecute Smith's case is immaterial to this analysis.

In view of the above, it is **ORDERED** that:

The trial court's "Order on Defendant's Amended Motion to Suppress," which the court entered on October, 15, 2019, is **AFFIRMED**.

* * *

AMMI LEON, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 5th Judicial Circuit (Appellate) in and for Marion County. Case No. 2020-AP-07. L.T. Case No. 2019-TR-13136. September 16, 2020. Appeal from the County Court in and for Marion County, Hearing Officer Norman C. Polak. Counsel: Ammi Leon, Pro Se, Appellant. Office of the State Attorney, for Appellee.

OPINION

(FALVEY, J.) Appellant, Ammi Leon, received a Uniform Traffic Citation for careless driving resulting in an accident and property damage. She was adjudicated guilty on January 10, 2020. The Appellant filed her Notice of Appeal on March 9, 2020, beyond the 30-day appeal period prescribed by Fla. R. App. P. 9.100(b) (2020). Therefore, the Appellant's Notice of Appeal is untimely, and the appeal is dismissed. (ROGERS, S. and DAVIS, H., JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearings—Witnesses—Telephonic oath—Where arresting officer appeared telephonically at formal review hearing without person authorized to administer oath present with officer to independently verify his identity, and officer was not personally known to hearing officer, oath administered telephonically by hearing officer was invalid—While hearing officer has authority to administer oaths telephonically, for oath to be proper witness must be personally known to hearing officer or must appear before person authorized to administer oaths who can vouch for their identity—Remand for new hearing

WILLIAM DOROFY, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 19-CA-2539. UCN Case No. 512019CA02539CAAXES. August 24, 2020. Petition for Writ of Certiorari from Decision of Hearing Officer Bureau of Administrative Reviews Department of Highway Safety and Motor Vehicles. Counsel: Keeley R. Karatinos, Mander Law Group, Dade City, for Petitioner. Christie S. Utt, General Counsel, and Mark L. Mason, Asst. Gen. Counsel, DHSMV, Tallahassee, for Respondent.

(**PER CURIAM.**) Petitioner William Dorofy seeks certiorari review of the "Findings of Fact, Conclusions of Law and Decision" of the Hearing Officer of the Bureau of Administrative Reviews, Department of Highway Safety and Motor Vehicles issued on June 26, 2019. The Decision upheld the suspension of Petitioner's driving privileges based upon his refusal to take a breath-alcohol test. The question before the Court is whether the Hearing Officer violated Petitioner's due process rights by administering the oath to a law enforcement witness over the telephone instead of requiring the officer to be in the presence of someone authorized to administer the oath. Upon review, the Petition for Writ of Certiorari is granted.

Statement of Case

Trooper Raeford Griffin of the Florida Highway Patrol conducted a traffic stop of Petitioner William Dorofy and subsequently arrested him for DUI. According to. Trooper Griffin's report, Petitioner refused to submit to a breath-alcohol test. As a result, Petitioner's driver license, was suspended. Petitioner sought formal review of the suspension. *See* § 322.2615(6)(a), Fla. Stat. (2018).

Prior to the formal hearing, Petitioner requested a subpoena for Trooper Griffin's appearance as a witness. *See* Rule 15A-6.012(1), F.A.C. (2007). The subpoena Petitioner submitted as part of the request, which was a form subpoena created by the Department,[1] directed that for a telephonic appearance, Trooper Griffin would be required to appear at a duty station so that a fellow officer could administer the oath in person. Before issuing the subpoena, the Hearing Officer crossed out the duty station reporting requirement and wrote "no longer required to report to a duty station."

In accordance with the subpoena, Trooper Griffin appeared telephonically. The Hearing Officer asked for, and Trooper Griffin provided, his name, rank, employment agency, and address. The Hearing Officer then administered the oath to Trooper Griffin over the phone. Petitioner objected, arguing that the oath must be administered by someone in Trooper Griffin's physical presence. The Hearing Officer overruled the objection, citing section 322.2615(6), Florida Statutes (2018), and a change in Department policy stating that hearing officers were now authorized to administer oaths over the phone.

Near the end of the hearing, Petitioner objected to the Hearing Officer considering Trooper Griffin's testimony based upon the lack of a proper oath. The Hearing Officer treated the objection as a motion and denied it. The Hearing Officer later issued the Decision upholding the driver license suspension.

Standard of Review

Circuit court certiorari review of an administrative agency decision is governed by a three-part standard: (1) whether procedural due process has been accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *State, Dep't of Highway Safety & Motor Vehicles v. Sarmiento,* 989 So. 2d 692, 693 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1926a]. This Court is not entitled to reweigh the evidence; it may only review the evidence to determine whether it supports the hearing officer's findings and Decision. *Dep't of Highway Safety & Motor Vehicles v. Stenmark,* 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a].

Analysis

The sole issue before the Court is whether the Hearing Officer violated Petitioner's due process rights by administering the oath to Trooper Griffin telephonically. While the procedure laid out in section 322.2615, Florida Statutes (2018), satisfies due process on its face, the facts of a specific case may show that a petitioner's due process rights have not been respected. *Dep't of Highway Safety & Motor Vehicles*

v. Stewart, 625 So. 2d 126,124 (Fla. 5th DCA 1993).

Section 322.2615(6)(b), Florida Statutes (2018), provides that a hearing officer may conduct a formal hearing using communications technology. It also provides that a hearing officer is authorized to administer oaths. However, these are general provisions regarding how a hearing officer may conduct a formal hearing. Contrary to Respondent's contention, nothing in section 322.2615(6)(b), Florida Statutes (2018), expressly authorizes a hearing officer to administer oaths to a witness telephonically. However, neither does the statute expressly forbid telephonic administration of an oath. *See also* Rule 15A-6.013(4), (8), F.A.C. (2007) (providing that oral evidence and witness testimony shall be taken under oath or affirmation but not providing how the oath shall be administered).

Respondent cites to three cases in support of the Hearing Officer's telephonic administration of the oath during the formal review hearing: *Dep't of Highway Safety & Motor Vehicles v. Edenfield,* 58 So. 2d 904 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D523a]; *Dep't of Highway Safety & Motor Vehicles v. Bennett,* 125 So. 3d 367 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D2376b]; *Dep't of Highway Safety & Motor Vehicles v. Canalejo,* 179 So. 3d 360 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2344a]. However, the cited cases only stand for the proposition that a law enforcement witness can testify telephonically during a formal hearing. They do not address whether a hearing officer can administer the oath telephonically. The Court could not find any controlling district court or supreme court case law ruling on this issue.

As persuasive authority, each party provided the Court with opinions or orders from sister circuit courts. See *Graca v. Dep't of Highway Safety & Motor Vehicles,* 24 Fla. L. Weekly Supp. 329c (Fla. 20th Cir. Ct. Jul 23, 2016) ("The effect of this statute [section 322.2615(6)(b)] authorized the Hearing Officer . . . to place Corporal Driscoll under oath in order to obtain his testimony by phone"); *Eckert v. Dep't of Highway Safety & Motor Vehicles,* Case No 19-CA-10990 (Fla. 13th Cir. Ct. May 26, 2020) [Editor's note: Second amended order entered July 1, 2020; 28 Fla. L. Weekly Supp. 285a] (holding that administering the oath to the law enforcement officer by telephone without independent verification of the witness's identity failed to place the witness under a proper oath, resulting in the petitioner being denied due process).

Because of the purpose in administering an oath before a witness testifies, this Court holds that the Hearing Officer's method of administering the oath in this instance resulted in a violation of Petitioner's due process rights.

Without proper identification of the person giving the oath by the person administering the oath, an oath cannot properly be sworn and a witness's testimony, which the hearing officer then relies upon in upholding the suspension of a driver license, is not properly sworn. Upholding a driver license suspension after a formal review hearing based upon unsworn testimony violates the driver's due process rights. *Cf. Pena v. Rodriguez,* 273 So, 3d 237, 239 n2, 239-241 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1346a] (noting that "an unsworn witness is not competent to testify," and holding that a trial court committed a due process violation by considering a lawyer's proffer and not sworn testimony in determining parental responsibility, timesharing, and child support).

As did the Thirteenth Judicial Circuit Court in *Eckert,* this Court finds the reasoning in question 2 of an advisory opinion by the Florida Attorney General to be persuasive:

> Florida courts have stated that a valid oath must be an unequivocal act made in the presence of an officer who is authorized to administer oaths in which the declarant knowingly attests to the truth of the statement and assumes the obligations of an oath. The key to a valid oath is that perjury will lie for its falsity. Thus, an affiant is required to be in the personal presence of an officer administering an oath, not to the end that the officer knows him to be the person he represents himself to be, but that he can be certainly identified as the person who actually took the oath. This purpose cannot be accomplished by a notary public administering an oath over the telephone.

Atty. Gen. Opinion 92-95.

There is an obvious distinguishing feature between the situation addressed in the Attorney General's opinion and the formal hearing under review in this petition. The Attorney General's opinion addresses notaries under Chapter 117, Florida Statutes. It does not address hearing officers and formal hearings under section 322.2615, Florida Statutes. However, the reasoning underlying the Attorney General's opinion is applicable here.

As noted in the Attorney General's opinion, the purpose of an oath is that the declarant knowingly attests to the truth of his or her statements. And the key to an oath is that perjury will lie for false statements. This is true regardless of whether the oath is sworn in a courtroom or during an administrative hearing *See* §837.02(1), Florida Statutes (2020) ("whoever makes a false statement, which he or she does not believe to be true, under oath *in an official proceeding* in regard to any material matter, commits a felony of the third degree . . .") (emphasis added).

The Attorney General's opinion notes that for the oath to have any effect, the person administering the oath must be in the personal presence of the witness swearing the oath so that the person administering the oath can certainly identify the person who actually took the oath. In other words, if the witness makes a false statement under oath, the person who administered the oath needs to be able to point to the witness and say "that is the actual person that swore the oath."

However, unlike the Attorney General's opinion and contrary to Petitioner's argument, the Court is not convinced that this purpose can *never* be accomplished telephonically. As the Attorney General's opinion notes, the purpose of the witness being in the personal presence of the hearing officer, law enforcement officer, or notary administering the oath is not so that the officer or notary knows the witness to be the person he represents himself to be, but that he can be certainly identified as the person who actually took the oath.

But if a hearing officer administering the oath does, in fact, personally know the witness and on that basis knows that the witness is the person he represents himself to be, then under some circumstances the hearing officer would be able to point to the witness and say "that is the person who actually took the oath" even though the hearing officer administered the oath over the phone.

Accordingly, the Court holds that if the hearing officer can state on the record that he has previously met the law enforcement witness in person and therefore the law enforcement witness is personally known to him *and* the hearing officer can verify that the law enforcement witness is the person he knows based upon the witness's voice over the phone, then the hearing officer can administer the oath telephonically and the driver's due process rights are protected because the law enforcement witness's testimony is now properly sworn. This is because, in the unlikely event that the need arises, the hearing officer can later point to the law enforcement witness and say "that is the actual person that took the oath." However, if the hearing officer cannot so state on the record, then the proper swearing of the law enforcement witness, and consequently the protection of the driver's due process rights, requires the law enforcement witness to appear physically before someone authorized to administer an oath, such as a fellow officer.[2]

Because the oath was not properly administered on this record, Trooper Griffin's testimony was unsworn and the Hearing Officer's reliance on that unsworn testimony in upholding the driver license suspension violated Petitioner's due process rights. And Trooper

Griffin's recitation of his name, rank, employment agency, and address did not correct this deficiency. No matter what information a witness provides over the phone, the hearing officer administering the oath telephonically will not be able to point at a particular witness in a courtroom and say "that is the actual person who took the oath" if he has never seen the witness before.

To be clear, we do not think that Trooper Griffin committed perjury or that the witness was not Trooper Griffin. Nor do we fault the Hearing Officer for following the Department's guidance with little to no explicit statutory, regulatory, or appellate case law to the contrary. We simply address the due process concerns attendant to a witness offering testimony against a driver at a formal hearing. *See generally Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles,* 209 So. 3d 1165, 1173 (Fla. 2017) [42 Fla. L. Weekly S85a] (noting that section 322.2615 is designed to preserve a driver's due process rights and to protect the driver's significant interest in the driving privilege).

Conclusion

Because the Hearing Officer administered the oath telephonically to Trooper Griffin without any indication that. the Hearing Officer personally knew the trooper and could identify his voice, Petitioner's due process rights were violated. Accordingly, the Petition for Writ of Certiorari is granted. The order of the Hearing Officer is quashed and the cause remanded to the Department.

Procedure upon Remand

Because Petitioner argued and the Court finds that Petitioner's due process rights were violated, the proper remedy is quashal of the Hearing Officer's Decision and remand for a second formal hearing; not quashal of the license suspension. *Dep't of Highway Safety & Motor Vehicles v. Clay,* 152 So. 3d 1259, 1260 (Fla. 5th DCA 2014) [40 Fla. L. Weekly D51c].

Accordingly, it is:

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is **GRANTED**; "Findings of Fact, Conclusions of Law and Decision" **QUASHED**; and the matter remanded to the Department of Highway Safety and Motor Vehicles. (DISKEY, BABB, AND WESTINE, JJ.)

---

[1]*See* HSMV Form 72066 (Rev. 10/11).

[2]While not addressed by the parties, the Court notes that a hearing officer can likely administer the oath to a law enforcement witness appearing remotely by videoconference technology regardless of whether the hearing officer has met the witness before because the identification and due process concerns raised in this petition would likely be assuaged in that circumstance.

* * *

Criminal law—Battery—Jurors—Voir dire—No abuse of discretion in prohibiting defense from inquiring about prospective jurors' views on witness "flip-flopping" where defense counsel was seeking improperly to assess opinions of jurors about credibility of particular witness or value of evidence related to that witness—Defendant's ability to determine jurors' views on recantation was not curtailed where defense was offered opportunity to inquire about jurors' views of witnesses who have made prior inconsistent statements but failed to do so—Evidence—Hearsay—Trial court erred in allowing state to reference statements of non-testifying witness that would corroborate statements of testifying witnesses in opening statement, during examination of investigating officer, and in closing argument—Evidence was hearsay, irrespective of fact that actual statements made by non-testifying witness were not repeated—Error was not harmless where, in light of conflicting evidence from victim and eyewitness, there was reasonable probability that repeated references to statements had impact on verdict—Trial court erred by not allowing defense counsel to recall state witnesses in its case-in-chief to inquire about areas that were outside of scope of cross-examination, but error was not preserved—If defense request was to recall state witness for re-cross examination, trial court did not abuse its discretion in denying request where defense did not advise court of significance of impeachment it intended to offer through witnesses or what testimony needed to be clarified—New trial required because of improper admission of hearsay

DANNY WILSON, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. CRC 19-00033AP. L.T. Case No. 19-07458MM. July 27, 2020. Appeal from judgment and sentence entered by the Pinellas County Court, County Judge Holly Grissinger. Counsel: Christopher DeLaughter and Leonardo B. Perez III, for Appellant. Zachary Morrision, Assistant State Attorney, for Appellee.

ORDER AND OPINION

(ANDREWS, J.) THIS MATTER is before the Court on appellant Danny Wilson's appeal of his conviction at trial for the crime of battery. Appellant argues that the trial court erred or abused its discretion by: 1) prohibiting defense counsel from asking certain questions in voir dire, 2) allowing the arresting officer to offer the hearsay statements of a non-testifying witness and 3) prohibiting defense counsel from recalling witnesses. The trial court's decision to allow the State to comment repeatedly about statements of a non-testifying witness requires reversal. We address each argument presented to us because of the possibility of repetition.

Factual Background and Trial Court Proceedings:

On May 11, 2019, the defendant was accused of committing the crime of battery against Chanise Wilson. On June 18, 2019, the State filed an information alleging the same. It was alleged that the defendant threw coffee on Chanise Wilson, slapped, and choked her in the presence of Janae Clark and Leiah Clark. Both Janae and Leiah are the victim's daughter.

During jury selection defense counsel endeavored to engage in a line of questioning relating to what evidence the jury would need to convict someone of the pending charges. The trial court would not allow that line of questioning. Counsel then clarified that what he intended to inquire about was the jury's feelings about a victim who is "flip-flopping." The court advised counsel that he can ask jurors their opinion related to previous inconsistent statements but precluded counsel from inquiring about victim "flip-flopping."

In opening statement, the prosecutor referred to the witnesses the State intended to call and the testimony the witnesses would offer. The prosecutor also referred to corroborating comments the officer obtained as a part of her investigation from witness Leiah Clark. The State did not intend to call the witness during trial. The prosecutor did not state the details of the statement but offered that the statement "lined up" with other testimony the State intended to present. On direct examination of the investigating officer, the prosecutor inquired of the witness if the statements of Leiah Clark lined up with the statements of other witnesses on the evening in question. The answer was affirmative. In its final closing argument, the State again referred statements of the non-testifying witness Leiah Clark and how those statements lined up with other statements that were presented. On each occasion the defense objected to reference to comments by Leiah Clark. Defense counsel argued a violation of the confrontation clause. The objection was consistently overruled. The trial court concluded that because no actual statement was being admitted there was no violation of the confrontation clause. The defense counsel also lodged a hearsay objection. The court found that the statements were not hearsay because the prosecutor was not "eliciting words by another individual." The court found that the State was eliciting "information regarding the officer's investigation."

The State called two witnesses in its case in chief. Each of the

witnesses were subject to cross-examination by defense counsel. Subsequently, the court recessed for the evening. The next morning counsel for the defendant sought to recall both State witnesses. The trial court refused to allow the defense to recall the two State witnesses. During the court's inquiry into why counsel wanted to recall Officer Cruz defense counsel offered the purpose was to impeach Janae Clark. Precisely what question he intended to ask Officer Cruz or testimony of Janae Clark would be impeached was not explained to the court. When asked why he wanted to recall Janae Clark, defense counsel indicated it was to "explore more topics—just more—like, for example, her current living situations, if she moved out of the apartment."

***Standard of Review*:**

A trial judge's limitation on the questioning of prospective jurors during vior dire is reviewed under the abuse of discretion standard. *Wyatt v. State,* 78 So.3d 512 (Fla. 2011) [36 Fla. L. Weekly S683a] (The scope of voir dire questioning rests in the sound discretion of the trial court, and we will not disturb the trial court's ruling unless the court clearly abused its discretion."). Admissibility of evidence pursuant to the Confrontation Clause is subject to *de novo* review. *McWatters v. State,* 36 So.3d 613 (2010) [35 Fla. L. Weekly S169a] ("In considering a trial court's ruling on admissibility of evidence over an objection based on the Confrontation Clause, our standard of review is *de novo.*"). A trial court's denial of defense request to reopen cross-examination is reviewed for abuse of discretion. *Vazquez v. State*, 700 So.2d 5 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D2254a]. Trial court's denial of defense request to recall a witness is reviewed for abuse of discretion. *State v. S.R.*, 1 So. 3d 221, 223 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D2869b].

Law and Analysis:

I. Limitation of Jury Inquiry:

In his brief, defense counsel argues the "trial court erred in prohibiting defense counsel from asking prospective jurors about their attitudes regarding 'flip-flopping' victims." The scope of *voir dire* questioning rests in the sound discretion of the court and will not be interfered with unless that discretion is clearly abused. *Vining v. State,* 637 So.2d 921, 926 (Fla. 1994). We are not able to say the trial court's decision to prohibit the defense from inquiring of the jury about "flip-flopping" witnesses was an abuse of discretion.

The purpose of voir dire is to " 'obtain a fair and impartial jury, whose minds are free of all interest, bias, or prejudice,' not to shock potential jurors or to obtain a preview of their opinions of the evidence." *Hoskins v. State,* 965 So. 2d 1, 13 (Fla. 2007) [32 Fla. L. Weekly S159a] (quoting *Ferreiro v. State,* 936 So.2d 1140, 1142 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2166c]. *See also, Evans v. State,* 808 So. 2d 92, 105 (Fla. 2001) [26 Fla. L. Weekly S675a] (The purpose of the voir dire proceeding is to secure an impartial jury for the accused). The purpose of jury selection is not served when counsel attempts "to obtain a preview of [potential juror's] opinions of the evidence." *Id.* It is a well-settled principle in Florida that parties may not question potential jurors during *voir dire* about evidence that is expected to be presented during trial and request an initial decision from prospective jurors as to how they will rule related to that evidence. *Calloway v. State,* 210 So. 3d 1160, 1178 (Fla. 2017) [42 Fla. L. Weekly S45a]. Counsel must be permitted to ask prospective jurors about their latent or concealed prejudgments; yet, the trial court still has discretion to limit repetitive, improper, and argumentative *voir dire* questions. *King v. State,* 790 So. 2d 1253, 1254-55 (Fla. 5th DCA 2001) [42 Fla. L. Weekly D2365a].

Where counsel seeks to inquire of jurors, directly or indirectly, about the facts of the case that inquiry is improper. *Infantes v. State,* 941 So. 2d 432, 434 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2519a] (During voir dire, attorneys may not have prospective jurors indicate, in advance, what their decision will be under a certain state of evidence or upon a certain set of facts); *Blevins v. State,* 766 So. 2d 401, 402 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D1910c] (To the extent hypothetical questions involve the facts of the case they are not allowed); *Renney v. State,* 543 So.2d 420 (Fla. 5th DCA 1989) (Hypothetical question presented to the jury embodying the facts of the case were a tacit commitment to convict); *Minor v. State,* 763 So. 2d 1169, 1171 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D206b] (It would be error to include in a hypothetical question the very facts of the case against the accused as such facts would serve to obtain at least a tacit commitment of the prospective juror to convict).

Appellant argues the purpose of his question regarding "flip-flopping" witnesses was to inquiry into the potential juror's bias related to "recanted statements." The possible bias of a member of the jury venire which might affect the fairness of the trial of the accused, is clearly a proper ground of inquiry. *Lewis v. State,* 377 So. 2d 640, 642-43 (Fla. 1979). However, bias related to recanting or "flip-flopping" witnesses was not an argument presented to the trial judge. In his reply brief, appellant also argues the inquiry was appropriate because it addressed the "issue of whether or not a recanting witness can be trusted[.]" Whether a witness can be "trusted" is not an appropriate inquiry for voir dire as it seeks a tacit commitment from the jurors not to trust the statements of certain witnesses. Citing *Wyatt v. State,* 78 So.3d 512, 534 (Fla. 2011) [36 Fla. L. Weekly S683a], appellant argues, "a juror's attitude about a particular legal doctrine . . . is essential to the determination of whether challenges for cause or peremptory challenges are to be made[.]" We agree that a defendant must be allowed to explore juror attitudes about and acceptance of legal doctrines. Such inquiry is permitted through the use of direct or hypothetical questions. The burden of proof, circumstantial evidence, self-defense, insanity, willful blindness, accessory before or after the fact, justifiable use of force, entrapment and alibi are all examples of legal doctrines appropriate for inquiry during voir dire. Juror's "attitude regarding 'flip-flopping' victim," and whether they can be "trusted" do not relate to any particular legal doctrine. The trial court intervened because the court was concerned that the defense's line of inquiry, even as a hypothetical, drew parallels to the facts of the instant case.

In *Infantes v. State,* 941 So. 2d 432 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2519a], the prosecutor, while discussing the definition of burglary, posed various hypothetical scenarios involving the prosecutor visiting the White House and while on a White House tour taking a pen off the President's desk. *Id.* at 433. The inquiries were proper because "they were designed to determine whether the jurors could correctly apply the law." *Id.* In *Williams v. State,* 931 So. 2d 999 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1579b], the prosecutor used a series of hypotheticals that were designed to determine if jurors would find reasonable doubt based upon an extreme set of unrelated facts. *Id.* at 1000. Jurors were not presented with any facts of the case nor asked to offer decision on case-related facts during voir dire. *Id.* Instead, the hypotheticals were designed to determine if the jurors could correctly apply the law. *Id.* The scenario the defendant sought to use began with a question proposed to a juror asking him, "[W]hat kind of evidence you need to convict—to find Mr. Wilson or any defendant guilty of touching someone intentionally without the other person's consent[?]" The trial court intervened advising counsel that the question was improper. Counsel then sought to change the inquiry from one related to battery to one related to stealing a car. The court advised counsel the question needed to relate to whether the jury could be "fair and impartial." The court suggested that counsel was pre-trying the case by asking a jury what they need to convict or find the defendant innocent. At this point counsel indicated his intention was "to ask

them how they would feel if a victim is flip-flopping." The following exchange was recorded:

THE COURT: That's case—that's fact specific to this case. That is absolutely not admissible.

MR. PEREZ: On a theft case, Your Honor, not a battery case.

THE COURT: No, no you are not allowed to give your hypothetical that so directly relates to the facts of this case. **You can flat out ask them do they have an issue if someone has given a previous inconsistent statement**. That's not—and then move on. You can't say the victim, you can't say it's the defendant, but you are not going to ask them what they need for guilt or innocence. **And you are not going to ask them how they feel about a flip-flopping victim** when that is directly—that's the facts of this case.

MR. PEREZ: It's also the defense—it's also the defense of the defense, Your Honor. **The credibility of the—**.

THE COURT: What did she—well, then address whether—what they could—what they need to determine credibility. You are not going to ask them those questions. They're inappropriate. So if you want to ask them what they use to determine credibility, that's fine, but you cannot talk about the—you cannot talk directly about the facts of the case in front of the jury.

MR. PEREZ: A person flip-flopping.

THE COURT: That's not a question to put in front of this jury.

MR. PEREZ: I don't believe it's a fact in the case because if the—

THE COURT: You are saying it's a fact. I've been told by you, yourself, on previous—

MR. PEREZ: Okay.

THE COURT:—occasions that that is a fact, that she has a made now—

MR. PEREZ: Okay.

THE COURT:—different statement.

MR. PEREZ: Just be—so that I won't be confused, Your Honor, I'll apply first the question, if the victim testifies here and flip-flops?

THE COURT: No, you cannot ask that. That's absolutely not appropriate. You can ask them what they used to determine credibility, but that's it. You cannot ask them if a victim flip-flops, how they feel about it; that's an improper question.

MR. PEREZ: Okay. Just for the record, Your Honor, we're asking because if—it's a potential defense of the defendant.

THE COURT: If someone—

MR. PEREZ: I agree.

THE COURT:—made a prior inconsistent statement is not a defense. It goes to credibility.

MR. PEREZ: I—I understand the Court's ruling.

It is apparent from the transcript that defense counsel hoped to get the feelings and opinion of prospective jurors about the credibility of a particular witness or the value of the evidence related to that witness prior to selecting the panel. The purpose of voir dire does not include attacking or bolstering the creditability of potential witnesses. *See Lewis v. State,* 377 So. 2d 640, 642 (Fla. 1979) (It was proper and commendable for the state to ask to the jury not to prejudge the credibility of any witness); *Weddington v. State,* 270 So. 3d 468, 470 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D923a] (Trial judge's voir dire comments did not express his view on the credibility of the witnesses).

Even if we were to find that the inquiry was not prohibited, we would none-the-less find that the trial court did not abuse its discretion. Though it is the centerpiece of his argument on appeal, the defendant's counsel never actually asked the court to inquire of the jury about witness recantation. The trial court advised the defendant's trial counsel that he was free to inquire of the jury about witnesses who have made prior inconsistent statements. Such an inquiry would have been just as effective at addressing a "flip-flopping" witness without using inflammatory terms or going into the facts of the case.[1] At least one appellate court has found that the definition of improper "pre-trying" includes questioning designed to "plant seeds in the jury's mind about the defendant's theory of the case, to be argued later during trial. Such 'pre-trying' of the case is not the purpose of voir dire, nor is it an appropriate use of the amount of time provided for voir dire." *Thomany v. State,* 252 So. 3d 256, 257 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D1619a]. Insistence upon using the term "flip-flopping" seemingly had a purpose beyond supporting the defense theory.

In *Hoskins v. State,* 965 So. 2d 1 (Fla. 2007) [32 Fla. L. Weekly S159a], counsel for the defendant wanted to show prospective juror autopsy photos to determine if the photos would cause any of them to vote for death. *Id.* at 12. The trial judge denied the request, but indicated that the defense could tell the jury they would see very graphic photos. *Id.* On appeal, the Court found defense counsel's inquiry would have "in effect, sought an advance opinion of the evidence from the jurors." *Id.* at 13. The Court further stated, that although the "trial court did not permit the use of the actual photographs, it did permit questioning about the effect of viewing graphic autopsy photographs. Therefore, the record [did] not demonstrate that the trial court restricted Hoskins's ability to determine the jurors' fairness." *Id.* at 13. Such is the case here. The defendant's ability to inquire about the prior inconsistent statement or even witness recantation was not curtailed; it was abandoned.

II. Reference to Non-Testifying Witness Corroboration:

On several occasions during this trial, the office of the State Attorney referenced that statements of a non-testifying witness would corroborate the statements of testifying witnesses. This comment was made in opening statement where the State told the jury: "Janae's ten-year-old little sister, . . . saw the whole thing. And her story corroborated what Janae told officers." Defense counsel objected. The objection was overruled. The prosecutor continued: "So officers made contact with Janae Clark, Leiah Clark, and Chanise Wilson. All of their stories line up. And you're going to hear that." To compound the issue, the prosecutors sought to justify their decision not to call the witness by stating: "But you're not going to hear that from Leiah; we're not calling a ten-year-old in to come testify in front of you guys to say what she saw had happened to Mom. Not doing it."

During the direct examination of the investigating officer, Officer Cruz, the prosecutor asked the following relating to the non-testifying witness Leiah Clark:

Q: And did she tell you in her words what happened? Without telling me what she said, did she tell you what she saw happen?

A: She—yes.

Q: Okay. And was that consistent with what Ms. Wilson had just told you occurred?

A: Yes.

The prosecutor went on to have the officer explain that before he questioned Leiah Clark he asked her a series of questions to "truth qualifying" questions. The witness explained the purpose of truth qualifying questions and that the child was able to tell the difference between the truth and a lie. The prosecutor then asked:

Q: And when you spoke with her, did her recollection of the events line up with Janae Clark's?

A: Yes.

Q: And when you spoke with her, did her recollection of the events line up with Ms. Wilson's?

A: Yes.

During closing argument, the prosecutor again addressed the corroborating statements of the non-testifying minor child. The prosecutor argued:

> Does the witnesses' testimony agree with the other testimony and other evidence in the cases? And did the witness at some other time make a statement that is inconsistent with the testimony he or she gave in court? We have Janae Clark's story aligning with Leiah Clark's story, the ten-year-old. . . . Aligning with Chanise Wilson's story and recollection of the events.

All of the prosecutor's use of the corroborating statements of Leiah Clark was done over defense objections. To compound matters, the prosecutor asserted to the jury that the witness had been "truth qualifi[ed]." Such comments are usually reserved for child hearsay statements. The clear purpose here was to give the jury the impression that the child's similar and corroborating statements must be truthful. To wrest more mileage out of advising the jury that the non-testifying witness's testimony would be the same as that of her sister, the prosecutor offered that the only reason the witness wasn't being called is because she is too young to "testify in front of you guys" about what happened to her mom.

There is great value in not having to call a witness who would then be subject to the crucible of cross-examination and potential impeachment. The demeanor, memory, intelligence, and candor of the witness is unchallenged and unevaluated by the jury. *Postell v. State,* 398 So. 2d 851, 854 (Fla. 3d DCA 1981). By saying the non-testifying witness's testimony would have been the same as the testimony of the witness who testified, you effectively have the testimony of two witnesses affirming the same behavior of a defendant for the price of one and without the opportunity for cross. The State then asserts the non-testifying witness's credibility by saying the witness was "truth qualified." The argument again stripped the defendant of the opportunity to explore that statement and the circumstances under which the statement was made and to determine if the witness was telling the truth. The court repeatedly overruled the defendant's objection to violation of the Confrontation Clause and hearsay because the actual statements of the non-testifying witness were not being uttered. Defense counsel provided the court with a case that stated the contrary and was directly on point. In *Postell v. State,* 398 So. 2d 851, 854 (Fla. 3d DCA 1981) the court held:

> where, as in the present case, the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated.

The trial court none-the-less overruled the objection. In its brief, the State appropriately and correctly concedes error.

It is a maxim of law that "a criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, *not to obscure the jury's view with . . . nonrecord evidence*." *Ruiz v. State,* 743 So.2d 1, 4 (Fla. 1999) [24 Fla. L. Weekly S157a] (emphasis added): *See also, Cardona v. State,* 185 So. 3d 514, 520 (Fla. 2016) [41 Fla. L. Weekly S45a]; *Fountain v. State,* 275 So. 3d 253, 255 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D1754a]; *Johns v. State,* 832 So. 2d 959, 963 (Fla. 2d DCA 2002) [28 Fla. L. Weekly D149a]. In *Diaz v. State,* 139 So. 3d 431 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1138a] the defendant was charged with, among other things, assault. At trial the prosecution did not call the victim but instead relied upon the 911 recordings. *Id.* at 432. During closing argument defense counsel highlighted the State's failure to call a witness to the assault. *Id.* at 433. In rebuttal the prosecution argued:

> Now, I'll ask you, if I had actually brought Rachel Llerena here today, how much stronger do you think the state's case would have gotten? *She would have told you exactly the same things that's on the 911 call.* Only the 911 call, I submit to you, is better because that's her in the moment, it's not her thinking on the witness stand.

Id. (emphasis in original). The appellate court found the argument was improper. The court stated:

> The State, in commenting on what a non-testifying witness would have said and how that non-testifying witness would have corroborated its case, [] went outside the evidence, and asked the jury to accept the prosecutor's assurance that there existed extra-record evidence to corroborate that which the jury heard during the trial. . . . The prosecutor's argument that Llerena, if called to testify, would have reaffirmed everything in those calls, was more than an improper comment on the accuracy and truthfulness of the contents of the 911 tape. It was an argument which reasonably would *lead the jury to believe that there is other evidence, unknown or unavailable to the jury, upon which the prosecutor was convinced of the accused's guilt.*

Id. at 435 (emphasis added). Such was the case here; the prosecutor led the jury to believe that there was other evidence upon which the prosecutor relied and on which the jury could feel confident would only bolster proof of the defendant's guilt.

Although the State has conceded error, it argues that the error was harmless beyond a reasonable doubt in light of the admissible evidence that was presented during the trial. *See State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986). The burden to show the error is harmless remains on the State. *Id.* at 1139.

The victim, upon taking the stand, denied that the defendant intentionally threw coffee on her. She stated she was hit with coffee by accident. She denied ever stating to the officer she was hit with coffee intentionally. She also refuted the testimony that she had ever been the victim of violence at the hand of the defendant. We have taken into consideration the 911 call, the tacit admissions of the defendant as he spoke to Chanise Wilson in the presence of Officer Cruz and the physical evidence introduced at trial. Without the testimony regarding the statements of the non-testifying minor child, the direct evidence the jury was presented with was the divergent statements of the victim and her daughter.

> The [harmless error] test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. ***The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict.*** The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Id. See also, Long v. State, 494 So. 2d 213, 214 (Fla. 1986). We cannot say that the State has met its burden of showing harmless error beyond a reasonable doubt. We believe that there is a *reasonable possibility,* indeed a likelihood, that the State's repeated reference to the statements of the non-testifying minor child had an impact on the verdict.

III. Request to Recall State Witnesses:

At the close of the first day of trial counsel for the defendant advised the court and the prosecutors of his request that Officer Cruz return for the second day of trial. Counsel indicated his intent to inquire about matters in the report. On this day there was no objection. The next morning, prior to the commencement of the trial the court alerted the State and the defense that a juror had submitted a question. The questions were as follows:

> a. Have there been prior complaints at this address for domestic violence?
>
> b. Is there a history of assaults by the defendant?
>
> c. Did mom confirm or deny choking?
>
> d. Did daughter see choking once or twice?

e. Were drugs or alcohol involved or noted on the police report?
f. Did Deputy Cruz say defendant left with stepson?
g. Any are (sic) three kids related to defendant?
h. Can you read back daughter's testimony that said, every time I call the police, the (inaudible) to me?

After the court read the juror's questions, defense counsel advised the court that he wanted to call both Officer Cruz and Janae Clark as witnesses. The State objected to recalling either witness arguing the defense "already had an opportunity to cross-examine" the witness.

Defense counsel explained to the trial court his reason for calling Officer Cruz was to impeach Janae Clark. Defense counsel explained to the trial court that his reason for seeking to call Janae Clark was "for clarifications on her prior testimony." Specifically, counsel wanted to inquire about her "current living situations, if she moved out of the apartment." Defense counsel also sought to recall Janae Clark in light of the questions asked by the jurors. Counsel advised the court that there was additional information he wanted to inquire about that did not come out during cross-examination because he felt they were outside the scope of cross. The trial court disagreed. The court advised defense counsel that during cross-examination there are no limitations. The judge suggested the party calling the witness was limited in scope but during cross-examination "you have a right to question a witness for *any purpose* that you feel is necessary." The court refused to allow counsel to recall the witnesses because of the ample opportunity to cross. The trial court declined to allow any inquiry into the juror questions because the inquiry would be "completely improper."

We first address the trial court's belief that counsel was not limited in the questions he could ask on cross-examination. "Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness." *Andres v. State,* 254 So. 3d 283, 295 (Fla. 2018) [43 Fla. L. Weekly S389a]. The language in *Andres* comes directly from the Evidence Code § 90.612(2), Fla. Stat. (2019) ("Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness."). *See also, Smith v. State,* 7 So.3d 473, 500 (2009) [34 Fla. L. Weekly S276a] ("The Florida Evidence Code provides that '[c]ross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness.' "); *Pedro v. Baber,* 83 So. 3d 912, 917 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D550a] ("Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination."). Cross-examination of a witness is not confined to the *identical* details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief. *Boyd v. State,* 910 So.2d 167, 185 (2005) [30 Fla. L. Weekly S87a], *See also, Coxwell v. State,* 361 So.2d 148, 151 (Fla. 1978) ("[W]hen the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts . . . or to the specific facts developed by the direct examination"). Thus, counsel was right to be concerned about asking questions that were not related to the questions asked on direct or that did not relate to the witness's credibility. Section 90.612(2), Fla. Stat. does permit the court, in its discretion, to permit inquiry into additional matters outside of the scope of direct during cross-examination.

The trial court was of the opinion that it is improper to allow witnesses to be called to address the questions written by jurors. We agree that the time to answer juror questions, if the jurors were permitted to ask questions, was not ripe in that the court had given no indication it intended to permit juror questions. However, counsel had no obligation to ignore juror concerns and we are aware of no legal reason why counsel could not attempt to address those concerns by calling a witness in the defense case-in-chief. It is well-settled that "[t]he admission of evidence is within the sound discretion of the trial court, constrained by the application of the rules of evidence and the principles of stare decisis." *Hayward v. State,* 183 So. 3d 286, 325 (Fla. 2015) [40 Fla. L. Weekly S381a]. *See also, Saldana v. State,* 45 Fla. L. Weekly D1116a, 2020 WL 218218845 (Fla. 1st DCA May 6, 2020) ("[T]rial courts have *'wide latitude'* to regulate court proceedings before them 'in order that the administration of justice be speedily and fairly achieved in an orderly and dignified manner.' ") (alterations in original). Defense counsel should have been permitted to call both witnesses however because defense counsel failed to preserve the issue, we do not find reversible error.

In its brief, the State couches the defendant's request as "recross-examination." In his brief, appellant states his request was to "recall" the witnesses. Recross-examination of a State witness and recalling a witness to testify in the defense case-in-chief are not the same. While it is in the trial court's discretion to allow testimony either through recross-examination or the recalling of a witness, that discretion will be deemed abused where the failure to exercise that discretion will have a substantive bearing on the fairness of the proceedings. *See Delgado v. State,* 573 So. 2d 83, 86 (Fla. 2d DCA 1990) ("Although the decision to allow a case to be reopened involves sound judicial discretion, not usually interfered with on the appellate level, a denial will be reversed where the request is timely made and the jury will be deprived of evidence which might have had significant impact upon the issues to be resolved."); *Fitzgibbons v. State,* 745 So. 2d 452, 452 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2647b] (The trial court abuse its discretion where the failure to allow a witness to be recalled is prejudicial.); *State v. Ellis,* 491 So. 2d 1296, 1296-97 (Fla. 3d DCA 1986) (it was an abuse of discretion to preclude the state from calling a witness whose evidence was crucial to the state's case and whose testimony would have impacted the case). In *Perkins v. State,* 704 So. 2d 619, 620 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D2504a] appellant was charged with armed robbery. A former neighbor and high school teacher identified the defendant, who was a twin, as the perpetrator. *Id.* The witness testified she could distinguish the defendant from his twin. *Id.* During cross-examination defense counsel failed to ask the witness whether she had previously told the defendant's aunt she could not tell them apart. *Id.* When the defendant tried to recall the witness the trial court sustained the objection. *Id.* Reversing, the appellate court stated:

> Although the decision to allow a case to be reopened involves sound judicial discretion not usually interfered with on the appellate level, a denial will be reversed where the request is timely made and the jury will be deprived of evidence which might have had a significant impact upon the issues to be resolved.

Id. The common thread in each of the cases we cite is that the trial court was placed on notice of what evidence would be elicited and the significance of that evidence. Here, defense counsel did not advise the court of the significance of the testimony he wished to offer. Nor did he seek to proffer such testimony for appellate review. *See Fitzgibbons v. State,* 745 So. 2d 452, 452) (a proffer was made by the defense showing that the exclusions of certain testimony would be prejudicial required reversal). Without advising the court of the significant nature of the impeachment he sought to introduce, the significance of whether Janae Clark had moved out of the residence or what testimony needed to be clarified, there is no way to determine if the trial court abused its discretion. Finally, counsel did not identify which of the questions the jurors asked that he wanted to call a witness to answer, what he anticipated the answer would be or whether the answer would be impactful. After review the entire transcript we note that only one of the eight questions posed by the juror had not already

been answered. That question, "whether drugs or alcohol [was] involved or noted in the police report?" would not have been admissible.

Conclusion:

We conclude that because of the State's repeated improper reference to the statements of the non-testifying witness the Appellant did not receive a fair trial and he is entitled to a new trial.

IT IS THEREFORE ORDERED that the trial court should be reversed. Accordingly, the trial court is reversed. and remanded for a new trial. (BULONE and SIRACUSA, JJ.)

---

[1]The expression "flip-flopping" is more synonymous with inconsistent that it is with recanting. Synonyms for the term "flip-flopping" include: yo-yoing, equivocating, waffling, weaseling, dodging, evading, sidestepping, quibbling, straddling. *Merriam-Webster.com Thesaurus,* https://www.merriam-webster.com/thesaurus/flipflopping.

* * *

Criminal law—Driving without valid license— Evidence— Impeachment—Prior convictions—Trial court erred in allowing state to ask defendant if he had prior convictions for crimes of dishonesty or felonies—Error was harmless where defendant testified that he did not have any convictions, and state did not question him further on issue or mention it again—Sentencing—Vindictiveness—Resentencing by new judge is required where imposition of consecutive rather than concurrent sentence was response to defendant's behavior in leaving courtroom without permission during plea negotiations and proceeding to trial

TREROY JAYQWAN PETERSON, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2018-AP-000021-A-O. L.T. Case No. 2018-CT-002391-A-O. June 12, 2020. Appeal from the County Court, in and for Orange County, Honorable Carol E. Draper, County Court Judge. Counsel: Jerry Jenkins, for Appellant. Aramis D. Ayala, State Attorney, and Kenneth Sloan Nunnelley, Assistant State Attorney, for Appellee.

(Before BLACKWELL, HARRIS, and MARQUES, JJ.)

(**PER CURIAM.**) Appellant Treroy Peterson appeals his judgment and sentence.

On July 30, 2018, Officer Martinez responded to a burglary dispatch. He observed traveling towards him a vehicle that matched the getaway car. He conducted a traffic stop and identified the driver as Appellant. He asked Appellant for his driver's license and learned that he did not have one; he only had a valid Florida ID card. He arrested Appellant for Operating a Motor Vehicle Without a Valid Driver's License.

On September 12, 2018, defense counsel asked the Court what it could offer Appellant if he pled to the bench, to which the Court offered him 59 days. Appellant refused this offer and left the courtroom. The Court warned counsel that Appellant ran the risk of a consecutive sentence if found guilty and that his decision to leave the courtroom would be held against him because he was not supposed to leave. Appellant chose to proceed to trial.

At trial, Appellee asked Appellant on cross-examination if he had any prior convictions for crimes of dishonesty or felonies. Appellant responded 'no' and Appellee did not question him further or raise the issue again. Appellant objected, arguing that it was a misleading question, and moved for a mistrial. The Court denied the objection and the motion for mistrial, finding that there was sufficient evidence to show his convictions in the court file, thereby providing a good faith basis for the question. The jury found him guilty.

At sentencing, Appellant offered to waive his right to appeal on the impeachment issue if the Court ran his sentence concurrently to his pending felony charge. The Court denied this request, finding that the State asked the impeachment question in good faith. The Court sentenced him to serve 59 days in jail, consecutive to his felony VOP sentence.

To determine whether a sentence is vindictive in nature, the Court will look at the totality of the circumstances. *Evans v. State,* 979 So. 2d 383, 385 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1066a]. A trial court's ruling on the admissibility of evidence is reviewed under an abuse of discretion standard. *Mathieu v. State,* 258 So. 3d 528, 532 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2305a]. An error in interpreting a rule of evidence, however, is subject to *de novo review. Id.*

Appellant argues that the trial court: 1) erred by allowing the State to impeach him regarding any prior convictions, and 2) imposed a vindictive sentence because he chose to proceed to trial.

Appellee argues that: 1) the trial court's decision regarding the impeachment question was sound because Appellee had a good faith basis for the question, and 2) Appellant's argument for vindictive sentencing is not credible because counsel invited the Court to discuss a plea option, the sentence was less than the Court's original offer, and it had the discretion to sentence in accord to how it believed Appellant should be sentenced.

Analysis and Ruling

Improper Impeachment: Appellant argues that the trial court erred by allowing the State to ask him if he had been convicted of a felony or a crime of dishonesty. Appellee failed to produce any certified copies of any conviction or state a good faith reason for not having certified copies. The lower court improperly overruled his objection and denied his motion for mistrial. Appellant objected again at the end of the trial and the lower court overruled, finding a good faith basis in the court file. Appellant did not have any prior convictions for felonies or crimes of dishonesty. This destroyed his credibility with the jury and therefore this error was not harmless.

Although a trial court erred in allowing the State to question a defendant about whether he had prior convictions of felonies or crimes of dishonesty, this error is harmless where it did not contribute to the verdict, or alternatively, there is no reasonable possibility that the error contributed to the conviction. *Spradling v. State,* 211 So. 3d 1144, 1146 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D529b].

In this case, any error in allowing the question was harmless because Appellant testified that he did not have any prior convictions and Appellee did not question him further or mention it again. R., 148-49. There is no reasonable possibility that this contributed to his conviction since he responded in his favor and Appellee did not attempt to contradict him. This is especially true when combined with Officer Martinez's testimony supporting a conviction: that he found a car matching the one he was searching for, asked the driver (Appellant) for his driver's license, and determined he only had an identification card. *Id.* at 134-37. Although the car was stopped, the jury received an instruction that "drive" as an element included having actual physical control of the vehicle. *Id.* at 148, 161-62. Defendant is not entitled to relief on this issue.

Vindictive sentencing: Appellant argues that the trial court imposed a vindictive sentence when it made it consecutive to his felony case instead of concurrent. He contends the trial court participated in plea negotiations and offered him a 59-day sentence with 45 days of credit for time served. When Appellant left the courtroom to go back to jail, the lower court stated, "Now it could be consecutive" as though it were punishment for leaving before he had permission to do so. On the day of trial, the lower court stated that it may consider consecutive probation, but if the jury found him guilty at trial, Appellant would receive a consecutive jail sentence.[1] Appellant believes this proves the lower court gave him an ultimatum.

When a claim of vindictive sentencing is raised, the reviewing court must examine all of the surrounding circumstances. *Williams v. State,* 225 So. 3d 349, 356 (Fla. 3d DCA 2017) [42 Fla. L. Weekly

D1722a]. The factors to consider are: 1) whether the trial judge initiated plea discussions; 2) whether the trial judge appeared to have departed from his role as an impartial arbiter by either urging the defendant to accept a plea or implying or stating that the sentence would hinge on future procedural choices like going to trial; 3) the disparity between the plea offer and the ultimate sentence; and 4) the lack of any facts on the record that explain the reason for an increased sentence other than that the defendant exercised his right to a trial. *Vardaman v. State,* 63 So. 3d 925, 927 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1405a].

A presumption of vindictiveness arises where there is a "reasonable likelihood" that the increase is the result of actual vindictiveness on the part of the sentencing authority. *Evans v. State,* 280 So. 3d 511, 514 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D2320a].

A review of the record shows that the trial court did not initiate plea negotiations, but made it clear that Appellant's sentence would be consecutive if he went to trial and a jury found him guilty; it would remain concurrent if he entered a plea. This indicates punishment for proceeding to trial. These statements occurred in response to Appellant's behavior and removed the Court from its role as an impartial arbiter. Specifically, Appellant left the courtroom without permission because he did not "feel like listening to the judge," to which the Court responded that "he [did not] have the right to say that garbage." The trial court unequivocally stated, "It'll be held against him. He wasn't supposed to leave" and it would "remember that for the trial."

At the trial call, Appellant refused to come from the jail because he felt ill, but the Court believed this was a tactic, saying, "That was bull. Why did he really refuse? That wasn't true." Shortly thereafter, the parties attempted to reach a resolution, but the Court refused to accept it:

> **Mr. Jenkins:** Judge, speaking—speaking with the State, they're willing, if the Court would accept it, to the 45 days served on Mr. Peterson.
>
> **The Court:** No. If he wants to act like that, no.
>
> **Mr. Jenkins:** Judge, a guilty plea would result in him violating his probation.
>
> **The Court:** I don't care. When he—when I get a call that he's refusing to come over, do we—do you still want him over, and I'm thinking, I got him set for a jury trial, of course. Well, then that would have to include possible force. The jail—it's not my job. So, no, I'm not gonna take a time served from the gentleman. He's not in jail on this case, I don't believe.

On the day of trial, defense counsel again asked the Court to consider something other than the maximum, but it refused, saying, "But if he wants a trial and he loses, it'll be consecutive." After defense asked the Court to reconsider at sentencing, it asked, "What part of consecutive that I've been repeating over and over and over again doesn't he understand?"

It appears Appellant's sentence was vindictive in response to his behavior prior to trial and was not solely based on the crime or outcome of the trial. The trial court clearly stepped out of its role as an impartial arbiter when it imposed a consecutive instead of concurrent sentence in response to Appellant's pre-trial decisions and "ultimatums." We conclude that the trial court's frustration at Appellant's behavior, suggestion that a post-trial sentence would be harsher, imposition of an increased sentence after Appellant rejected the offer and went to trial, and failure to explain the reason for that sentence together show vindictiveness in violation of Appellant's rights.

AFFIRMED in regards to judgment, REVERSED AND REMANDED for resentencing in front of a new judge. (HARRIS and MARQUES, JJ., concur.)

[1]Appellant had a pending VOP sentencing, so the parties were discussing whether this sentence would be consecutive or concurrent to the VOP sentence.

* * *

Insurance—Homeowners—Coverage—Summary judgment—Factual issues—Error to enter summary judgment in favor of insurer where opposing affidavits filed by homeowner created genuine issue of material fact as to whether water damage was result of sudden event or of long-term leak that was excluded from coverage—Error to disregard affidavits of homeowner's experts on ground that they were based on information provided by homeowner, not expert's personal inspection of premises

DANIEL MENDEZ, Appellant, v. AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA, Appellee. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case Nos. 2017-CV-000106-A-O, 2018-CV-000102-A-O. L.T. Case No. 2015-CC-009703-O. July 13, 2020. Appeal from the County Court for Orange County, Faye L. Allen, County Court Judge. Counsel: Earl I. Higgs, Jr., Higgs Law, P.A., Orlando, for Appellant. Melissa M. Burghardt, Wood Smith Henning & Berman LLP, Tampa, for Appellee.

(Before MYERS, LEBLANC and WHITE, JJ.)

(MYERS, J.) In case number 2017-CV-106, Appellant, Daniel Mendez ("Mendez"), appeals the trial court's order granting summary judgment in favor of Appellee, American Integrity Ins. Co. of Florida ("AII"). In case number 2018-CV-102, Mendez appeals the trial court's order awarding attorney fees in favor of AII pursuant to § 768.79, Fla. Stat. (2015).

Facts

Mendez contacted his insurance company, AII, about damage to his property due to a plumbing leak. On or about October 2014, a plumbing leak caused extensive water damage to the Mendez's property. Following the loss, Mendez contacted his insurance company, AII, and sought coverage under the policy. AII conducted an inspection of the home and determined the loss was not covered because the policy excluded coverage for, *inter alia,* constant or repeated seepage or leakage of water for 14 or more days. As a result, Mendez filed a breach of contract complaint to obtain payment.

AII conducted Mendez's deposition as part of its defense of the case. When asked at deposition to describe the loss, Mendez testified the loss occurred in October 2014, more or less. He also testified that over a period of time, humidity started to build up and when he and his wife noticed the walls begin to change colors, he thought there was a problem. Mendez also testified he did not see water on the floor frequently because if he had seen water frequently, he would have made a claim right away. While Mendez acknowledged that from time to time they would see puddles of water when taking a bath or when guests used the bathroom, Mendez testified that he did not know this was an ongoing problem and that he disagreed with AII's denial of the claim. When asked by counsel for AII why he disagreed with the denial, Mendez stated:

> Number one, us, my family, we are not and are not pretending to be engineers and understand the leakage or where it comes from. Since it was an internal leakage, we wouldn't know—we didn't know that in order to find the leakage, we had to bring the walls down. So how do we know how to fix it? How are we going to notice that it's negligence if we're not aware of that.

Following Mendez's deposition, AII moved for summary judgment, contending there were no genuine issues of material fact, and that it was entitled to judgment as a matter of law because the policy excluded constant and repeated seepage or leakage for fourteen days or more. To support its position, AII filed the affidavit of its mold assessor who concluded the damage to Mendez's home occurred due to a long-term water leak occurring over a minimum of six months. In response Mendez asserted that genuine issues of fact remained. To support its position, Mendez presented the affidavit of its public

adjuster, Yadin Acosta. Mr. Acosta conducted a thorough inspection of the property and determined the loss was caused by a sudden water event that occurred over a period of less than fourteen (14) days. Based upon his physical inspection of the property and his experience, Mr. Acosta disagreed with AII's findings and opined that the damage to Mendez's property occurred in less than fourteen days.

Mendez also presented the affidavit and report of its engineering expert, Grant Renne. Mr. Renne specifically excluded construction defects as the cause of loss and further confirmed that a "single sudden pressurized plumbing leak caused the interior flooding detailed by insured and is the proximate cause of the tile flooring, cabinetry, and interior finishing damage documented in the photographs and the Conestoga-Rover.

On February 3, 2017, the parties attended a hearing on the motion for summary judgment. At the hearing, the trial court raised the issue of admissibility of evidence concerning Mendez's engineering expert. The trial court was also bothered that Mendez reported the loss months after noticing the water and requested that Mendez's counsel provide case law that would allow the trial court to ignore what it perceived as late notice. Mendez's counsel informed the trial court that AII did not contend it was prejudiced by the notice and that the policy did not require Mendez to report the loss within the first fourteen days. The trial court did not accept Mendez's counsel's explanation.

The trial court subsequently determined that Mendez's evidence was insufficient to defeat AII's motion for summary judgment. The trial court then entered its order and final judgment in favor of AII. The court subsequently entered a judgment of attorney's fees in favor of AII. These appeals ensued.

Standard of Review

An order of final summary judgment is reviewed de novo. *Fayad v. Clarendon Nat'l Ins. Co.,* 899 So. 2d 1082, 1085 (Fla. 2005) [30 Fla. L. Weekly S203a]; *Volusia County v. Aberdeen at Ormond Beach, L.P.,* 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a]; *Genuinely Loving Childcare, LLC v. Bre Mariner Conway Crossings, LLC,* 209 So. 3d 622, 624 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D164a]; *T-Quip of Florida, Inc. v. Tietig,* 207 So. 3d 958, 960 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D2740d].

Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to a judgment as a matter of law. Fla. R. Civ. P. 1.510(c). *Desvarieux v. Bridgestone Retail Operations, LLC*, 45 Fla. L. Weekly D188b (Fla. 3d DCA Jan. 22, 2020); See *Gidwani v. Roberts,* 248 So. 3d 203, 206 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1024a]; see also *Cox v. CSX Intermodal, Inc.,* 732 So. 2d 1092, 1095 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D195a]

The standard of review for an award of prevailing party attorney's fees is abuse of discretion. *Shands Teaching Hosp. and Clinics, Inc. v. Mercury Ins. Co. of Florida,* 97 So. 3d 204, 213 (Fla. 2012) [37 Fla. L. Weekly S407b]; *Diaz v. Kosch,* 250 So. 3d 156, 162 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1352a].

Analysis

Mendez contends that the trial court erred in granting summary judgment in AII's favor because (1) Mendez presented evidence that the loss resulted from a sudden pressurized plumbing leak, thus creating a disputed issue of material fact, and (2) the trial court exceeded its authority by acting as the trier of fact, weighing the evidence and determining that Mendez could not defeat AII's motion for summary judgment, rather than simply deciding whether there was an issue of material fact.

AII argues that the affidavits filed by Mendez in opposition to the motion for summary judgment were based on information provided by Mendez and not based on the engineer's or public adjuster's first-hand observations. AII also contends that Mendez testified under oath that the leak was ongoing and long-term. For these reasons, AII asserts there was no issue of material fact and it was entitled to summary judgment as a matter of law. At the conclusion of the hearing on the motion for summary judgement, the court stated:

> Okay. Then I'm going to grant this motion for summary judgment. From this Court's perspective, I don't see any material disputed facts. I see disputed facts, but I don't think they rise to the level of changing the outcome of this case.
>
> To me, it's clear that Mr. Mendez saw water, humidity, leaking, pooling water, puddling water, because I read it in his deposition testimony. That leak was ongoing. There's no other way to take his testimony.
>
> The fact that an engineer come in and decides to give us alternate facts, you cannot insert your own facts. The facts are what they are. So he can't change Mr. Mendez's testimony. Mr. Renne can't do that.
>
> The Court, therefore, concludes that there is no material disputed fact, nothing material. The defense is to provide the Court with a proposed summary final judgment.

In its order granting AII's motion for summary judgement, the court held:

> 3. Defendant's Motion for Summary Judgment is GRANTED.
>
> 4. The loss and claimed damages referenced in Plaintiffs' Complaints are not covered under the Policy.
>
> a. Such claimed losses are excluded by the Policy's exclusions for continuous, repeated, long-term water leakage, neglect, and faulty maintenance.
>
> 5. Defendant is the prevailing party for the purposes of issues relating to attorney's fees and costs.

Rule 1.510(c)(1), Florida Rules of Civil Procedure, provides that summary judgement shall be granted "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."

Further, subsection (e) provides:

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

AII contends that because the affidavit submitted by Mendez in opposition to the motion for summary judgment was based on a review of the report prepared by AAI' s adjuster and photographs, and not on an actual examination of the property, the affidavit does not create an issue of material fact. The Court seemed to accept this position, stating:

> **The Court**: . . . is he supposed to be an expert, Mr. Renne?
>
> **Mr. Gonzales**: Yes.
>
> **The Court**:—coming to an expert conclusion as to how and when these damages occurred. You know, I don't think a Daubert motion is pending, but I don't know how I could allow someone to come in and testify—as the Court, I don't think I can allow someone to come in and testify who absolutely and positively has not even seen the damage and has no way to make an evaluation based upon the actual, you know, bathroom sinks and fixtures and pluming that is at issue in this case. If he hasn't even gone out there and looked at it, how on Earth can he tell from a picture?
>
> **Mr. Gonzalez**: And reading directly from his report, the way that he's able to analyze this, he uses the lack of movement of the control joints around the perimeter of the tile flooring—

The Court: But he's not moving them. He hasn't done a physical analysis of the location. You know, I just think this is not going to reach Daubert standards as the gate keeper on expert testimony. I'm not sure I would allow him to testify. I might strike his testimony, especially if he hasn't gone out there.

But that's not what I'm being asked to do today. I'm being asked to determine if there are any genuine issues of material fact. It's going to be difficult for me to reach that conclusion if all I have is his desk report.

However, the trial court did not actually determine whether the facts in the affidavit would be admissible at trial, or whether Mr. Renne was competent to testify regarding them.

Florida's Evidence Code provides:

90.702 Testimony by experts.—If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case.

And section 90.704 provides:

Basis of opinion testimony by experts.—The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

There is nothing in the Evidence Code that would require Mr. Renne to physically inspect the premises before rendering an expert opinion. The above cited section states that the expert's opinion may be based on facts or data "perceived by, **or made known to**, the expert at or before trial." (emphasis added). Thus, Mr. Renne's opinion regarding the damage to Mendez's property could be based on reports, photographs and any other facts or data made known to him, provided such is generally relied on by experts in his field when rendering opinions.

The competing expert opinions created a genuine issue of material fact regarding whether the water damage was the result of a sudden event or the result of a continuing, on-going problem. The trial court stated that although there were disputed facts, they were not material. However, since the entire case hinged on whether the damage resulted from a sudden event or ongoing problems, the disputed facts were material.

The trial court further stated that it was unsure that it would have allowed Mr. Renne to testify, but didn't state a reason for that. There was no indication that Mr. Renne was incompetent to testify, nor that any methodology he used was unreliable. Rather the court stated,

The fact that an engineer come in and decides to give us alternate facts, you cannot insert your own facts. The facts are what they are. So he can't change Mr. Mendez's testimony. Mr. Renne can't do that.

However, the facts are what is in dispute. AII says the damage occurred over a period of more than 14 days; Mendez says the damage occurred due to a single event. The only way to determine which facts are true is to weigh the evidence, which the court was not supposed to do at the motion hearing. The court's role at that time was to determine whether an issue of material fact exists and, it would appear from the opinions presented that such an issue does exist. See *Hicks v. American Integrity Insurance Co. of America,* 241 So. 3d 925 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D446a] (holding that "In an all-risks policy, once the insured establishes a loss within the terms of a policy, the burden shifts to the insurer to prove that a particular loss arose from and excluded cause. Whether such a determination is possible is a genuine issue of material fact precluding summary judgment.") (Citation omitted).

The trial court's award of prevailing party attorney's fees and costs pursuant to § 768.79, Fla. Stat. (2015) was based upon its order granting Appellee's motion for summary judgment. Because the trial court erred and its order granting summary judgment must be reversed, the award of prevailing party attorney's fees and costs pursuant to § 768.79, Fla. Stat. (2015) must also be reversed.

Based on the foregoing, it is **ORDERED AND ADJUDGED** that the Order Granting Motion for Summary Judgement, Final Judgment, and Order Granting Defendant's Motion to Tax Fees and Costs are **REVERSED**, and the matter is **REMANDED** for further proceedings. (LEBLANC, J., concurs. WHITE, J., concurs in the judgment.)

* * *

GEICO GENERAL INSURANCE COMPANY, Petitioner, v. PHOENIX EMERGENCY MEDICINE OF BROWARD, LLC, a/a/o Dorothy Lawrence, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2017-CA-10494-O. L.T. Case No. 2015-SC-7209-O . November 5, 2019. Counsel: David B. Alexander, for Plaintiff. Ronalda Stevens, for Defendant.

FINAL ORDER DISMISSING PETITION FOR WRIT OF CERTIORARI

(SCHREIBER, J.) THIS MATTER came before the Court for consideration of Petitioner's Notice of Voluntary Dismissal, filed on October 11, 2019; and Respondent's Response to Petitioner's Notice of Voluntary Dismissal, filed on October 14, 2019.

It is ORDERED and ADJUDGED that this case is DISMISSED.[1] The Clerk of the Court is directed to close this case forthwith.

It is further ORDERED and ADJUDGED that Petitioner's Amended Motion for Appellate Attorney's Fees, filed on filed on October 16, 2018, is DENIED; and that Respondent's Motion for Conditional Award of Appellate Attorney's Fees, filed on January 5, 2018, is CONDITIONALLY GRANTED, contingent on Respondent ultimately obtaining a judgment in its favor, and the assessment of those fees is REMANDED to the trial court. (BLECHMAN and ROCHE, JJ., concur.)

[1]Respondent's October 11, 2019 Motion to Dismiss, which seeks dismissal of the Petition for Writ of Certiorari, is rendered moot in view of Petitioner's Notice of Voluntary Dismissal.

* * *

Landlord-tenant—Eviction—Appeals—Standard of review—Where, by stipulation of parties, successor judge ruled on eviction action based on transcript of trial before original presiding judge, presumption of correctness of successor judge's findings is not as strong as with original presiding judge, and appellate court is not bound by successor judge's credibility determinations—Affirmative defenses—Retaliation for exercising rights under fair housing laws—Trial court erred in finding that landlord did not have good cause for eviction that made retaliation defense inapplicable where landlord provided evidence that tenants violated good conduct addendum to lease by harassing neighbors—Trial court erred in ruling that tenants did not agree to addendum—Tenants did not raise undue influence defense, and record is devoid of any evidence that tenants were forced to sign addendum because they could not find alternative housing—Tenants' claim of retaliation was not supported by any evidence that they were treated differently from other tenants—Violation of landlord's duty of good faith—Alleged violation of duty of good faith did not bar eviction action where there was good cause for eviction—Forfeiture—Trial court erred in ruling in favor of tenants on equitable forfeiture defense based on son's medical condition where underlying finding that change in environment could have detrimental effect on son's condition was not supported by record

245 C & C LLC, Appellant, v. CARLOS ALONSO CANO and FE MOREJON FERNANDEZ, Appellees. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 19-208-AP-01. L.T. Case No. 18-000236-CC-21. September 3, 2020. On Appeal from the County Court in and for Miami-Dade County, Hon. Milena Abreu, County Court Judge. Counsel: Leslie W. Langbein, Langbein & Langbein, P.A., for Appellant. Lissie Salazar and Christopher Brochyus, Legal Services of Greater Miami, Inc., for Appellees.

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

OPINION

(SANTOVENIA, J.) 245 C & C LLC, ("Appellant" or "Landlord") filed an appeal alleging that final judgment was incorrectly entered in favor of Appellees, Carlos Alberto Alonso Cano ("Alonso") and Fe Morejon Fernandez (collectively "Appellees" or "Tenants") in this eviction case for termination of a month-to-month tenancy.

While the Tenants' annual written leases with the Landlord commenced in 2011, issues between the Tenants and the Landlord apparently arose in 2013. The tenancy changed to a month-to-month tenancy with a good conduct addendum in October, 2016. A notice of non-renewal was delivered to Tenants thereafter on September 26, 2017. On September 27, 2017, Tenants filed a fair housing complaint with the United States Department of Housing and Urban Development ("HUD") and the Florida Commission on Human Relations ("FCHR"). At HUD's request, the Landlord provided Tenants additional time to vacate the property so that HUD could investigate the complaint. The Landlord's September 26, 2017 notice of non-renewal was thus followed by an October 4, 2017 notice of non-renewal requiring the Tenants to vacate the property by January 31, 2018. The eviction action commenced on February 1, 2018. Alonso filed a complaint on February 12, 2018 in the United States District Court for the Southern District of Florida alleging the Landlord's violations of Alonso's civil rights, the Americans with Disabilities Act and housing laws, as well as alleging discrimination and retaliation by the Landlord (the "Federal Case").[1]

Tenants raised three affirmative defenses in the eviction action: 1) retaliatory eviction pursuant to Section 83.64(1)(f), Fla. Stat. premised on Tenants' filing of complaints under federal and state housing laws; 2) violation of the Landlord's obligation of good faith under Section 83.44, Fla. Stat. and 3) equitable relief from forfeiture. Alonso also filed a counterclaim against the Landlord alleging violation of Section 83.67, Fla. Stat. for termination of water services and breach of contract for the Landlord's alleged violation of its obligation of good faith for failing to advise Alonso of water shutoffs and because wildlife damaged Alonso's car. The Landlord replied to the affirmative defenses and filed HUD's and the FCHR's adverse agency determinations in the record in support of its position that the retaliatory eviction defense was legally insufficient.

The trial judge who originally presided over the eviction action conducted a non-jury trial in November, 2018, but retired in December, 2018 before ruling or entering judgment. The successor judge provided the parties with the options of having a new trial or having the successor judge enter a ruling based on the trial transcripts, exhibits and memoranda of law. The parties stipulated to the latter option.[2] The successor judge entered final judgment in favor of Appellees on June 20, 2019 and this appeal followed.

Standard of review

Where a trial court's conclusions following a non-jury trial are based upon legal error, the standard of review is *de novo. Acoustic Innovations, Inc. v. Schafer*, 976 So. 2d 1139, 1143 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D544a]. Generally, when a decision in a non-jury trial is based on findings of fact from disputed evidence, it is reviewed on appeal for competent, substantial evidence. *Id.* (*citing In re Estate of Sterile,* 902 So. 2d 915, 922 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D1407a]). This is because "the trial judge is in the best position 'to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses.' " *In Re Estate of Sterile*, 902 So. 2d at 922 (*quoting Shaw v. Shaw,* 334 So. 2d 13, 16 (Fla. 1976)). However, the successor judge here did not observe "the bearing, demeanor and credibility of the witnesses," but ruled based on a review of a cold transcript. The issue then becomes what deference, if any, this appellate court is required to give to the successor judge's factual findings and credibility determinations.

In *Walton v. Estate of Walton*, 601 So. 2d 1266, 1268 (Fla. 3d DCA 1992), the Third District Court of Appeal stated that:

> The rule has long been established that where a trial judge bases his final order on the transcribed testimony of witnesses, the appellate court is in the same position in examining the testimony as is the trial judge. Although the presumption of correctness remains, it is not as strong as when the trial judge, as a trier of fact, personally hears and sees the witnesses. This is one of the rare instances in which an appellate court is permitted to reexamine a factual determination made by a trial court. . .We, therefore, are in as good a position as was the probate judge to examine the transcript and determine the weight to be given the witness' testimony.

(citations omitted). The court in *Sullivan v. Kanarek* similarly ruled that the appellate court does not need to afford a successor judge the same deference it would afford the original presiding trial judge. 79 So. 3d 900, 904 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D439a]. "Furthermore, the presumption of correctness of a court's ruling based upon a written record of pleadings, affidavits and depositions is not as strong as where the court heard the witnesses itself or ruled on conflicting evidence." *Savage-Hawk v. Premier Outdoor Products, Inc.*, 474 So. 2d 1242, 1244 (Fla. 2d DCA 1985). The presumption of correctness is not as strong when (1) the trial judge makes his or her determinations on the written record or (2) when the evidence is not conflicting. *See W. Shore Rest. Corp. v. Turk*, 101 So. 2d 123, 126 (Fla. 1958) (where a trial judge did not hear witnesses, the presumption of correctness due the judge's ruling based on a written record "is slight for the reason that we have everything before us that he had before him and we have the same opportunity to weigh it as did the chancellor"). The Court in *Julian v. Julian* similarly stated that:

> It is plain from the record that the trial court has never seen or examined any of the parties to the suit, or the witnesses whose depositions were taken, but has based its decision as to the competency of the plaintiff solely upon typewritten evidence. In these circumstances, the trial court was in no better position to arrive at a correct conclusion as to the competency of the plaintiff and the credibility of the witnesses at the time the summary judgment was entered than is the appellate court on this appeal. Hence, the general rule to the effect that a judgment entered by a trial court on evidence will on appeal be presumed correct until the presumption has been clearly overcome by the appealing party does not obtain to the same degree as it would where the trial court had seen and heard the witnesses testify.

188 So. 2d 896, 898-99 (Fla. 2d DCA 1966) (quoting *Harmon v. Harmon*, 40 So. 2d 209 (Fla. 1949)); see also *Dukes v. Dukes*, 346 So. 2d 544, 545 (Fla. 1st DCA 1976).

Moreover, when a trial judge makes credibility determinations pursuant to the written record, the appellate court is not required to accept the trial court's credibility determinations. *See Redondo v. Jessup*, 426 So. 2d 1146, 1147 (Fla. 3d DCA 1983) ("Whitley's testimony was also presented at the evidentiary hearing, but only by way of deposition. Since the trial court had no opportunity to observe Whitley's demeanor, we are not required, as appellee suggests, to accept the trial court's determination of Whitley's credibility"). This is because when a trial judge makes credibility determinations pursuant to written submissions, as opposed to live testimony, the appellate court "stand[s] on equal footing with the trial court as to the interpretation of the written submissions." *Highland Stucco & Lime Products, Inc. v. Onorato*, 259 So. 3d 944, 947-48 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2579a]. The Third District Court of Appeal articulated the rationale for this principle in *Sanford v. State*, 687 So. 2d 315 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D307h], stating:

> [W]e conclude that it is virtually impossible for any judge other than the actual trial judge to properly entertain a challenge to a jury verdict based upon the weight where as here, the credibility of the witnesses played such an important role. As Sanford points out, a careful consideration of the credibility of the witnesses cannot be adequately accomplished by a mere reading of the cold trial transcript.
>
> The State asserts, however, that a witness' credibility can be readily gleaned from the witness' consistent and/or inconsistent answers to propounded questions, stated bias or interests in the outcome of the case, etc. While these are certainly factors which the jurors are instructed to consider in determining a witness' credibility, *see* Florida Standard Jury Instructions in Criminal Cases 2.04 at 14-15, we find that they are not all encompassing. The demeanor, physical appearance, gestures, voice intonations, etc. of the witness while testifying are also critical factors which bear on the credibility of the witness. And such factors clearly cannot not be captured or articulated on a trial transcript. Only the judge who actually presided over Sanford's trial and observed the witnesses will know what significance, if any, such factors played in the outcome of the trial.

Id. at 317.

Here, the successor judge, albeit based on a stipulation of the parties, reviewed a cold transcript and was in no better position than this appellate court to make credibility determinations based on the record. As such, this court is not bound by the successor judge's credibility determinations. *Redondo*, *supra.*, 426 So. 2d at 1147.

The Eviction Claim

Section 83.64(1)(f), Fla. Stat., the statute pursuant to which Appellees asserted their retaliation defense, provides, in relevant part, that:

> (1) **It is unlawful for a Landlord to** discriminatorily increase a tenant's rent or decrease services to a tenant, or to **bring or threaten to bring an action for possession or other civil action, primarily because the Landlord is retaliating against the tenant.** In order for the tenant to raise the defense of retaliatory conduct, the tenant must have acted in good faith. Examples of conduct for which the Landlord may not retaliate include, but are not limited to, situations where:
>
> **(f) The tenant has exercised his or her rights under local, state, or federal fair housing laws.**
>
> (2) Evidence of retaliatory conduct may be raised by the tenant as a defense in any action brought against him or her for possession.

(emphasis added). Notably, Section 83.64(3), Fla. Stat. provides that "[i]n any event, this section does not apply if the Landlord proves that the eviction is for good cause. Examples of good cause include, but are not limited to, good faith actions for nonpayment of rent, violation of the rental agreement or of reasonable rules, or violation of the terms of this chapter." *See Salmonte v. Eilertson*, 526 So. 2d 179 (Fla. 1st DCA 1988) (interpreting Section 83.64(3); retaliatory eviction defense does not apply when landlord proves eviction is for good cause and further defines good cause to include violation of the rental agreement).

The history between the parties provides context for the non-renewal of the written lease and the reasons for the requirement of the good conduct addendum. In October, 2016, Landlord advised Tenants that it would only allow Tenants to remain at the property on a month-to-month basis contingent on their execution of a good conduct addendum. A Month to Month Tenancy and Good Conduct Addendum was executed by Tenants on October 28, 2016 ("Good Conduct Addendum"). Pursuant to paragraph 13 of the Good Conduct Addendum, Tenants agreed that any violation of the month-to-month lease may result in immediate termination of the lease. Specifically, Tenants agreed in paragraph 10 of the Good Conduct Addendum that they would not harass their neighbors. The month-to-month lease required Tenants to comply with the terms of the lease agreement. Tenants also admit in their Answer Brief that "the lease agreement does state that tenants must abide by all federal, state, municipal and local laws and ordinances".

At trial, the Landlord introduced evidence of Appellees' "violation of the rental agreement or of reasonable rules" within the meaning of Section 83.64(3), Fla. Stat. Specifically, the Landlord introduced evidence that the Landlord had good cause to evict the Tenant. For example, Maria Hernandez, the tenant in apartment 1401 (the "Upstairs Tenant"), whose apartment is located directly above the Tenants' apartment, testified that Alonso screamed at her the very first day she moved into the apartment because the balcony door made noise when opened (November 16, 2018 Trial Transcript at p. 117, lines 14-23) and that his treatment of her did not improve over the course of her tenancy of four years and ten months (November 16, 2018 Trial Transcript at p.119, lines 3-5). Alonso would bang on the ceiling of his apartment (her floor) on a regular basis whenever she opened the sliding glass door to her balcony or any time he heard anything or footsteps (November 16, 2018 Trial Transcript at p. 119, lines 16-22—p.121, line 3). Tenants' actions led her to not wear heels within her apartment and to not invite any guests to the apartment (November 16, 2018 Trial Transcript at p. 119, line 16-p.120, line 3).

Also, the Upstairs Tenants were required to evacuate their apartment because there was no power and they could not open their balcony door due to the noise, fumes and concerns of carbon monoxide emanating from Tenants' unauthorized use of a generator following Hurricane Irma (November 16, 2018 Trial Transcript at p. 134, lines 6-13). In addition, Tenants had made noise complaints to the security guard about the Upstairs Tenants that were not true (November 16, 2018 Trial Transcript at p. 122, line 5-p.124, line 5; p. 131, lines 8-13). This testimony, standing alone, was sufficient to support a finding that the Landlord pursued the eviction for good cause, rendering the retaliation defense inapplicable pursuant to

Section 83.64(3), Fla. Stat. Further, the terms in paragraph 10 of the Good Conduct Addendum, to which Tenants agreed, corroborate the testimony of the Upstairs Tenant and appear to be specifically tailored to address the ongoing issues with Tenants to which the Upstairs Tenant testified.

The property manager, Vilma Hernandez ("Property Manager") testified that Tenants were sent notice of termination of the month-to-month tenancy because they were not following the terms of the Good Conduct Addendum (November 16, 2018 Trial Transcript at p. 90, lines 21-24). Following the issues with the air conditioning and the generator, there was testimony from the Upstairs Tenant that Tenants continued to disturb her through September, 2017 (November 16, 2018 Trial Transcript at p. 121, lines 16-21). Accordingly, Tenants were notified of the non-renewal of the month-to-month lease effective October 31, 2017.

The successor judge determined that the Property Manager was not trustworthy[3] and rejected not only her testimony, but all the other evidence submitted on behalf of the Landlord. It was error to do so. There was no finding that the Landlord's other witnesses were not credible. Notably, the opinion does not even mention the testimony of the Upstairs Tenant.

Among other findings, the successor judge found that the Tenants had not agreed to the Good Conduct Addendum but that "defendants [Tenants] had no choice but to sign the addendum because they could not secure alternative housing and risk any changes to their son's daily living habits as their son suffers from cerebral palsy. . ." First, this was not an issue for trial as no affirmative defense of undue influence was raised in the Tenants' answer or amended answer in the eviction action. As such, any such defense was waived for Tenants' failure to raise it in a responsive pleading. *See Heartwood 2, LLC v. Dori*, 208 So.3d 817, 821 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D155a] ("It is well-settled law in Florida that affirmative defenses not raised are waived"); *S. Mgmt. & Dev., L.P. v. Gardner*, 992 So.2d 919, 920 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D2556b] (holding that affirmative defenses are waived if not pled); *Boca Golf View, Ltd. v. Hughes Hall, Inc.*, 843 So.2d 992, 993 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1070d] (reversing the trial court's involuntary dismissal that was based on an unpled affirmative defense); *Sonnenblick-Goldman of Miami Corp. v. Feldman*, 266 So.2d 48, 50 (Fla. 3d DCA 1972) ("When an affirmative defense . . . is not raised by answer, it is waived."); *Jaffer v. Chase Home Fin., LLC*, 155 So. 3d 1199, 1202 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D177a] (standing is an affirmative defense and failure to raise it in a responsive pleading generally results in a waiver); Rule 1.140(b), Fla. R. Civ. P. ("The grounds on which any of the enumerated defenses are based and the substantial matters of law intended to be argued must be stated specifically and with particularity in the responsive pleading or motion. Any ground not stated must be deemed to be waived.").

Moreover, even assuming *arguendo* that such a defense had not been waived, undue influence "must amount to over-persuasion, duress, force, coercion, or artful or fraudulent contrivances to such a degree that there is a destruction of free agency and willpower." *Jordan v. Noll*, 423 So.2d 368, 370 (Fla. 1st DCA 1982). "[M]ere weakness of mind, unaccompanied by any other inequitable incident, if the person has sufficient intelligence to understand the nature of the transaction and is left to act upon his own free will, is not a sufficient ground to set aside an agreement." *Donnelly v. Mann*, 68 So.2d 584, 586 (Fla. 1953) (citations omitted). "To constitute 'undue influence' the mind . . . must be so controlled or affected by persuasion or pressure, artful or fraudulent contrivances, or by the insidious influences of persons in close confidential relations with him, that he is not left to act intelligently, understandingly, and voluntarily, but . . . subject to the will or purposes of another." *Peacock v. Du Bois*, 105 So. 321, 322 (Fla. 1925) (citation omitted).

The record below is devoid of any evidence that the Tenants had no choice but to sign the Good Conduct Addendum because they could not secure alternative housing. To the contrary, the record supports that Tenants received the notice of non-renewal on August 3, 2016. The Landlord informed Tenants that the Landlord would be willing to allow them to stay if they signed the Good Conduct Addendum (R. 152). Upon receiving the Good Conduct Addendum, Tenants informed the Property Manager that they would review the addendum with an attorney (November 15, 2018 Trial Transcript at p.36, line 25-p. 37, line 3). After several weeks had transpired, the Landlord sent the Tenants a notice dated October 19, 2016, stating they must sign the addendum or face eviction (November 15, 2018 Trial Transcript at p.37, lines 10-17). There is no record detailing what efforts, if any, Tenants made to secure alternative housing between August 3, 2016 and October 19, 2016.

The successor judge also found that "Dr. Fornos testified that the son had cerebral palsy and that a change in environment could cause him additional problems." Dr. Fornos's testimony at trial, which comprised all of two pages (November 16, 2018 Trial Transcript at p.114, line 7- p.116, line 2), was as follows: "It's impossible to know exactly what would happen" when asked what would happen if the son had environment changes, and "not necessarily" when asked if it is detrimental to have environment changes for someone with cerebral palsy. She also testified that her statement in an earlier letter that a change of environment could have a detrimental effect meant "could as in it may or may not happen." Nor did she testify to any conclusion within a reasonable degree of medical certainty (November 16, 2018 Trial Transcript at p.114, line 23-p. 116, line 2). Accordingly, there is no support in the record below from Dr. Fornos for the successor judge's finding that a change in environment could cause Tenants' son additional problems.

The Retaliation Defense

Section 83.64, Fla. Stat., provides, in relevant part, that:

> (1) It is unlawful for a landlord to discriminatorily increase a tenant's rent or decrease services to a tenant, **or to bring or threaten to bring an action for possession** or other civil action, **primarily because the landlord is retaliating against the tenant**. In order for the tenant to raise the defense of retaliatory conduct, the tenant must have acted in good faith. Examples of conduct for which the landlord may not retaliate include, but are not limited to, situations where. . .
>
> (f) The tenant has exercised his or her rights under local, state, or federal fair housing laws.
>
> (2) **Evidence of retaliatory conduct may be raised by the tenant as a defense in any action brought against him or her for possession.**
>
> (3) **In any event, this section does not apply if the landlord proves that the eviction is for good cause.** Examples of good cause include, but are not limited to, good faith actions for nonpayment of rent, **violation of the rental agreement or of reasonable rules,** or violation of the terms of this chapter.
>
> (4) "**Discrimination**" under this section means that a tenant is being treated differently as to the rent charged, the services rendered, or the action being taken by the landlord, which **shall be a prerequisite to a finding of retaliatory conduct**.

(emphasis added). Even though Tenants raised retaliation as an affirmative defense in their Amended Answer, it was premised on subsection (1)(f) of Section 83.64, which provides as a basis that "[t]he tenant has exercised his or her rights under local, state, or federal fair housing laws." No other retaliation defense was asserted by Tenants in their pleadings. However, at the outset of the non-jury trial, Tenants' counsel announced that:

> "We're not gonna go forward on the water issues. . .**The issue's gonna be retaliation. The issue is not the discrimination. The issue is not going to be the Fair Housing case. It is not gonna be the ADA case.**
>
> That case currently is being litigated in Federal Court. So whatever—whatever's going with that case, I'm going to be objecting to any of that coming into this case because that is not the basis for my affirmative defense. My affirmative defense is based clearly on retaliation. I also have an A344 claim and I have an equity claim".

(emphasis added) (Transcript of November 15, 2018 trial at p. 11, lines 3-22). Tenants' counsel further stated that "when Mr. Alonso was asserting his rights to this property that they [the Landlord] have elected to respond through termination. They have done this since 2013. We're here because he asserts his rights and they terminate." Tenants' counsel gave as examples of retaliation that when Tenants requested that their air conditioning be fixed in the summer or that they be allowed to use a generator following a hurricane, the Landlord responded with termination. (Transcript of November 15, 2018 trial at p. 11, line 23-p.12, line 25).

Based on the foregoing statements, it is clear that at trial the Tenants withdrew or abandoned the retaliation defense raised in their pleadings, which argued retaliation premised solely on the Tenants' filing of complaints under federal and state housing laws. Appellee Alonso also withdrew his counterclaim premised on the "water issues." Notwithstanding, the arguments in Tenants'/Appellees' answer brief contain multiple references to Tenants' "reasonable accommodation" requests and Tenants' son's disabilities.

It must be stressed that the case below was not an affirmative claim filed by Tenants alleging violation of the Fair Housing Act for Landlord's failure to provide any "reasonable accommodation." Nor was a claim for the Landlord's alleged failure to provide any "reasonable accommodation" included in the Tenants' counterclaim. Rather, those claims were included in the Tenants' Federal Case and "reasonable accommodation" was only an issue in the eviction action to the extent that the Tenants' filing of the Federal Case formed the basis of Tenants' retaliation defense. Once Tenants withdrew at trial the retaliation defense asserted in their pleadings, the Tenants' "reasonable accommodation" requests were not at issue in the eviction action. As such, it was error for the successor judge to base her ruling in the eviction case below on the Landlord's alleged failure to provide "reasonable accommodations" to Tenants.

Tenants attempted at trial, for the first time, to assert an alternative retaliation defense premised on their requests for their air conditioning to be repaired and for a generator following Hurricane Irma in 2017. Notwithstanding that the Landlord did not object to Appellees' attempt to amend their retaliation defense at trial, Tenants, who carried the burden of proving their affirmative defenses, failed to show how the Landlord's alleged failure to provide air conditioning or a generator amounts to retaliation as a matter of law. Significantly, Section 83.64(4), Fla. Stat. provides that:

> "Discrimination" under this section means that a tenant is being treated differently as to the rent charged, the services rendered, or the action being taken by the Landlord, which **shall be a prerequisite to a finding of retaliatory conduct**.

(emphasis added). The statute makes clear that there can be no retaliation absent a finding of discrimination, or that Tenants were treated differently than other tenants. No such finding of discrimination was made by the successor judge prior to determining that there was a pattern of retaliation by the Landlord, nor is such a finding supported by the record.

The concept of differential treatment for discrimination purposes implies a comparison of those who are similarly situated in all relevant respects. *See Johnson v. Great Expressions Dental Center of Fla. P.A.*, 132 So. 3d 1174, 1176 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D92a] ("an adequate comparator must be "similarly situated 'in all relevant respects.") (*citing Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D1680a]. Tenants' claims of disparate treatment were unsupported by any evidence.

Here, while Alonso testified that he was provided a notice that the use of a generator on his balcony post-Hurricane Irma was a violation of the apartment complex rules, there was no testimony that other tenants who were using their generators were not provided with notices of violation by the Landlord or were allowed to continue using their generators. To the contrary, there was testimony by the Property Manager that prior to the arrival of Hurricane Irma in 2017, a notice was sent to all tenants advising them that pursuant to regulation N, nothing could be placed on apartment windows or doors and that the use of generators was not allowed during or after the storm (November 15, 2018 Trial Transcript at p. 41, 13-20; November 16, 2018 Trial Transcript at p. 90, lines 11-12). Similarly, the Upstairs Tenant testified that an e-mail and letters were sent to everybody advising that it was prohibited to have or use a generator in the building (November 16, 2018 Trial Transcript at p. 134, lines 11-17). In addition, the Property Manager testified that while a handful of other tenants had generators on their balconies, they removed them when requested to do so (November 15, 2018 Trial Transcript at p. 40, lines 11-25) with the exception of two tenants, regarding whom she was required to send seven-day notices and call the police (November 15, 2018 Trial Transcript at p. 40, lines 16-20).

The Property Manager also testified that all of the tenants were sleeping with their windows open following Hurricane Irma and that the carbon monoxide emitted by generators was a health concern (November 15, 2018 Trial Transcript at p. 40, lines 3-5). Further, the fire department said that this was not safe and that the generators had to be removed (November 15, 2018 Trial Transcript at p. 40, lines 21-p. 41, line 1). Also, this was a violation of the South Florida Fire Code (November 15, 2018 Trial Transcript at p. 41, lines 2-4). This trial testimony was unrebutted.

The Landlord also introduced at trial a notice requiring tenants who had placed tape on their windows and doors to remove same or face a $150 fine. (R. 152). On September 18, 2017, Alonso sent a letter that he was not going to remove the tape and was going to leave the tape on until the hurricane season was over (November 19, 2018 Trial Transcript at p. 194, lines 12-15). A notice dated September 25, 2017 was submitted by the Property Manager to Alonso advising that he had seven days to remove the tape on his windows or face eviction (R. 153). Also, the Property Manager responded, when asked if she had targeted Tenants specifically for placing tape on their windows, "to all the tenants" (November 16, 2018 Trial Transcript at p. 91, lines 7-16). The Property Manager testified that although there were other residents that also placed tape on their windows (November 15, 2018 Trial Transcript at p.42, line 22-p.43, line 9), these individuals eventually removed the tape, but Alonso did not remove the tape from his windows until he received the seven-day notice (November 16, 2018 Trial Transcript at p. 91, lines 19-21).

Similarly, as to any requests or complaints by Tenants regarding air conditioning post-Hurricane Irma, no finding of discrimination was made by the successor judge prior to determining that there was a pattern of retaliation by the Landlord against Tenants, nor is such a finding supported by the record. Tenants admit in their answer brief that "on Saturday, September 9, 2017, all the units in the complex lost power due to damage caused by Hurricane Irma." The Property Manager testified at trial that when Tenants requested a generator, there was no power in the whole community (November 15, 2018 Trial Transcript at p. 43, lines 10-13). There is no evidence of record that other tenants who were without power and requested air condi-

tioning were somehow treated differently than Tenants.

Moreover, Tenants failed to show how a prior termination notice which was issued by the Landlord in 2013 amounts to retaliation where no eviction action was pursued at that time and Tenants ultimately remained at the property as tenants.

The Violation of Obligation of Good Faith Defense

Tenants raised as their second affirmative defense that a landlord has, pursuant to Section 83.44, Fla. Stat., an obligation of good faith in its performance of a rental agreement and that Landlord allegedly violated that obligation by 1) attempting to evict Tenants based on the facts and circumstances of this case, noting that Tenants' son is physically disabled and 2) by failing to comply with the requirements of state law "and/or even attempting to resolve the alleged problems with the Defendant prior to Plaintiff's institution of this action."

Section 83.44, Fla. Stat. provides that "[e]very rental agreement or duty within this part imposes an obligation of good faith in its performance or enforcement." The Landlord filed a reply to this "affirmative defense" alleging that it fails to state an affirmative defense. We agree. Tenants have failed to show how any purported violation of the Landlord's duty of good faith would operate as a complete bar to the eviction once the Landlord has shown good cause for the eviction.

The Equitable Forfeiture Defense

The successor judge also found that "based upon the testimony and evidence of the Defendants' son's condition, it would be unconscionable to remove the Defendants based on the facts and circumstances of this case" and that "a court of equity may relieve a lessee against forfeiture when the effect of enforcing the default would be unconscionable, inequitable or unjust."

The successor judge's ruling that Tenants prevail on their equitable forfeiture defense is based again on the Tenants' son's condition. As stated above, the conclusion for which Dr. Fornos's testimony is cited in the final judgment is not supported in the record. Further, the cases cited in support of the trial court's ruling are distinguishable as they involve long-term commercial leases or cases where the lessee had made improvements to the property. *Contrast Rader v. Prather*, 100 Fla. 591, 597 (1930) (lessee had constructed building on commercial property; court of equity found lessor had waived right to enforce forfeiture clause where agreement was sufficient to mislead the lessee, to his prejudice, into the honest belief that a waiver was intended or consented to by the lessor); *Sharpe v. Sentry Drugs, Inc.*, 505 So. 2d 618 (Fla. 3d DCA 1987) (lessee's act of subletting small portion of lease without lessor's consent insufficient to forfeit entire lease for remainder of 30-year lease period); *Smith v. Winn Dixie, Inc.*, 448 So. 2d 62 (Fla. 3d DCA 1984) (long-standing commercial lease where lessee Grand Union had paid taxes for years and repaired roof). Here, the eviction action was of a month-to-month residential tenancy following non-renewal of a yearly lease where there is no factual record that Tenants made any improvements to the property.

For the foregoing reasons, the Final Judgment below is reversed and the cause is remanded with directions to enter judgment for Appellant. Appellant's motion for appellate attorney's fees and costs is granted, the amount to be fixed by the trial court on remand. Appellees' motion for attorney's fees and costs is denied. (TRAWICK AND WALSH, JJ., concur.)

---

[1]On January 28, 2019, the court in the Federal Case ruled that Tenants' September 12, 2017 request for a portable generator is not a "right" under the Fair Housing Act. It does not appear in the record below that this ruling was brought to the successor judge's attention before she entered the final judgment in the eviction action on June 20, 2019.

[2]Generally, a successor judge may not rule on matters based on the credibility of witnesses that he or she has not heard. *Turner v. State*, 993 So. 2d 996, 997 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2628a]. When the Second District Court of Appeal addressed this issue, it stated that:

> Reason and conscience lead this court, in line with other jurisdictions, to adopt the rule that where oral testimony is produced at trial and the cause is left undetermined, the successor judge cannot render verdict or judgment without a trial de novo, unless upon the record by stipulation of the parties.

Bradford v. Found. & Marine Const. Co., 182 So. 2d 447, 449 (Fla. 2d DCA 1966); *see also Smith v. Smith*, 612 So. 2d 713, 714 (Fla. 2d DCA 1993) (reversing and remanding the case to the trial court because the parties had not stipulated to allow the successor judge to decide the case based on evidence in the original action). The Court in *Alvord v. Alvord*, 572 So. 2d 925, 926 (Fla. 3d DCA 1990), ruled that a successor judge could not weigh and compare testimony heard before the predecessor judge, unless the parties stipulate to a ruling on the basis of the record of the prior proceedings. "A successor judge who does not hear all the evidence may only enter a verdict or judgment on a retrial or if the parties so stipulate on the basis of the record of the prior proceedings." *Reaves v. Reaves*, 546 So. 2d 744, 745 (Fla. 2d DCA 1989). In *Fratello v. State*, 950 So. 2d 440, 442 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D412a], the court ruled that "[o]rdinarily, a trial judge is not permitted to rule on a matter based on the credibility of witnesses which the judge has not heard, absent a stipulation of the parties."

[3]The Lease Renewal Addendum dated September 4, 2014 (R. 156) contains a handwritten notation under Special Provisions that "Resident will be able to break the lease at any time giving 30 days writing [sic] notice. Also can't mistreat any Villas of Hialeah staff or throw water by balcony or hallway". Tenants produced at trial a second copy of the Lease Renewal Addendum (R. 157) which does not contain the handwritten notation. However, it also is missing a second signature for "Authorized Agent for the Landlord" which is included on the first Lease Renewal Addendum (compare R. 156) and would appear to be an incomplete document. Notwithstanding, Tenants argued that the Property Manager had unilaterally added the handwritten terms after Tenants initialed the Lease Renewal Addendum dated September 4, 2014. This argument formed the basis for the successor judge's determination that the Property Manager was not trustworthy, thus rejecting her entire trial testimony. Specifically, the successor judge found in the Final Judgment that "a comparison of both Addendums clearly demonstrates Ms. Hernandez' pattern of retaliatory behavior against Defendants."

* * *

Counties—Code enforcement—Fire prevention—Certiorari challenge to county Fire Prevention and Safety Appeals Board decision affirming fire marshal's rejection of condominium association's remedial action plan as inadequate to address condominium complex's life and property safety deficiencies is denied—Fire marshal and board followed essential requirements of law in rejecting plan for failure to include partial sprinkler system—Fire marshal had discretion to require sprinkler system, requirement of sprinkler installation was supported by competent substantial evidence, and board's deferral to fire marshal's exercise of discretion did not deny association due process—Association's asserted equitable claims regarding enforcement of current fire codes against property that was constructed 48 years ago are outweighed by government interest in protecting lives and property

CASA DEL MAR CONDOMINIUM ASSOCIATION, INC., a Florida Not-For Profit Corporation, Petitioner, v. KEY BISCAYNE FIRE RESCUE DEPARTMENT, on behalf of the Authority Having Jurisdiction, VILLAGE OF KEY BISCAYNE, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-210-AP-01. L.T. Miami-Dade Fire Prevention and Safety Appeals Board 19-1. September 15, 2020. Counsel: Vincent Flor, Law Office of Vincent B. Flor, P.A., for Petitioner. Laura Wendell and Richard Rosengarten, Weiss Serota Helfman Cole & Bierman, P. L., for Respondent.

(TRAWICK, WALSH and, SANTOVENIA, JJ.)

ON MOTION FOR REHEARING

(TRAWICK, J.) We grant Petitioner's Motion for Rehearing, withdraw our previous opinion, and issue the following in its place.

This is an appeal from a decision rendered by the Miami-Dade County Fire Prevention and Safety Appeals Board ("the Board") affirming the decision rendered by the Key Biscayne Fire Marshall ("the Fire Marshall"). The Fire Marshall denied an engineering life safety system and accompanying remedial action plan, an alternate method of attempting to ensure life safety in an existing building, in compliance with §633.202, Florida Statutes (2018) (Florida Fire Prevention Code).

Casa Del Mar is a combination high-rise condominium and townhouse property with accompanying parking structures located in Key Biscayne, Florida. The property is comprised of condominium and townhouse units, administered by the Casa Del Mar Association,

Inc. The 27-story high-rise condominium tower contains eight residential units per floor on floors 3-27. The end units on each floor have three bedrooms. Two of these three bedroom have only one means of egress in the event of a fire, in violation of the current code which requires at least two means of egress. Also located on the property are 32 townhouses; a two-level open-air parking garage; a single level parking garage; and a covered driveway open on each end which separates the condominium tower from the townhouses.

The property was permitted, constructed, inspected and issued a certificate of use by Miami-Dade County in 1971.[1] When it was constructed, the property was deemed compliant with all applicable building and fire-life safety codes in existence. Since 1971, the property has undergone and passed a 40-year recertification. At the time of the filing of this appeal, Casa Del Mar was 48 years old, and had been issued several certificates of compliance and construction permits without issue. The property passed all compliance measures even after the State Fire Marshall adopted the Florida Fire Prevention Code, which incorporates by reference all fire and safety laws and rules.

After a recent inspection by the Key Biscayne Fire Department ("the Department"), Casa Del Mar was determined to be fire-safety deficient. Among the deficiencies noted were:

(1) no fire sprinklers in the residences;

(2) a lack of secondary means of escape from the tower's end units;

(3) no sprinklers on the catwalks[2];

(4) a lack of any secondary means of escape from the town houses' upstairs bedrooms;

(5) the termination of the tower stairs in the garage, which, in the event of Ere in the garage, would make the exit route impassable;

(6) no smoke control in the elevator shafts;

(7) interior trash chutes not enclosed in an intake room sealed by a fire-proof door, which in the event of fire, would cause heat and fire to enter residences.

In response to the findings of the Department, the Casa Del Mar Condominium Association ("the Association") voluntarily hired a licensed fire protection engineer, to bring the condominium property into compliance with §633.202, Florida Statutes.[3] The fire protection engineer conducted an evaluation of the Casa Del Mar properties, including each individual condominium and townhouse unit, pursuant to the instructions provided in NFPA (National Fire Prevention Association) 101A;[4] the Guide on Alternative Association Approaches to Fire Safety; and the Fire Safety Evaluation System for Board and Care Facilities (2016), §633.208(5), Florida Statutes (2017) (Minimum Fire Safety Standards). Pursuant to the evaluation, both an engineered life safety system and remedial action plan ("ELSS/RAP") were developed to improve the life safety systems to in the Association's condo unit tower and townhouse units. The ELSS/RAP was also created for the purpose of achieving compliance with NFPA 101: section 31.3.5.12.3 [5] (Existing residential high-rise buildings), and §633.202, Florida Statutes.

Once completed, the Association's ELSS/RAP was submitted to the Department in April 2018 for review. After this review the Department met with the directors, manager, and attorney of the Association to discuss the Department's concerns with the proposed ELSS/RAP. After failing to satisfactorily resolve these concerns, the Fire Marshall formally rejected the Association's ELSS/RAP in a letter dated March 1, 2019.

The Association filed a Notice of Appeal/Letter of Intent and Application for Public Hearing with the Secretary of the Miami-Dade County Fire Safety Appeals Board ("the Board"). The hearing on the appeal was convened by the Board, after which the Board voted unanimously to deny the appeal and affirm the Key Biscayne Fire Department/Fire Marshall's decision rejecting the Association's ELSS/RAP, issuing an order to this effect dated June 21, 2019. As a result, the Association filed its Petition before this Court.

A party is entitled as a matter of right to seek review of an administrative decision of a code compliance board in the circuit court. The circuit court must determine whether: 1) procedural due process, was accorded; 2) the essential requirements of the law have been observed; and 3) the findings and judgment of the administrative authority are supported by competent substantial evidence. *Dusseau v. Metropolitan Dade County,* 794 So. 2d 1270, 1274 (Fla. 2001) [26 Fla. L. Weekly S329a]; *Florida Power and Light Co. v. City of Dania,* 761 So. 2d 1089, 1092 (Fla. 2000) [25 Fla. L. Weekly S461a].

Section 633.208(5), Florida Statutes, provides that if a fire official determines that a threat to life safety or property appears in an existing building, the fire official shall apply the applicable fire safety code to the extent practical to ensure a reasonable degree of life safety and safety of property. However, §633.208(5) also provides that if the application of the code to an existing building is not possible, the evaluating fire official is required to fashion a reasonable alternative that affords an equivalent degree of life and property safety for the building.

In an attempt to fashion a reasonable fire safety alternative, the Association took the initiative and, with the help of its fire protection engineer, evaluated the condo tower and townhouses utilizing NFPA 101A: Guide on Alternative Approaches to Life Safety to determine the complex's existing compliance shortfalls.[6] After identifying the condo complex's inadequacies pursuant to the 101A evaluation systems, the fire protection engineer created an engineering life safety system and remedial action plan (ELSS/RAP) to address the existing life and property safety deficiencies. This plan included minimal use of partial sprinkling.

After reviewing both the Association's use of the 101A evaluation system and its ELSS/RAP, the Fire Marshall rejected the ELSS/RAP as an alternative method of obtaining compliance with section 633.202 due to the building's age and existing fire safety classification. The Fire Marshall concluded that among the most glaring concerns that had to be addressed to alleviate the complex's serious life and property safety issues was the need to install sprinklers in limited areas of the complex, including within the catwalks, kitchen areas of the tower units and the parking garage. The Association disputes the Fire Marshall's conclusions, arguing that its ELSS/RAP provides a reasonable alternative that significantly elevates the level of life and property safety for the condo complex. In particular, as to the Fire Marshall's proposals regarding partial sprinkling, the Association deemed such a retrofit unnecessary and unwarranted.

While the Association made a conscientious and admirable effort to fashion its own engineering life safety system and remedial action plan (as it was required to do under NFPA 101 §31.3.5.12.4 after opting out of any obligation to retrofit the building with a fire sprinkler system), the Fire Marshall was under no obligation to accept the Association's proposal.[7] The responsibility for approving or rejecting such a plan rests with the Fire Marshall. Section 69A-60.007(2), Florida Administrative Code (2020) specifies that it is the fire authority, in this case the Key Biscayne Fire Marshall, who has jurisdiction over fire safety and who is thus responsible for enforcing the Florida Fire Prevention Code. In exercising this jurisdiction, §633.208(5), Florida Statutes, affords the Fire Marshall wide latitude in approving or rejecting an engineered life safety system or fashioning a reasonable alternative.[8] Thus, we believe it is appropriate to afford the Fire Marshall's determinations and use of his professional judgment great deference in exercising his statutory discretion.

We think it appropriate to specifically address the fire sprinkler system at issue here. The Association contends that the Fire Marshall cannot require that a partial sprinkler system more extensive than that included in the Association's proposed ELSS/RAP be part of any life safety system. They argue that the condominium is exempt from such

a mandate. Florida Statutes Section 718.112(2)(1) prevents a "retrofit of the common elements, association property or units of a residential condominium with a fire sprinkler system" if there is a vote against such a retrofit by majority of the unit owners. Such a vote by Casa Del Mar owners occurred in 2016. Thus, the provisions of Section 718.112(2)(1) supersede any other "code, statute, ordinance, administrative rule, or regulation." This would appear to lead to the conclusion that the Fire Marshall was not authorized to direct a retrofit of the complex that included a complete fire sprinkler system or even a "more robust 'partial sprinkler system' However, 718.112(2)(1) must be read in conjunction with NFPA 101 §31.3.5.12, which states in relevant part:

> Section 31.3.12.1. All high-rise buildings that are condominiums . . .
>
> shall be protected throughout by an approved, supervised automatic sprinkler system . . . .
>
> Section 31.3.15.3. An automatic sprinkler system shall not be required in buildings having an approved, engineered life safety system in accordance with 31.3.5.12.4.
>
> Section 31.3.15.4. When required by 31.3.5.12.3, an engineered life system shall be developed by a registered professional engineer experienced in fire and life safety system design, shall be approved by the authority having jurisdiction, and shall include any or all of the following:
>
> (1) Partial automatic sprinkler protection
> (2) Smoke detection systems
> (3) Smoke control systems
> (4) Compartmentation
> (5) Other approved systems.
>
> Section 31.3.5.12.4.1. When used to satisfy the requirements of 31.3.5.12.3, the term "Engineered Life Safety System" shall only Apply as an alternate to complete "automatic fire sprinkler protection in existing high-rise buildings.

Thus, while the Fire Marshall cannot require a complete retrofit of the fire sprinkler system, the opt-out provision of NFPA 101(A) which is applicable here does give him the discretion to both require and determine the extent of partial automatic sprinkler protection.

We thus find that the Fire Marshall and the Board followed the essential requirements of law in reaching their respective determinations. Additionally, while the parties may disagree with the methods and means to address the life and property safety issues in the complex, this does not mean that the remedial measures required by the Fire Marshall's lack adequate evidentiary support. Quite the contrary—the record before the Court is replete with testimony and documentary evidence to support the Fire Marshall's determination. It is evident that the decisions of both the Fire Marshall and the Board were supported by substantial competent evidence.

The Association additionally contends that they were denied due process because the Board failed to examine each reason given by the Fire Marshall for the rejection of the Association's ELSS/RAP. We find this argument to be without merit. Section 633.208(5) gives the Fire Marshall the discretion to devise an ELSS/RAP. Simply because the Association voluntarily created an ELSS/RAP did not impose any obligation on the part of the Fire Marshall to accept it. He was free to reject it *en toto.* Likewise, the Board was not required to specifically address each, and every reason given by the Fire Marshall for rejecting the ELSS/RAP. We disagree with the assertion of the Association that by deferring to the Fire Marshall's exercise of discretion, the Board acted as a "rubber stamp" of the Fire Marshall's decision.

The Association has also argued that both the Department and the Board are equitably estopped from enforcing the Florida Fire Prevention Code against the Association. They contend that both the design and construction of the Association property were accomplished after receiving the required permits from the County 48 years ago, and that the property was constructed in reliance on those permits. In response, the Respondents contend that this issue was not raised before the Board nor could it have been since the Board lacks the authority to decide this type of legal issue. We agree with the Association that this issue was fairly raised before the Board when the Association argued that it would be unfair for the Fire Department to impose requirements that were not obligatory in 1971 when the County issued the necessary permits for construction. However, we do not believe that applying the doctrine of equitable estoppel is appropriate on these facts. The determinations of the Fire Marshall were meant to address the lives and safety of residents, guests and firefighters, not to mention the protection of property. The interest of government authorities under these circumstances outweigh the asserted equitable claims of the Association. *See Hollywood Beach Hotel Co. v. City of Hollywood,* 329 So. 2d 10, 16 (Fla. 1976) (Court posed but did not address the question of whether municipality's interest in addressing a new peril to health and safety between granting of building permit and subsequent change in zoning law may outweigh good faith reliance by landowner on the zoning law); *City of Lauderdale Lakes v. Corn,* 427 So. 2d 239, 244 (Fla. 4th DCA 1983) (claim of estoppel against city government precluded when the public health or safety is placed in jeopardy); *Board of County Commissioners of the County of Adams v. Isaac,* 18 F.3d 1492, 1498 (10th Cir. 1994); *Westinghouse Elec. Corp. v. U.S. Dept. of the Navy,* 894 F.Supp. 204, 210 (W.D. Pa. 1995);

We reject without further comment the Association's contention that certain determinations made by the Fire Marshall (fire sprinkling retrofitting and the installation of elevator pressurization) amounted to a taking under the Florida and U.S. Constitutions.

Accordingly, the Association's Petition for Writ of Certiorari is DENIED. (WALSH AND SANTOVENIA, JJ., concur.)

---

[1]In 1971, the Village of Key Biscayne was not incorporated, thus the task of permitting, inspecting, and issuing certificates of use and occupancy fell to Miami-Dade County. The Village incorporated in 1990.

[2]This was of particular concern because if a fire broke out in one of the residential units with an east-facing window, prevailing east winds from the ocean could cause the fire to spread through the building toward the west side where the catwalks are located. If this were to occur, fleeing residents and firefighters would not be protected on those catwalks without sprinklers.

[3]In 2016, pursuant to §718.112(2)(1), Florida Statutes, a majority of the voting interests in the Association opted out of any obligation to retrofit the Association's common elements, Association property or units with a fire sprinkler system. Section 718.112(2)(1) states in pertinent part:

> Notwithstanding chapter 633 ["Fire Prevention and Control"] or of any other code, statute, ordinance, administrative rule, or regulation, or any interpretation of the foregoing, an association, residential condominium, or other unit owner is not obligated to retrofit the common elements, association property, or units of a residential condominium with a fire sprinkler system in a building that has been certified for occupancy by the applicable government entity if the unit owners have voted to forego such retrofitting by the affirmative vote of a majority of all voting interests in the affected condominium.

[4]The NFPA Standard 1 (Fire Prevention Code) and Standard 101 (Life Safety Code) have been adopted by the State Fire Marshall as the Florida Fire Prevention Code, §633.202(2), Fla. Stat. (2018) which applies to all of Miami-Dade County, including the Village of Key Biscayne.

[5]"An automatic sprinkler system shall not be required in buildings having an approved, engineered life safety system in accordance with 31.3.5.12.4." NFPA 101 (Edition 2015).

[6]The NFPA 101A evaluation systems have been adopted by the State Fire Marshal as an acceptable means to identify reasonable low-cost alternatives to achieve compliance. §633.208(5), Fla. Stat. (2017).

[7]Section 633.208(5), Florida Statutes (2016) states in pertinent part:

> The local fire official **may** consider the fire safety evaluation systems found in NFPA 101A: Guide on Alternative Approaches to Life Safety, adopted by the State Fire Marshal, as acceptable systems for the identification of low-cost, reasonable alternatives. **It is acceptable** to use the Fire Safety Evaluation System for Board and Care Facilities using prompt evacuation capabilities parameter values on existing residential high-rise buildings (emphasis added).

The use of the words "may" and "it is acceptable" in this provision indicate that the Fire Marshall is granted discretion to use or decline to use Alternative Approaches to Life Safety and the Fire Safety Evaluation System for Board and Care Facilities

[8]The preamble and opening sentences of §633.208(5) state:
With regard to existing buildings, the Legislature recognizes that it is not always practical to apply any or all of the provisions of the Florida Fire Prevention Code and that physical limitations may require disproportionate effort or expense with little increase in fire or life safety. Before applying the minimum firesafety code to an existing building, the local fire official shall determine whether a threat to lifesafety or property exists. **If a threat to lifesafety or property exists, the fire official shall apply the applicable firesafety code for existing buildings to the extent practical to ensure a reasonable degree of lifesafety and safety of property or shall fashion a reasonable alternative that affords an equivalent degree of lifesafety and safety of property. . . . (emphasis added).**

* * *

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, a/a/o Lorna Cesar, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-145-AP-01. L.T. Case No. 2012-1200-SP-21(01). September 15, 2020. On Appeal from the County Court in and for Miami-Dade County, Hon. Martin Shapiro, Senior Judge. Counsel: Michael Neimand, House Counsel, United Automobile Insurance Company, for Appellant. G. Bart Billbrough, Billbrough & Marks, P.A., for Appellee.

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

OPINION

(PER CURIAM.) United Automobile Insurance Company (UAIC) appeals the trial court's order granting final summary judgment on behalf of the Provider, Zenith Mobile Diagnostic, the assignee of the insured, Lorna Cesar. UAIC stipulated that the medical bills were related to the insured's auto accident and that the services provided were medically necessary. The only issue remaining to be determined was whether the bills were reasonable in price.

Here, the trial court rejected the conflicting affidavit offered by UAIC of its adjuster, Monica Johnson. The trial court found, "that Monica Johnson's affidavit fails to create an issue of fact as to reasonableness of Plaintiff's charges." 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.

As her affidavit reflected, Ms. Johnson has been an insurance adjuster for more than 20 years. She has been responsible for adjusting PIP claims for multiple insurers for much of that time. She is familiar with reimbursement rates under different fee schedules as well as the usual and customary charges and payments accepted by providers in the tri-county area. Based on her background, experience and knowledge, she opined that the charges exceeded a reasonable amount. Taking UAIC's excluded affidavit into account, it was error to grant summary judgment. *See United Automobile Ins. Co. v. Miami Dade County MRI Corp., a/a/o Tania Cazo*, FLWSUPP2804CAZO (Fla. 11th Cir. Ct. June 17, 2020) [28 Fla. L. Weekly Supp. 276a]; *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. (TRAWICK, WALSH, and B. ARECES, J., JJ., concur.)

[1]Judge Areces did not participate in the original review panel.

* * *

Torts—Defamation—Privilege—Qualified—False police report—Speech—Prior restraint—Contractor's counterclaim against homeowner who had sued contractor for breach of contract and who purportedly falsely claimed in various written complaints that contractor changed contractual terms, stole homeowner's deposit, failed to communicate with homeowner, and failed to do the work required by contract—Trial court erred in concluding that statements were protected by qualified privilege where homeowner never raised or argued defense that statements made by her were privileged—Further, homeowner failed to establish entitlement to privilege as matter of law where she failed to offer proof that she acted in good faith, and trial court's findings that homeowner made undeniably false statements about contractor refute any claim of good faith—Remand to enter judgment for contractor on defamation count—Filing false police report—Trial court did not err in construing homeowner's objections regarding police report to be a challenge to report's authenticity and in excluding report on grounds that contractor failed to establish authenticity—Injunctions—Prior restraint on speech—Trial court did not err in denying request for injunction requiring homeowner to remove defamatory comments from online reviews regarding contractor—Generally, injunctive relief is not available to prohibit defamatory speech, and contractor did not allege that defamatory comments fell within exception for statements made in furtherance of commission of another independent tort

QBIQ CORP. and PABLO PALACIOS, Appellants, v. AMPARO ECHARTE, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-217-AP-01. L.T. Case No. 2018-18427-SP-25. September 2, 2020.Order on Motion for Rehearing September 20, 2020. On Appeal from County Court in and for Miami-Dade County, Hon. Robert Watson, Judge. Counsel: Nancy C. Wear, B.C.S., for Appellants. Amparo Echarte, in proper person, Appellee.

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

OPINION

(PER CURIAM.) Following a bench trial on claims and counterclaims related to an unfulfilled home renovation contract, the trial court entered judgment for the defendants/counter-plaintiffs QBIQ Corp. and Pablo Palacios (collectively, "QBIQ") and against the Plaintiff, homeowner Amparo Echarte. The trial court found that Ms. Echarte, the homeowner, unilaterally breached a renovation contract with QBIQ and Mr. Palacios. After Ms. Echarte cancelled the contract, QBIQ retained a portion of the deposit. In retaliation, Ms. Echarte made numerous false written complaints to multiple entities about QBIQ and Mr. Palacios.

QBIC brought a multi-count counterclaim to Ms. Echarte's breach of contract claim, including claims (1) for injunction, (2) for damages for filing a false police report with Miami-Dade Police Department, (3) for her unilateral breach of contract, and (4) for defamation by publishing false and defamatory statements about QBIQ. The counterclaim was factually based upon the Homeowner's complaints submitted to the Better Business Bureau, Home Advisor, Adornus, the Miami-Dade County licensing agency, the Florida Department of

Business and Professional Regulation (DBPR) and a criminal complaint alleging grand theft made to the Miami-Dade Police Department. QBIQ alleged in its counterclaim that Ms. Echarte falsely alleged that QBIQ and Mr. Palacios changed the contractual terms, stole her deposit, failed to communicate with her, and failed to do the work.

Following a bench trial, the trial judge found that Ms. Echarte unilaterally cancelled the contract and thereby refused to allow QBIQ to fulfill their contractual duties. The court entered judgment for QBIQ on the Homeowner's breach of contract claim and Judgment for QBIQ on its counterclaim for breach of contract in the amount of $4,561.57. The Homeowner, Ms. Echarte, has not appealed this judgment.

On QBIQ's remaining counterclaims for injunctive relief, filing a false police report, and for defamation, the trial court found for the Counter-Defendant, Ms. Echarte.

QBIQ raises three issues on appeal.

First, QBIQ argues that because the trial court found that Ms. Echarte's statements about QBIQ were defamatory, it was error not to enter judgment in QBIQ's favor on its defamation claim. QBIQ argues that the trial court erred in finding that Ms. Echarte's defamatory statements were protected by a qualified privilege, because Ms. Echarte did not plead, raise or argue her qualified privilege as a defense. Even if she had, her defamatory statements were made absent a showing of good faith, barring her assertion of a qualified privilege. Second, QBIQ claims the trial court departed from its neutrality in excluding its evidence offered to prove its claim for filing a false police report. Third, QBIQ argues that the trial court erred in denying an injunction to prohibit Ms. Echarte's present and future false or defamatory statements.

Defamation

Ms. Echarte made numerous statements to third parties about her experience with QBIQ. On QBIQ's count for defamation, the trial court considered only three statements. Ms. Echarte told the Better Business Bureau that QBIQ immediately cashed her deposit, that all her communications with QBIQ's principal, Mr. Palacios, went unanswered, that no work was ever done, and that Mr. Palacios stole her check. The trial court found these statements to be false.

In a review on Homeadvisor.com, Ms. Echarte stated that QBIQ took her money, ran off and never did the work. The trial court found that these false statements tended to injure QBIQ in its business, reputation or occupation and that the statements falsely accused QBIQ of theft, which is criminal conduct.

Ms. Echarte told the DBPR that QBIQ did no work. The trial court found this statement to be misleading because Ms. Echarte unilaterally cancelled the contract and did not allow QBIQ to work. Ms. Echarte told the DBPR that she was unable to communicate with Mr. Palacios. The trial court found that this statement was false. The trial court found "Ms. Echarte wove a web of blatant, self-serving lies in her complaint to the DBPR." The trial court further found that her statement that QBIQ refused to return any of her money was untrue.

Defamation requires proof of the following five elements: "(1) publication; (2) falsity; (3) actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) statement must be defamatory." *Jews for Jesus, Inc. v. Rapp,* 997 So. 2d 1098, 1106 (Fla. 2008) [33 Fla. L. Weekly S849a]. The trial court's findings supported the tort of defamation. "Words are defamatory when they 'tend to subject one to hatred, distrust, ridicule, contempt or disgrace or tend to injure one in one's business or profession.' " *American Airlines, Inc. v. Geddes,* 960 So. 2d 830, 833 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1636a]. (quoting *Seropian v. Forman,* 652 So. 2d 490, 495 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D762d]), *citing Adams v. News-Journal Corp.,* 84 So. 2d 549 (Fla.1955). However, the trial court rejected the defamation claim on the ground that Ms. Echarte's statements were entitled to a qualified privilege.

The standard of review to determine whether allegedly defamatory statements are covered under a privilege is *de novo. Resha v. Tucker,* 670 So. 2d 56, 59 (Fla. 1996) [21 Fla. L. Weekly S24a]; *Cassell v. India,* 964 So. 2d 190 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1988b].

QBIQ argues that the trial court erred in its *sua sponte* finding that a qualified privilege shielded Ms. Echarte from liability for her defamatory statements. Ms. Echarte never raised a qualified privilege in a responsive pleading, nor did she argue that her statements were protected by her privilege at trial. Although not required to file responsive pleadings under Small Claims Rule 7.090, and at no point in the litigation below did Ms. Echarte plead, raise or argue that she was protected by a qualified privilege.

QBIQ is correct that it was not required to anticipate an affirmative defense not pled and not argued at trial. "Qualified privilege is an affirmative defense, and the burden of proving it rests with the defendant." *Kieffer v. Atheists of Fla., Inc.,* 269 So. 3d 656, 660 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D1129c], *citing Healy v. Suntrust Serv. Corp.,* 569 So.2d 458, 460 (Fla. 5th DCA 1990). As Ms. Echarte never raised nor argued this defense, it was error to conclude that Ms. Echarte's defamatory statements were protected by a qualified privilege.

Further, even if Ms. Echarte had raised the defense, she failed to establish entitlement to the privilege as a matter of law. For a defamatory statement to be protected by a qualified privilege, the declarant must establish the following elements: "(1) good faith; (2) an interest in the subject by the speaker or a subject in which the speaker has a duty to speak; (3) a corresponding interest or duty in the listener or reader; (4) a proper occasion; and (5) publication in a proper manner." *Thomas v. Tampa Bay Downs, Inc.,* 761 So. 2d 401, 404 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D1154b], *citing Nodar,* 462 So. 2d at 809. Ms. Echarte failed to offer proof that she acted in good faith. To determine whether a statement was made in good faith, the statement must be made "with a good motive, and not for the purpose of harming the subject of the defamation." *Lewis v. Evans,* 406 So. 2d 489, 492 (Fla. 2d DCA 1981).

Here, the trial judge's findings refute any claim that she acted in good faith. Ms. Echarte falsely told the Better Business Bureau that QBIQ immediately cashed her check, that she was never able to reach QBIQ and that all her communications went unanswered. The trial court found that Ms. Echarte "wove a web of blatant, self-serving lies in her complaint to the DBPR." The evidence at trial was uncontroverted that QBIQ did not cash her check and a string of emails flowing back and forth between the parties evincing this fact was introduced at trial. The trial court found that these statements were "undeniably false." Thus, there was no evidentiary basis to support the conclusion that Ms. Echarte acted in good faith.

Likewise, the posting on Homeadvisor.com—the only statements made which were tied in any way to evidence of damages—was false and misleading. Ms. Echarte wrote that Mr. Palacios "took money . . . and ran off never did the work." As the trial court found, Ms. Echarte *unilaterally* cancelled the contract and would not allow QBIQ to complete the job. Not only was her statement blatantly false, she accused Palacios of committing a crime. Like the statements to the BBB and the DBPR, the trial court's findings preclude any finding that Ms. Echarte acted in good faith. Therefore, she was not protected by a qualified privilege.

Absent any good faith, and because she did not raise the defense of qualified privilege, it was error to deny judgment based on the

privilege, and we therefore reverse and remand for the trial judge to enter judgment for QBIQ on the defamation count. On remand, the trial court shall review the trial transcripts and determine the amount of damages, if any, in connection with the defamation count.

Filing a False Police Report

The trial court found that QBIQ failed to introduce sufficient evidence to establish its claim against Ms. Echarte for filing a false police report. QBIQ failed to satisfy its burden because the trial court excluded the police report on the ground that QBIQ failed to establish the document's authenticity. QBIQ argues that the trial court raised the issue of authenticity *sua sponte* and Ms. Echarte was prompted to challenge the document's authenticity. We find that the trial judge appropriately construed Ms. Echarte's objections at trial as objections to authenticity and affirm the judgment for Ms. Echarte on the claim of filing a false police report.

Injunction

QBIQ argues that because Ms. Echarte's statements on homeadvisor.com were defamatory, it follows that it was error to deny QBIQ an injunction requiring her to remove her defamatory speech. We disagree.

In *Chevaldina v. R.K./FL Mgt., Inc.*, 133 So. 3d 1086 (Fla. 3d Dist. App. 2014) [39 Fla. L. Weekly D294b], the court held that generally, injunctive relief is not available to prohibit defamatory speech:

> Injunctive relief is not available to prohibit the making of defamatory or libelous statements. *See, e.g., Vrasic v. Leibel,* 106 So.3d 485, 486 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D106a]. A temporary injunction directed to speech is a classic example of prior restraint on speech triggering First Amendment concerns. *Id.*

Id. at 1090.

An exception to this general rule lies where "defamatory words are made in the furtherance of the commission of another intentional tort." *Id., citing Murtagh v. Hurley,* 40 So.3d 62 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1481c]; *Zimmerman v. D.C.A. at Welleby, Inc.,* 505 So.2d 1371 (Fla. 4th DCA 1987). The declarant in *Chevaldina,* like Ms. Echarte, made defamatory and misleading statements on the internet with the intent to damage the subject's business. The court reversed an injunction directed at suppressing this defamatory speech because it violated the rule against prior restraint. Even though the subject of the statements in *Chevaldina*—a former commercial landlord—brought forth evidence about the impact of the defamatory speech and its effect upon his reputation, this evidence was not sufficient to proscribe speech by injunction. Here, there is no independent tort alleged by QBIQ. QBIQ did not file a claim for tortious interference with business relationships. It could not do so, because, as in *Chevaldina,* QBIQ brought forth no direct evidence that *identifiable* prospective customers did not hire QBIQ because of Ms. Echarte's postings on homeadvisor.com. QBIQ's evidence (during the damages phase of trial) consisted of a comparison between current profit after the postings and its prior profit. QBIQ's proof of damages is insufficient to establish the narrow exception to the prohibition of prior restraint. We therefore affirm the trial court's denial of injunctive relief.

We reverse the judgment for the counter-defendant on defamation and remand for the trial judge to review the record, determine an appropriate amount of damages, if any, for defamation, and enter judgment for QBIQ on its defamation claim. We otherwise affirm the judgment below.

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

ORDER ON APPELLANT'S MOTION FOR REHEARING

(PER CURIAM.) In its motion for rehearing, Appellant insists that it is entitled to an injunction ordering the Appellee to remove her defamatory posts on Homeadvisor.com. Following a review of the trial evidence presented below, an injunction—even one directed at removing existing posts—would constitute a prior restraint on speech. The trial court therefore correctly denied QBIQ's injunction. Recently, in *Logue v. Book,* 297 So. 3d 605 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D1500a], the court explained:

> [I]njunctions are not available to stop someone from uttering insults or falsehoods. *See, e.g., Concerned Citizens for Judicial Fairness, Inc. v. Yacucci,* 162 So. 3d 68, 72 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1869a]; *Vrasic v. Leibel,* 106 So. 3d 485, 486 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D106a] (holding that an injunction remedy is not available to prohibit defamatory or libelous statements). One reason for this is that there is an adequate remedy at law: an action for damages. *See Yacucci,* 162 So. 3d at 72; *Vrasic,* 106 So. 3d at 486.

See also Chevaldina v. R.K./FL Mgt., Inc., 133 So. 3d 1086 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D294b] ("as there was no evidence of unjustified interactions with specific parties known to be involved, or likely to be involved, in an advantageous business or contractual relationship with the appellees," injunction directed at removing offensive internet speech violates prior restraint on speech and should have been denied). Rehearing is therefore denied.

* * *

Criminal law—Search and seizure—Vehicle stop—Obscured tag—License plate frame that did not obscure registration decal did not provide legal basis for traffic stop—Trial court erred in denying motion to suppress stop and post-stop evidence

JEANNETH MORALES, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000113-AC-01. L.T. Case No. A39NO5P. September 2, 2020. On Appeal from the County Court in and for Miami-Dade County, Honorable Betsy Alvarez-Zane, Judge. Counsel: Carlos J. Martinez, Miami-Dade Public Defender and Robert Kalter, Assistant Public Defender and Deborah Prager, Assistant Public Defender, for Appellant. Katherine Fernandez Rundle, Miami-Dade State Attorney and Conrad C. Witte, Assistant State Attorney, for Appellee.

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

OPINION

(PER CURIAM.) Jeanneth Morales was the driver of a motor vehicle which was stopped on April 7, 2018 when the police officer noted that her tag was "obscured". At issue in this appeal is whether the license plate frame around the tag violated Section 316.605(1), Fla. Stat. During the stop the officer discovered that Morales did not have a valid driver's license and issued a ticket charging her with driving without a valid driver's license. The defense filed a motion to suppress the stop as well as any post-stop evidence, which motion was denied and this appeal followed.

The statute's 2017 version provides that on a Florida license plate, "all letters, numerals, printing, writing, the registration decal, and the alphanumeric designation shall be clear and distinct and free from . . . other obscuring matter, so that they will be plainly visible and legible at all times 100 feet from the rear or front." § 316.605(1), Fla. Stat. (2017).

On the State's commendable confession of error at oral argument that the tag's registration decal was not obstructed by the frame because the date and year were visible, we reverse the judgment below on the authority of *State v. Morris*, 270 So.3d 436 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1062a] (held that license plate frame did not constitute obscuring matter and thus did not violate statute providing that license plate should be clear from obscuring matter and visible from 100 feet away).

Accordingly, the April 2, 2019 final judgment of conviction and sentence below is REVERSED and this cause is REMANDED to the trial court.

* * *

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 Nelson Vanegas, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-187-AP-01. L.T. Case No. 2013-003033-SP-23. September 4, 2020. On Appeal from the County Court in and for Miami-Dade County, Hon. Renatha S. Francis, County Court Judge. Counsel: Kenneth Paul Hazouri, de Beaubien, Simmons, Knight, Mantzaris & Neal, LLP, 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 on June 4, 2018 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 Natasha Roger, State Farm's corporate representative 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. State Farm's cross-motion for summary judgment was denied.

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 State Farm Mutual Ins. Co. v. Gables Insurance Recovery a/a/o Alexis Revollo,* 2017-158-AP-01 (Fla. 11th Cir. Ct. Aug. 13, 2020) [28 Fla. L. Weekly Supp. 453b]; *United Auto. Ins. 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]; *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.

* * *

Criminal law—Exposure of sexual organ—Public place—Jail dormitory in which naked defendant masturbated was public place where dormitory contained numerous bunks in close proximity and was open to view of inmates and jail personnel—Trial court properly denied motion for judgment of acquittal

SHABITAN MARABLE, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-210-AC-01. L.T. Case No. M17011290. September 4, 2020. On Appeal from County Court in and for Miami-Dade County, Joseph Mansfield, Judge. Counsel: Carlos J. Martinez, Public Defender, Deborah Prager, Assistant Public Defender, for Appellant. Katherine Fernandez Rundle, State Attorney, Alyssa Christine Mance, Assistant State Attorney, for Appellee.

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

(TRAWICK, J.)

> But at night! Fear of the guard who may suddenly flick on the light and stick his head through the grating compels me to take sordid precautions lest the rustling of the sheets draw attention to my pleasure. . . .

Jean Genet, *Our Lady of the Flowers* (1942). If only Appellant here had taken such precautions!

The Appellant, Shabitan Marable, appeals a final judgment of conviction and sentence for a violation of section 800.03 Florida Statutes (2017) (Exposure of sexual organs) (the "Final Judgment"). Appellant's conviction rests on the answer of a single question—is a one room bunk area of a jail containing beds for numerous inmates a public area or a private area? We find that such an area is public. As a result, the trial court correctly denied Appellant's motions for judgment of acquittal.

The testimony at trial elicited the following facts: while incarcerated at the Metro West Detention Facility on March 23, 2017, Mr. Marable was observed in his bunk by Corrections Officer Latonya Touchstone ("Officer Touchstone") "with his erect penis in his hands," looking at her while he was, "stroking it in an upward and downward motion." Mr. Marable's legs were partially covered by a bed covering and his pants were pulled down to his thighs. When Officer Touchstone made her observation, she was seated at her desk centered at the front of the unit between ten to fifteen feet from Mr. Marable. The one room unit she was overseeing at the time contained between seventy and seventy-two bunks, each consisting of two-beds, spaced two to three feet apart, which housed at the time approximately sixty-four inmates. It was early morning; the lights were still dimmed, and most inmates were still in their bunks.

The State charged Mr. Marable with a violation of section 800.03.[1] At the conclusion of the State's case and again after both sides rested, the Defense moved for judgment of acquittal. The trial court denied both motions. The jury returned a unanimous verdict convicting Mr. Marable of a violation of section 800.03, after which the trial court sentenced him to 364 days in the Dade County Jail with credit for time served. This appeal followed.

The denial of a motion for judgment of acquittal is reviewed de novo; however, all evidence and inferences therefrom are viewed in a light most favorable to the State. *Williams v. State,* 261 So. 3d 1248, 1252 (Fla. 2019) [44 Fla. L. Weekly S98a].

Section 800.03 provides, in relevant part, that:

> It is unlawful to expose or exhibit one's sexual organs in public or on the private premises of another, or so near thereto as to be seen from such private premises, in a vulgar or indecent manner, or to be naked in public except in any place provided or set apart for that purpose. . .

Appellant argues that a jail is not a place designed to be frequented by the public as required by the indecent exposure statute. In support of this argument he contends that a jail does not fall within the definition of a "public place" as set forth in Florida Standard Jury Instruction (Criminal) 11.9, which defines "public place" as "any place intended or designed to be frequented or resorted to by the public." Appellant reasons that "[a] detention facility is a unique place" *Clark v. State,* 395 So.2d 525, 528 (Fla. 1981), and that "prisons are institutions where public access is generally limited." *Saxbe v. Washington Post Co.,* 417 U.S. 843 (1974). Appellant argues that because prisoners are isolated from the general public, such a facility cannot be a public place. He concludes that since a jail is not a public place, he cannot be convicted of a violation of section 800.03.

The Supreme Court of the United States has held that "it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." *Lanza v. State,* 370 U.S. 139, 143 (1962). As a result, any expectation of privacy of inmates would be extremely limited. *See Jackson v. State,* 18 So. 3d 1016, 1030 (Fla. 2009) [34 Fla. L. Weekly S547a] ("[A] prisoner's privacy interest is severely limited by the status of being a prisoner and by being in an area of confinement . . . ."); *State v. Smith,* 641 So. 2d 849, 851 (Fla. 1994). As a jail shares none of the attributes of a private place, and there is a "severely limited" expectation of privacy in a jail, can we then infer that that all parts of a jail are public places?[2] Or is it more reasonable to conclude that certain areas of a jail may be public while others are private?

While not a case involving a jail setting, *Ward v. State,* 636 So. 2d 68, 71 (Fla. 5th DCA 1994) is instructive in resolving this quandary. There the court addressed the privacy interests of a person masturbating in a public restroom stall in a park. The court found that

> had the defendant been masturbating in the public area of the restroom with the intent of exposing himself to others, or had he been doing so in a stall, the interior of which could be freely seen from the public areas, a reasonable expectation of privacy would not have existed.

In *Gonzalez v. State,* 541 So. 2d 1354 (Fla. 3rd DCA 1989), corrections officers took a prisoner to a prison bathroom to conduct a strip search. The court, citing *Wolff v. McDonnell,* 418 U.S. 539, 555 (1974), noted that prisoners retain "to some minimal extent," protection from unreasonable searches and seizures under the Fourth Amendment. The court found that although the search was invasive and was conducted in a private place, i.e. a bathroom, the search of the prisoner for missing cell block keys was reasonable under the circumstances. *Id.* at 1356.

Similar reasoning to the situations presented in *Ward* and *Gonzalez* could be applied here. Perhaps had Appellant been masturbating in a jail cell or a bathroom stall in which he was alone and free from prying eyes, a persuasive argument could be made that he had some expectation of privacy during which time the cell or stall was not a public place. However, the context presented here is quite different—a large room containing many prisoners at one time.

Numerous Florida Circuit Appellate Court cases, although not binding, provide additional guidance regarding whether different areas of the jail are considered public or private.

In *Dawes v. State,* 11 Fla. L. Weekly Supp. 611c, (Fla. 10th Jud. Cir. Ct., April 6, 2004), Dawes was observed in the jail shower area stroking his penis while grinning at a female jail nurse. The Defense filed a motion for acquittal arguing that Dawes was not in a public place and entitled to an expectation of privacy. The Circuit Appellate Court disagreed citing *State v. Smith,* 641 So. 2d 849, 850 (Fla. 1994) and *Lanza,* 370 U.S. at 143.

In *State v. Cromartie,* 14 Fla. L. Weekly Supp. 430b (Fla. 17th Jud. Cir. Ct., March 8, 2007), while Cromartie was an inmate at the Broward County Jail

> [A] female deputy observed him completely naked and masturbating. He was looking at the deputy as he did so. When she ordered him to stop and place his hands on the window, he instead continued his actions. This occurred in a cell in the jail's infirmary which was open to view.

Id. The Circuit Appellate Court found that:

> *There are clearly jail cells which could not be considered public places. But this particular cell was open to the view of any authorized personnel; medical staff, cleaning crews, visitors, as well as the detention personnel themselves.* Appellant had no control over who could be present at any given time, depriving him of any privacy claims. Indeed, after staring at the deputy and being told by her to stop, the Appellant was on notice that he was not in a private place, but that his actions were occurring in a public place. He then chose to continue. (emphasis added).

Id.

In *Mann v. State,* 25 Fla. L. Weekly Supp. 586a (Fla. 15th Jud. Cir. Ct., Aug. 3, 2017), Mann was in a dormitory area of a county jail when a female nurse who was distributing medication observed him masturbating and waiving at her. Mann argued that because public access to the jail was limited, the cell could not be considered a public place. The Court rejected Mann's position citing *Cromartie* and *Dawes,* reasoning that because Mann was in another inmate's cell, within view of other inmates and jail personnel walking freely around the dormitory area, the cell was a public place for purposes of section 800.03.

We find that the dormitory type area here containing numerous bunks in close proximity within which there were numerous inmates constituted a "public place." Appellant was within view of inmates, Officer Touchstone, and any other authorized person who might have entered the unit.[3] As Appellant both exposed his sexual organs while pleasuring himself in public and was likewise naked,[4] he was in violation of the applicable provisions of section 800.03. The trial court appropriately denied his motions for judgment of acquittal.

AFFIRMED.[5] (WALSH and CRUZ, JJ. concur.)

---

[1]The single count Information charged Mr. Marable with a violation of section 800.03. The text of the Information is not entirely clear regarding whether it is based solely on Mr. Marable exposing or exhibiting his sexual organs on the private premises of another, or if it also charged, in the alternative, that he was being naked in public. As pointed out by the State, the Defense never moved to dismiss the Information. Accordingly, any challenge to the Information being alleged in the alternative was waived pursuant to Florida Rule of Criminal Procedure 3.190(c).

[2]Section 876.11, Florida Statutes, defines public place as:

> All walks, alleys, streets, boulevards, avenues, lanes, roads, highways or other ways or thoroughfares dedicated to public use or owned or maintained by public authority, **and all grounds and buildings owned, leased by, operated, or maintained by public authority.** Emphasis added.

Section 876.11 is part of Chapter 876 titled "Criminal Anarchy, Treason and Other Crimes Against Public Order." However, while this definition isn't necessarily applicable to Chapter 800 containing section 800.03, it does provide support for the conclusion that a jail which is owned, leased by, operated, or maintained by a government entity, like the jail here, is a public place.

[3]None of the other inmates testified; however, section 800.03 does not require proof that a party was offended if the conduct occurred in a public place. *See State v. Kees,* 919 So. 2d 504 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2717b].

[4]"Naked" is defined as "[U]ncovered; exposed (said of parts of the body). *Webster's New World Dictionary* (3rd ed. 1988), As Appellant was in a partial state of undress exposing his sexual organs, he was naked within the meaning of section 800.03.

[5]We note that section 800.09(2)(a), Florida Statutes (2019) provides that:

> A person who is detained in a facility may not:
>
> 1. Intentionally masturbate;
>
> 2. Intentionally expose the genitals in a lewd or lascivious manner; or
>
> 3. Intentionally commit any other sexual act that does not involve actual physical or sexual contact with the victim, including, but not limited to, sadomasochistic abuse, sexual bestiality, or the simulation of any act involving sexual activity, in the presence of a person he or she knows or reasonably should know is an employee.

In previous versions of this statute, only employees of state and private correctional facilities were protected. This section was amended in 2019 and now applies to county detention facilities as well. If the latter version of section 800.09 had been in effect at the time of Mr. Marable's transgression, it would have more than adequately addressed the issue presented here.

* * *

ANA GOTT, Appellant, v. TARGET NATIONAL BANK, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000311-AP-01. L.T. Case No. 2006-018182-CC-23. September 3, 2020. An Appeal from the County Court for Miami-Dade County, Myriam Lehr, Judge. Counsel: Mandy L. Mills, for Appellant. Drew Linen, for Appellee.

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

(**PER CURIAM.**) **Affirmed.** Section 222.061, Fla. Stat.; *Schlosser v. State,* 602 So.2d 628, 630 (Fla. 2d DCA 1992) (where defense to garnishment grounded in Article X, Section 4, of the Florida Constitution, acknowledged that Section 222.061, Fla. Stat. sets forth the method by which a debtor may seek to exempt personalty subject to constitutional protection after issuance of the writ).

* * *

ROMAN SINYAVSKY, Appellant, v. HEMEL INVESTMENTS, LLC, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000322-AP-01. L.T. Case No. 2015-001459-CC-05. September 3, 2020. An Appeal from the County Court for Miami-Dade County, Lody Jean, Judge. Counsel: Robert M. Abramson, for Appellant. Lauren Luck, for Appellee.

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

(**PER CURIAM.**) **Affirmed.**

* * *

Taxation—Ad valorem—Religious exemption—Petition for writ of mandamus compelling property appraiser to grant petitioner's organization a religious exemption from property taxes is denied—Determination of whether entity meets requirements for tax exemption requires exercise of discretion—Further, petitioner has not shown that his property meets all requirements for exemption

AL-RASHID MUHAMMAD ABDULLAH, Petitioner, v. BOB HENRIQUEZ, HILLSBOROUGH COUNTY PROPERTY APPRAISER, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 20-CA-5342, Division K. August 7, 2020. Counsel: Al-Rashid Muhammad Abdullah, Pro se, Plant City, Petitioner. William Shepherd, Tampa, for Respondent.

ORDER DENYING PETITION FOR WRIT OF MANDAMUS
and
ORDER DENYING MOTION TO DISMISS AS MOOT

(CAROLINE TESCHE ARKIN, J.) THIS MATTER is before the Court on Petitioner's July 1, 2020, Petition for Writ of Mandamus. Petitioner asks this court to compel Respondent to grant his organization a religious exemption from property taxes. The court has reviewed the documentation Petitioner attached to the petition as well as the applicable law and finds that the petition must be denied.

Mandamus will issue only to enforce a clear legal right to performance of the requested act. *State, ex. Rel. Cortez v. Bentley,* 457 So. 2d 1072 (Fla. 2d DCA 1984). Moreover, the act must be ministerial; it may not involve the exercise of the official's discretion. *Brown v. Singletary,* 589 So. 2d 1016, 1016 (Fla. 2d DCA 1991) (internal citations omitted). The determination that an entity does or does not meet the requirements for a tax exemption requires the exercise of discretion. *See e.g. Fla. Dept. of Revenue v. Howard,* 916 So. 2d 640, 643 (Fla. 2005) [30 Fla. L. Weekly S498a]. Mandamus is, therefore, inappropriate. In addition, Petitioner's documentation confirms that he has not shown that his property meets all the legal requirements to qualify for the requested exemption. *See* §§196.195, 196.196, Florida Statutes. The property appraiser, and later the Value Adjustment Board, determined that Petitioner failed to demonstrate that the organization on whose behalf Petitioner seeks the exemption is a recognized non-profit organization. *Id.* Also, as shown the by deed's "reversionary clause," Petitioner has not shown he does not retain an interest in the property. This showing is required for the exemption. Section 196.195(3). Accordingly, it is

ORDERED that the Petition for Writ of Mandamus is DENIED without need for a response. It is FURTHER ORDERED that Respondent's motion to dismiss is DENIED as moot.

* * *

Municipal corporations—Zoning—Code enforcement—Special magistrate's order finding property owner to be in violation of code prohibiting commercial equipment and uses in residential zone quashed, as order was inconsistent with magistrate's oral pronouncements, and oral pronouncements addressed alleged commercial activities that were not referenced in notice of violation

SPENCER KASS, Appellant, v. CITY OF TAMPA, FLORIDA, Appellee. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Civil Division. Case No. 19-CA-1835, Division X. L.T. Case No. COD-17-0002445. August 11, 2020. On review of a decision of the Code Enforcement Special Magistrate for the City of Tampa. Counsel: J. Logan Murphy, Hill Ward Henderson, Tampa, for Appellant. Julia Mandell and Lauren A. Baio, GrayRobinson, P.A., Tampa, for Appellee.

APPELLATE OPINION

(COOK, J.) This case is before the Court to review an order of the code enforcement special magistrate for the City of Tampa. The order to be reviewed finds that Appellant Spencer Kass's property violates city code section 27-283.11, which, together with sections 27-156, and 27-241, prohibit commercial equipment and uses in the property's residential zone. This court's review of a final code enforcement order is to determine whether competent, substantial evidence supports the decision, whether there was a departure from the essential requirements of law, and whether Appellant was afforded due process. *City of Deerfield Beach v. Vaillant*, 419 So.2d 624, 626 (Fla.1982). The employee parking and vehicle storage specifically identified in the notice of violation was resolved before the hearing. But other matters that were not specified in the notice of violation—loading and unloading, and the presence of a dumpster—were also considered. The special magistrate orally determined these to be violations of the ordinance and ordered them to be rectified. Despite the more specific oral pronouncements and resolution of the original issue, the final written order merely echoes the original notice of violation without elaboration. Not only is the written order inconsistent with the oral pronouncements, the oral pronouncements address matters that were not adequately noticed. The order therefore violates Appellant's due process rights and must be quashed.

Appellant owns a vacant lot in the West Tampa neighborhood of Bowman Heights. The property is zoned for residential use. Its southern boundary lies adjacent to Appellant's business enterprise, Weather-Tite Windows. The City cited the property because it was being used commercially in connection with the business, to the consternation of neighbors. A September 21, 2017, notice of violation advised Appellant that "[p]roperty zoned RS-50, commercial use, equipment, vehicles not allowed per secs. 27.283.11, 27-241, 27-156 [Tampa City Code]."[1] It directed Appellant to "cease illegal use in residential zone, remove open storage of vehicles." The open storage of vehicles likely referred to the business's trucks and employee parking. Whether the direction to "cease illegal use" was limited to the parking and storage of vehicles or included other activity is not known; the notice specifies no other *facts* describing violations of the ordinance. One might assume, as did this court, that the direction to "remove open storage" merely intended to describe or specify the illegal use the City wanted stopped.

The case centers on the cited code sec. 27-283.11(b), which states:

> **Commercial equipment in residential districts.** The parking of commercial equipment in any residential district is prohibited. This requirement shall not be interpreted to prohibit commercial vehicles from loading and unloading in any residential district and shall not prevent temporary parking of vehicles on a lot as accessory to a lawful commercial use of the same residential lot or require such vehicles to be garaged. Parking is, however, permitted within any entirely enclosed structure which meets the regulatory requirements for the applicable zoning district.[2]

Pertinent facts related to activity on the property are not disputed. The

property was being used commercially as an extension of Appellant's business. A house that had been on the property had been removed to make room for employee and business vehicle parking. The notice of violation states generally that commercial use is prohibited, and specifically requires that parking and vehicle storage—a form of commercial use—cease. At the hearing, the code inspector testified that Appellant had stopped all parking on the property, and the property was compliant on that issue.

Other than the general direction to "cease illegal use" of the property, followed by the more specific direction related to parking and vehicle storage, the notice set forth no other facts describing commercial use. Relying on past interactions, however, at the hearing the code inspector indicated her belief that daily loading and unloading at the site were ongoing violations of the proscription against commercial activity. Although loading/unloading is not set forth specifically in the notice, record entries indicate Appellant may have been aware of the City's position regarding it. During the hearing, however, the City's attorney opined that loading and unloading is allowed under the code. The attorney's opinion was based on the fact that sec. 27-283.11 provides that its proscription against commercial activity and equipment in residential areas "shall not be interpreted to prohibit commercial vehicles from loading and unloading in any residential district" or "prevent temporary parking. . .as accessory to a lawful commercial use of the same residential lot." After hearing public comment on the issue, however, the special magistrate concluded that loading/unloading violates the code because, unlike the example given of a plumber or contractor providing services to a residence, Appellant's loading and unloading were not an accessory use to an existing lawful commercial use of the property.[3] Thereafter, the special magistrate orally, but not specifically in writing, ordered that the loading and unloading stop.

The City also took issue with the presence of a dumpster on the property. It was at this point Appellant's counsel complained that the claimed violations were a "moving target," but the issue was taken up anyway. During the hearing it was revealed that the City, not Appellant, owns the dumpster. The dumpster was placed at its location on the property by the City at the City's direction for the safety of sanitation workers, who would otherwise have to collect it from a very busy Columbus Drive. In addition, the dumpster had been on the property at the time of the initial notice of violation, but as with the loading/unloading, the notice did not specify the dumpster as a violation or direct the dumpster's removal. The special magistrate orally directed that the dumpster be removed, but, as with the loading/unloading, this direction does not appear in the final written order. Furthermore, it is not clear whether the special magistrate intended to make Appellant or the City responsible for its removal.

In this appeal, Appellant contends that deficiencies in the notice and the resulting order violate his due process rights. *See Massey v. Charlotte Cnty.*, 842 So. 2d 142, 146 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D407b] ("The specific parameters of the notice and opportunity to be heard required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding.").[4] The requirements of due process apply "in any proceeding which is to be accorded finality," including code enforcement proceedings. *Little v. D'Aloia*, 759 So. 2d 17, 19 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D675a] (internal citations omitted).

Tampa City Code § 9-3(b) prescribes six requirements for any notice of violation issued by the City, in addition to identifying the property, the code says in relevant part that citations must:

> (4) Identify the violation(s) or unlawful condition(s);
>
> (5) Direct the violator to correct the violation(s) or condition(s) within a time period of no more than twenty-one (21) calendar days; and
>
> (6) Advise the violator that if the violation(s) is not corrected within the time allotted, then the violator is subject to enforcement for the violation(s) using any of the methods of this chapter.

Tampa City Code Sec. 9-3(b)(4)-(6).

Procedural due process imposes constraints on governmental decisions that deprive individuals of liberty or property interests. *County of Pasco v. Riehl*, 620 So.2d 229, 231 (Fla. 2d DCA 1993). When an agency fails to comply with its own rules regarding notice, it violates a party's due process rights. *Gill v. Crosby*, 884 So. 2d 442, 442 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D2208c]. Here, where commercial use can include a number of different activities, a notice that references only one activity while appearing to sanction three fails to comply with sec. 9-3(b)(4),(5), Tampa City Code. To the extent the dumpster and loading/unloading activity violate the code, they should have been specified in the notice, just as vehicular parking and storage were specified. A party should not have to guess what action or actions are necessary to come into compliance. Further complicating the matter is that city officials do not even agree whether loading/unloading is a violation. Had the City's attorney's opinion been known to staff earlier, one might wonder if it would have been included as an issue at all. Yet, the special magistrate proceeded to find a violation and make an oral ruling on it.[5]

In contrast to the special magistrate's more specific oral pronouncements with regard to the dumpster and the loading, the written final order merely echoes the notice, again directing Appellant to "cease illegal use in residential zone," and specifically to "remove open storage of *vehicles* from the property." The written order does not conform to the oral pronouncement. In some cases such a discrepancy can be fundamental error. *Soldatich v. Jones o/b/o Jones*, 290 So.3d 497, 501 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D161b].[6] When this happens any discrepancy is *usually* resolved to conform the written order to the oral pronouncement. *Id.* at 500. Here, however, where the oral pronouncement addresses activities that were not adequately noticed, conforming the written order to the oral pronouncement would violate Appellant's right to due process.

Because the notice does not sufficiently apprise Appellant of activity constituting code violations, and the oral and written orders build on that infirmity, reversal is required. *Ulano v Anderson*, 626 So. 2d 1112, 1112 (Fla. 3d DCA 1993). It is therefore ORDERED that the decision below is QUASHED and the cause is REMANDED for proceedings consistent with this opinion. (COOK, HINSON, BARBAS, JJ.)

---

[1]Sec. and 27-156 sets forth the uses allowed in specific zones. Sec. 27-241 (West Tampa Overlay District) relates to local design requirements specific to the neighborhood. These disallow commercial uses in residential areas generally, as well as in the specific neighborhood.

[2]The other ordinances prohibit commercial activity on property zoned residential, generally, as well as in West Tampa where the property is located. The code does not specifically define "commercial use," only "commercial equipment." Sec. 27-43 (Definitions), Tampa City Code.

[3]The special magistrate may reach a conclusion contrary to that of legal or other staff.

[4]Appellant was also concerned with technical deficiencies in the notice of violation, specifically the fact that it contained errors with regard to the folio number and property description. These were amended in the hearing to conform to the evidence. These corrections did not cure the other deficiencies in the notice.

[5]This opinion need not and does not pass on the correctness of his conclusion on the loading/unloading issue.

[6]In *Soldatich v. Jones o/b/o Jones*, 290 So.3d 497, 501 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D161b], the written order was more specific than the oral pronouncement. In this case, the written order merely restates the notice and is less specific. The order does not specifically refer to the loading/unloading or dumpster issue that the special magistrate orally directed be corrected.

* * *

Municipal corporations—Zoning—Variances—Due process—Applicant for variance that would allow construction seaward of coastal construction control line was denied neutral and impartial decision maker where two councilmembers specifically promised residents in advance of hearing that they had no intention of granting variance and would do all that they could to prevent construction—Mayor's general political stance against coastal construction did not constitute disqualifying bias—Applicant is entitled to new hearing without participation of two councilmembers

2600 N OCEAN, LLC, Petitioner, v. CITY OF BOCA RATON, Respondent. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Division (Civil) AY. Case No. 502019CA004116XXXXMB. September 16, 2020. Petition for Writ of Certiorari from the City of Boca Raton City Council. Counsel: Roberto M. Vargas, West Palm Beach; and Robert A. Sweetapple, Boca Raton, for Appellant. Jamie A. Cole and Laura K. Wendell, Fort Lauderdale, for Appellee.

(PER CURIAM.) Petitioner, 2600 N Ocean, LLC, seeks certiorari review of the City of Boca Raton City Council's (the "City Council") final order denying Petitioner's variance application. Petitioner contends that the City Council was not an impartial tribunal. We agree and grant the Petition for Writ of Certiorari.

Petitioner owns undeveloped, oceanfront land east of the coastal construction control line in the City of Boca Raton (the "City"). By ordinance, the City prohibits the construction of any structure eastward of the coastal construction control line without a variance. As Petitioner wished to build a residential duplex on its property, it sought a variance with the City. After the City analyzed Petitioner's project, city staff recommended denying Petitioner's variance application. The application then proceeded to a hearing in front of the City Council, which was comprised of the mayor and four other councilmembers.

Before its presentation at the hearing, Petitioner moved to disqualify the mayor and two councilmembers, alleging their bias against oceanfront construction. As grounds for its motion, Petitioner pointed out that on an earlier occasion, the mayor created a campaign video in which he promised city residents that he would not approve of any oceanfront construction "based on the environmental evidence that exists." Additionally, while Petitioner's variance application was pending review, the other two councilmembers responded to correspondence from residents about Petitioner's application. One councilmember responded, "I want to reassure you that I have no intention of granting any variances seaward of the Coastal Construction Control Line." The other councilmember wrote, "I promise you I am not in favor of building on this sensitive precious land and will do all I can to prevent this from happening." The mayor and the two councilmembers declined to disqualify themselves, and the City Council ultimately denied Petitioner's variance application.

Although the due process afforded to a party in a quasi-judicial hearing is not the same as that which is afforded to a party in a full judicial hearing, an impartial decision-maker remains a basic component of minimum due process in a quasi-judicial hearing. S*ee, Jennings v. Dade Cnty.*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991); *Charlotte Cnty. v. IMC-Phosphates Co.*, 824 So. 2d 298, 300-01 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D1917d]. As many quasi-judicial officers are politically elected, political bias and adverse political philosophies are inevitable and do not in and of themselves render the decision-maker impartial. *Seminole Entm't v. City of Casselberry*, 811 So. 2d 693, 696 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D2822a]. Nonetheless, a quasi-judicial officer "should be judicial in attitude and demeanor and *free from prejudgment* and from zeal for or against the [applicant]." *Id.* (emphasis added) (quoting 9 McQuillin Municipal Corporations, § 26.89 (3rd Ed.)). Accordingly, although each of the councilmembers were allowed to have and express political views on the wider issue of oceanfront construction, the councilmembers were not permitted to prejudge the narrow issue of Petitioner's application.

In this case, it is hard to imagine that the two councilmembers who commented on Petitioner's application were free from prejudgment with respect to Petitioner. Unlike the mayor's general political stance made in a campaign video, the two councilmembers specifically addressed Petitioner's application and promised that they had "no intention of granting [the application]" and "[would] do all I can to prevent this from happening." This was more than mere political bias or an adverse political philosophy—it was express prejudgment of Petitioner's application. Thus, the councilmembers were not impartial. We, therefore, **GRANT** the Petition for Writ of Certiorari and **QUASH** the City Council's decision. Petitioner is entitled to a new hearing without the participation of the two councilmembers. (GOODMAN, J. KEYSER, and CURLEY, JJ. concur.)

* * *

Landlord-tenant—Commercial property—Past due rent—Default—Due process—Trial court deprived tenants of procedural due process in action for past due rent by failing to rule on potentially dispositive motion to quash service of process as to one tenant before entering judicial default against that tenant and entering final judgment against all tenants—Further, entry of final judgment against non-defaulting co-tenants based on fact that they were sued as jointly liable with defaulting tenant was unjust—On remand, trial court must rule on motion to quash and must resolve claims against non-defaulting co-tenants irrespective of its ruling on motion to quash

FAMILY FIRST HEALTH PLANS INC., MATTHEW O'LEARY, & PATRICK STERN, Appellants, v. MROD REALTY CORP., Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Division (Civil) AY. Case No. 50-2019-AP-000116-CAXX-MB. L.T. Case No. 50-2018-CC-008240-XXXX-SB. September 9, 2020. Appeal from the County Court in and for Palm Beach County, Judge Marni Bryson. Counsel: Kathleen E. Bente, Cooper City, for Appellants. Craig M. Oberweger, Boca Raton, for Appellee.

(PER CURIAM.) Appellant Family First Health Plans, Inc. ("Family First")—along with two of its officers, Matthew O'Leary and Patrick Stern—appeal the county court's final judgment entered on July 3, 2019 in favor of the Appellee, MROD Realty Corp. ("MROD"). Appellants argue that the lower court denied them procedural due process at several points in the proceedings, rendering the final judgment void. We hold that the lower court denied Appellants procedural due process by failing to rule on a potentially dispositive motion to quash service of process before entering a judicial default and subsequently awarding final judgment to MROD. Therefore, we reverse and remand for further proceedings consistent with this opinion.

Factual and Procedural Background

MROD, the owner of commercial property in Delray Beach, FL (the "Property"), entered into a month-to-month Occupancy License Agreement (the "Agreement") with Appellant Family First. Pursuant to the Agreement, Appellants Stern and O'Leary, officers of Family First, entered into a Guaranty with MROD. While the parties disagree on the circumstances leading up to litigation, MROD ultimately provided Appellants with a three-day notice to pay past due rent on July 2, 2018. MROD filed a Complaint against Appellants in county court on July 11, 2018.

On August 14, 2018, trial counsel for Appellants, David A. Fry, Esq., filed a "Motion to Quash Invalid Service of Process." MROD opposed the motion to quash, arguing that Appellant Stern was properly served and that the remaining Appellants had no standing to bring the motion because Attorney Fry only filed a notice of appearance on behalf of Stern. Appellants later conceded that Family First and Stern were properly served, but continued to contest the validity of service of process as to O'Leary. Attorney Fry then filed an Answer and Affirmative Defenses on behalf of Appellants Family First and Stern, but not Appellant O'Leary.

On October 5, 2018, MROD filed a Motion for Court Default against Appellant O'Leary on Counts 1 and 3 of the Complaint. Following a hearing, the transcript of which is not contained in the record, the lower court issued an order entering judicial default against O'Leary. In this order, the court also ruled that since the Agreement imposed joint and several liability against the remaining Appellants, final judgment should also be entered against Appellants Family First and Stern. Thereafter, the Court entered a final default judgment in favor of MROD against O'Leary individually and a final judgment against Family First and Stern jointly and severally in the amount of $39,289.52 for damages, attorney's fees, and costs. Appellants timely appealed.

Analysis

Appellants argue that the lower court deprived them of procedural due process at four separate instances. Of particular note, Appellants allege that they were deprived procedural due process when the lower court entered a judicial default against Appellant O'Leary and then entered final judgment against all Appellants without ruling on Appellant O'Leary's motion to quash service of process. Due process requires a lower court to definitively rule on a pending motion to quash service of process before it enters either a judicial default or default judgment against a party. Consequently, we reverse on this issue without addressing the remainder of Appellant's arguments.[1]

A court may properly enter a judicial default against a party if it "has failed to plead or otherwise defend" against a cause of action and the defaulting party is provided "notice of the application for default" if it has filed or served any document in the action. Fla. R. Civ. P. 1.500(b); *see also Hendrix v. Dep't Stores Nat. Bank*, 177 So. 3d 288, 290-91 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D2215f]. However, a court may not enter a default or default judgment if there are pending motions that raise certain defenses. *See* Fla. R. Civ. P. 1.140(d); *see also* § 51.011(1), Fla. Stat. (2018) (stating that, in summary proceedings, all defensive motions "including motions to quash" must be heard by the trial court prior to trial). Notably, the Fourth District Court of Appeal has held that a *clerk* default cannot be entered if the "defaulting" party files a motion to quash service of process. *Carson v. Rossignol*, 559 So. 2d 433, 433-34 (Fla. 4th DCA 1990); *see also Ripley v. Ripley*, 278 So. 3d 190, 192 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D1934a] (holding the same). We see no reason why *Carson* should not apply to judicial defaults as well. *See* Fla. R. Civ. P. 1.500(a), (b). Therefore, the court should not have entered a judicial default against O'Leary while his motion to quash was pending.

Assuming, *arguendo*, that the lower court did not err in entering a judicial default against Appellant O'Leary, it was certainly improper to enter a final default judgment. A default judgment cannot be entered when there is "an undisposed motion pending that would affect the plaintiff's right to proceed to judgment." *Singh v. Kumar*, 234 So. 3d 1, 3 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D2160a].There is no doubt that a motion to quash service of process is dispositive since a court does not acquire jurisdiction over a defendant, and therefore cannot enter a default judgment, until a summons is properly issued and served. *Seymour v. Panchita Inv., Inc.*, 28 So. 3d 194, 196 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D460a]; *Alvarez v. State Farm Mut. Auto Ins. Co.*, 635 So. 2d 131, 132 (Fla. 3d DCA 1994).

Appellee argues that Appellant O'Leary was not denied due process since he presented no evidence that service was actually invalid. This argument is unavailing for two reasons. First, regardless of the motion's validity, the lower court was required to make a ruling on it before entering a default. *See Carson*, 559 So. 2d at 433-34. Second, the motion to quash to service of process properly alleged that the return of service was facially insufficient. Appellant O'Leary was thus entitled to an evidentiary hearing on the matter. *See Talton v. CU Members Mortg.*, 126 So. 3d 446, 447 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2363a]; *Gonzalez v. Totalbank*, 472 So. 2d 861, 864 (Fla. 3d DCA 1985). Because Appellant O'Leary never received a hearing that he was legally entitled to, the lower court denied him procedural due process. *See Cnty. of Pasco v. Riehl*, 635 So. 2d 17, 18-19 (Fla. 1994). On remand, the lower court must hold an evidentiary hearing on Appellant O'Leary's motion to quash service of process. We express no opinion, however, on whether O'Leary's motion ultimately has merit.

While the lower court's error directly affected the due process rights of Appellant O'Leary, the other two Appellants are also entitled to relief from the final judgment. A trial court is not required to enter a default judgment in all cases where there are also non-defaulting co-defendants; the court should instead "evaluate whether the entry of the default judgment could lead to an absurd, unjust, or logically inconsistent result." *Days Inns Acquisition Corp. v. Hutchinson*, 707 So. 2d 747, 751 (Fla. 4th DCA 1997) [23 Fla. L. Weekly D51a]; *see also N. Shore Hosp., Inc. v. Barber*, 143 So. 2d 849, 853 (Fla. 1962) (holding that, when possible, a case shall be resolved on the merits rather than by default judgment). By entering a final judgment against all Appellants, not just O'Leary, the lower court essentially treated the other Appellants as if they also defaulted, even though they had served an answer and were ready to proceed on the merits. This was an unjust result. *See Hutchinson*, 707 So. 2d at 751 (citing *McMillian/McMillian, Inc. v. Monticello Ins. Co.*, 116 F.3d 319, 321 (8th Cir. 1997) ("when defendants are sued as jointly liable, and less than all default, the court may not enter default judgment against the defaulted defendants until the liability of nondefaulted defendants has been decided")). On remand, the lower court must resolve Appellee's claims against Family First and Stern on the merits, irrespective of its ruling on Appellant O'Leary's motion to quash service of process.

Conclusion

The lower court denied Appellants procedural due process when it failed to rule on Appellant O'Leary's motion to quash service of process before entering a judicial default and final judgment, which also prevented the other Appellants from arguing their case on the merits. Accordingly, we **REVERSE** the final judgment of the lower court and **REMAND** for further proceedings consistent with this decision. We also **GRANT** the Appellee's Motion to Strike portions of Appellant's Initial Brief and **DENY** Appellee's Motion for Appellate Attorney's Fees. (HAFELE, COATES, and CHEESMAN, JJ., concur.)

---

[1] Appellee argues that Appellants did not preserve their arguments for appeal, but the denial of procedural due process constitutes fundamental error and may be raised for the first time on appeal. *Pena v. Rodriguez*, 273 So. 3d 237, 240-41 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1346a]; *see also Farinas v. State*, 569 So. 2d 425, 429 (Fla. 1990) ("Absent fundamental error, an issue will not be considered for the first time on appeal.").

* * *

SEREF GUNDAY, Appellant, v. THE OLYMPUS ASSOCIATION, INC., Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE18-005562 (AP). L.T. Case No. COCE17-020499. July 30, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Daniel J. Kanner, Judge. Counsel: Philippe Symonovicz, Law Offices of Philippe Symonovicz, Ft. Lauderdale, for Appellant. Lilliana M. Farinas-Sabogal, Becker and Poliakoff, P.A., Miami, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the Order Granting Final Summary Judgment of Eviction in favor of

Plaintiff is hereby **AFFIRMED**. Appellee's Motion for Appellate Attorney's Fees 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 Attorney's Fees is hereby **DENIED**. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

* * *

KFIR BARANES, Appellant, v. CITY OF CORAL SPRINGS, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-63AC10A. L.T. Case No. 19-1308MO20A. August 28, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Judge Schiff. Counsel: M. Mendel Kass, Law Office of William J. Roe, P.A., for Appellant. Nicholas A. Noto, Assistant City Attorney, City of Coral Springs, for Appellee.

OPINION

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

* * *

UNITED AUTOMOBILE INSURANCE COMPANY, Appellant, v. DR. ALAN R. FREEDMAN, D.C., P.A., a/a/o Janette Westley, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Consolidated Case Nos. CACE19-003926 (AP) and CACE19-008370 (AP). L.T. Case No. COCE11-003383. July 30, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; John D. Fry, Judge. Counsel: Michael J. Neimand, House Counsel, United Automobile Insurance Company, Miami, for Appellant. Douglas H. Stein, Douglas H. Stein, P.A., Miami, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the Final Judgment for Plaintiff entered on January 28, 2019 is hereby **AFFIRMED**. Additionally, the Final Judgment Awarding Attorney's Fees and Costs entered on April 3, 2019 is hereby **AFFIRMED**. Appellee's Motion for Attorney's Fees is hereby **GRANTED** as to appellate attorney's fees, with the amount to be determined by the county court upon remand. Further, Appellant's Motion for Attorney's Fees is hereby **DENIED**. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

* * *

FRANCIS M. FLYNN, Appellant, v. STEVE GALE, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE17-019221 (AP). L.T. Case No. CONO17-004663. July 30, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Louis H. Schiff, Judge. Counsel: John Bernazzoli, Hollywood, for Appellant. Steve Gale, Pro Se, Pompano Beach, Appellee.

OPINION

(PER CURIAM.) Having carefully considered the initial brief, the record, and the applicable law, the default judgment is hereby **AFFIRMED**. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

* * *

SYLVESTER SYLVESTRE, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-30AC10A. L.T. Case No. 18-000298MM30A. August 28, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Judge Ginger Lerner-Wren. Counsel: Lisa S. Lawlor, for Appellant. Nicole Bloom, for Appellee.

OPINION

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

* * *

EDGAR CHANG, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-29AC10A. L.T. Case No. 18-11736MU10A. July 29, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Kathleen McHugh, Judge. Counsel: Bernadette Guerra, Assistant Public Defender, for Appellant. Nicole Bloom, Office of the State Attorney, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the Initial Brief of Appellant, the Answer Brief of Appellee, and the Reply Brief of Appellant, the record on appeal, and applicable law, we AFFIRM the judgment of conviction and sentence. (SIEGEL, MURPHY, and FEIN, JJ., concur.)

* * *

MARIO MELO, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 18-40AC10A. L.T. Case No. 17-20147MU10A. June 12, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Melinda Brown, Judge. Counsel: Lisa S. Lawlor, for Appellant. Nicole Bloom, Office of the State Attorney, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the Initial Brief of Appellant and the Answer Brief of Appellee, the record on appeal, and applicable law, we find no error as to the ruling by the County Court denying Appellant's motion to suppress evidence, and therefore AFFIRM the judgment of conviction. (SIEGEL, MURPHY, and FEIN, JJ., concur.)

* * *

STATE OF FLORIDA, Appellant, v. CESAR GOMERA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-14AC10A. L.T. Case No. 18-16598MU10A. August 28, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Robert Diaz, Judge. Counsel: Nicole Bloom, Office of the State Attorney, for Appellant. Edward J. Kone, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the Initial Brief of Appellant and the Answer Brief of Appellee, the record on appeal, and applicable law, we hereby AFFIRM the ruling of the County Court granting Appellee's motion to suppress. (SIEGEL, MURPHY, and FEIN, JJ., concur.)

* * *

ALXANDER SPOREA, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-10AC10A. L.T. Case Nos. 18-59953TC10A, 18-23650TC10A, 18-20694TC20A, and 19-01316TC10A. August 28, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Judge Christopher W. Pole. Counsel: Alexander Sporea, Pro Se,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 judgment and sentence entered in the trial court. (SIEGEL, MURPHY, III, AND FEIN, JJ., concur.)

* * *

ALXANDER SPOREA, Appellant, v. CITY OF PARKLAND and CITY OF CORAL SPRINGS, Appellees. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-2AC10A. L.T. Case Nos. 17-36670TI20A, 17-39536TI20A. August 28, 2020.Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Traffic Hearing Officer. Counsel: Alexander Sporea, Pro Se Appellant. Andrew S. Maurodis, for Appellee City of Parkland. Nicholas Noto, for Appellee City of Coral Springs.

OPINION

(PER CURIAM.) Having carefully considered Appellant's Initial Brief, Appellee's Answer Brief, and the applicable law, we hereby **AFFIRM** the judgment and sentence entered in the trial court. (SIEGEL, MURPHY, III, AND FEIN, JJ., concur.)

* * *

Volume 28, Number 7
November 30, 2020
Cite as 28 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—ORIGINAL

Declaratory judgments—Amendment of complaint to seek monetary relief

ALFONZO AND ANGELA BALDWIN, Plaintiffs, v. STATE FARM FLORIDA INSURANCE COMPANY, Defendant. Circuit Court, 2nd Judicial Circuit in and for Leon County. Case No. 2020 CA 1018. August 27, 2020. Angela C. Dempsey, Judge. Counsel: Francisco Cieza, Francisco Cieza, P.A., Coral Gables, for Plaintiff. Katie Keller, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

THIS CAUSE, having come before this Court Defendant's Motion to Dismiss Plaintiffs' Complaint, having read and considered the Motion, reviewed the Court file, 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 ORDERED AND ADJUDGED as follows:

1. Defendant's Motion to Dismiss Plaintiffs' Complaint for Declaratory Relief is hereby DENIED. *See Higgins v. State Farm,* 894 So. 2d 5 (Fla. 2004) [29 Fla. L. Weekly S533a]

2. It is further ordered and adjudged that Plaintiffs are solely seeking non-monetary relief by way of this action for declaratory relief and shall not be allowed to amend the pleadings in order to later seek monetary relief in this action.

3. Defendant shall file an Answer to the Complaint within twenty (20) days of this Order.

* * *

Insurance—Property—Dismissal—Motion to dismiss breach of contract action against insurer for failure to join co-owner of property as indispensable party is denied where case can be resolved without including co-owner

SAMUEL STEVENS, Plaintiff, v. AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA, Defendant. Circuit Court, 5th Judicial Circuit in and for Sumter County. Case No. 2020-CA-250. September 4, 2020. Mary P. Hatcher, Judge. Counsel: David Albert Spain, Morgan & Morgan, P.A., Orlando, for Plaintiff. Kimberly Fernandes, Kelley Kronenberg, Tallahassee, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, ABATE THE INSTANT ACTION FOR FAILURE TO ADD INDISPENSABLE PARTY

THIS COURT having considered Defendant's Motion to Dismiss, or in the alternative, Abate the Instant Action for Failure to Add Indispensable Party, filed on August 4, 2020; Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss, filed on August 5, 2020; and having reviewed the record in this case, finds as follows:

A. On June 12, 2020, the Plaintiff filed his Complaint which alleged a claim for breach of contract.

B. In the Motion to Dismiss, or in the Alternative, Abate the Instant Action for Failure to Add Indispensable Party, Defendant claims Plaintiff failed to include the co-owner of the property.

C. Florida law is well-settled that the trial court's standard of review regarding a motion to dismiss is as follows:

> The purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal. The trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations. It is not for the court to speculate whether the allegations are true or whether the pleader has the ability to prove them. The question for the trial court to decide is simply whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested.

Huet v. Mike Shad Ford, Inc., 915 So.2d 723, 725 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2728b]

Thus, this Court must confine its gaze to the four corners of the Complaint, "accept as true" the Plaintiff's allegations, and determine whether the Plaintiff has properly alleged a valid cause of action against the Defendant.

D. An indispensable party is one who must be joined in order to ensure complete and efficient resolution of the case involving the existing parties. *National Title Ins. Co. v. Oscar E. Dooly Associates, Inc.,* 377 So.2d 730 (Fla. 3d DCA 1979). Resolution of this case, however, may be completed without including the co-owner.

Based on the foregoing, it is hereby **ORDERED and ADJUDGED** as follows:

1. Defendant's Motion to Dismiss, or in the Alternative, Abate the Instant Action for Failure to Add Indispensable Party is hereby DENIED.

2. Defendant has twenty (20) days from the date of this Order to serve and file a response to Plaintiff's Complaint.

* * *

Insurance—Automobile—Application—Misrepresentations—Failure to disclose felony criminal history on insurance application—Policy void ab initio

IMPERIAL FIRE & CASUALTY INSURANCE COMPANY, Plaintiff, v. PETER BERTRAM, JR., SOUTHWEST VOLUSIA HEALTHCARE CORPORATION, d/b/a ADVENTHEALTH FISH MEMORIAL, CENTRAL FLORIDA MEDICAL & CHIROPRACTIC CENTER, INC., d/b/a STERLING MEDICAL GROUP, EMERGENCY MEDICINE PROFESSIONALS, P.A., STAND UP MRI DIAGNOSTIC CENTER, P.A., Defendants. Circuit Court, 7th Judicial Circuit in and for Volusia County. Case No. 2019 11204 CIDL. August 31, 2020. Kathryn D. Weston, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Gregory Tayon, Simoes Davila, PLLC, Ocala, for Defendant.

ORDER ON PLAINTIFF, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AS TO DEFENDNANT, PETER BERTRAM, JR.

THIS CAUSE having come before this Court at the hearing on August 28, 2020, on the Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendant, PETER BERTRAM, JR., 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:

a. Plaintiff, Imperial Fire and Casualty Insurance Company's Motion for Final Summary Judgment is hereby **GRANTED**;

b. This Court ***hereby enters final judgment*** for Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, and against the Defendant, PETER BERTRAM, JR.;

c. Since the insurance policy issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY is rescinded void ab initio, this matter is resolved, and the Counterclaim for Breach of Contract is dismissed with prejudice;

d. 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:

i. The Defendant, PETER BERTRAM, JR., failed to disclose his felony criminal history at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # [redacted] issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY;

ii. There is no insurance coverage for the named insured, PETER BERTRAM, JR., for any bodily injury liability, property damage liability, personal injury protection benefits, and collision or comprehensive ("other than collision") coverages, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE & CASUALTY INSURANCE COMPANY, bearing policy # [redacted]

iii. The Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, PETER BERTRAM, JR., for any claims made under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # [redacted]

iv. Since the policy of insurance issued to the Defendant, PETER BERTRAM, JR., bearing policy # [redacted] is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from PETER BERTRAM, JR. to any medical provider, medical entity and/or doctor is void;

v. Defendant, PETER BERTRAM, JR. entered a nolo contendere plea on or about June 25, 2009 in Volusia County, Florida, case number: 2009-02138CFAWS, for dealing in stolen property;

vi. Pursuant to the Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY's underwriting guidelines, the following drivers are Unacceptable Drivers: Drivers who has been convicted of or pled no contest or nolo contendere to a felony offense—other than alcohol-related driving offenses—during the last ten years (whether adjudication was withheld or not);

vii. Defendant, PETER BERTRAM, JR. answered "NO" to the application question #18, which provides: "Has the applicant or any listed driver been convicted, pleaded guilty, nolo contendere, or no contest to any felony, other than alcohol-related driving offenses during the last 10 years (whether adjudication was withheld or not)";

viii. Pursuant to IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY's Underwriting Guidelines, the Carrier does not accept any applicant or listed driver who has been convicted, pleaded guilty, nolo contendere, or no contest to any felony, other than alcohol-related driving offenses during the last 10 years (whether adjudication was withheld or not);

ix. Pursuant to IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY's Underwriting Guidelines, the Carrier does not assume the risk nor issue insurance policies for any applicant or listed driver who has been convicted, pleaded guilty, nolo contendere, or no contest to any felony, other than alcohol-related driving offenses during the last 10 years (whether adjudication was withheld or not);

x. The Defendant, PETER BERTRAM, JR., is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # [redacted] for the March 15, 2019 motor vehicle accident;

xi. The Defendant, SOUTHWEST VOLUSIA HEALTHCARE CORPORATION d/b/a ADENTHEALTH FISH MEMORIAL, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # [redacted] for the March 15, 2019 motor vehicle accident;

xii. The Defendant, 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, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # [redacted] for the March 15, 2019 motor vehicle accident;

xiii. The Defendant, EMERGENCY MEDICINE PROFESSIONALS, P.A., is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # [redacted] for the March 15, 2019 motor vehicle accident;

xiv. The Defendant, STAND UP MRI DIAGNOSTIC 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 # [redacted] for the March 15, 2019 motor vehicle accident;

xv. There is no insurance coverage for the motor vehicle accident which occurred on March 15, 2019, under policy # [redacted]

xvi. There is no personal injury protection ("PIP") insurance coverage for the motor vehicle accident which occurred on March 15, 2019, under policy # [redacted]

xvii. There is no bodily injury liability coverage for the motor vehicle accident which occurred on March 15, 2019, under policy # [redacted]

xviii. There is no property damage liability coverage for the motor vehicle accident which occurred on March 15, 2019, under policy # [redacted]

xix. There is no collision coverage for the motor vehicle accident which occurred on March 15, 2019, under policy # [redacted]

xx. There is no other than collision coverage for the motor vehicle accident which occurred on March 15, 2019, under policy # [redacted]

xxi. The IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY Policy of Insurance, bearing policy # [redacted] is rescinded and is void *ab initio.*

* * *

Insurance—Homeowners—Declaratory judgments—Coverage—Insured may proceed with action seeking declaration of coverage on denied insurance claim

VILMA EIKESETH, Plaintiff, v. AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA, Defendant. Circuit Court, 10th Judicial Circuit in and for Polk County. Case No. 2019-CA-005267. April 1, 2020. Gerald P. Hill, II, Judge. Counsel: Francisco Cieza, Law Office of Francisco Cieza, Coral Gables, for Plaintiff. Ried J. Arnold, Tampa, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR DECLARATORY JUDGMENT

THIS CAUSE having come before the Court on March 23, 2020, on Defendant's Motion to Dismiss Plaintiff's Complaint for Declaratory Judgment and the Court having heard arguments by counsel and after reviewing the file and being otherwise advised in the premises, it is hereby,

ORDERED AND ADJUDGED that:

1. Defendant's Motion to Dismiss Complaint for Declaratory Judgment is DENIED.

2. The case at hand involves a dispute between Plaintiff, Vilma Eikeseth, and her homeowner's insurance company, Defendant, American Integrity Insurance Company of Florida.

3. The underlying dispute arose after the Defendant denied insurance coverage related to an alleged loss occurring at the Plaintiff's property on or around May 1, 2019.

4. As a result, Plaintiff filed a one-count complaint seeking a declaration of coverage by way of an action for declaratory relief.

5. Pursuant to *Higgins v. State Farm Fire and Cas. Co.,* 894 So.2d 5 (Fla. 2004) [29 Fla. L. Weekly S533a], and in light of the fact that Plaintiff filed a single count for declaratory relief on a denied insurance claim, Plaintiff may proceed with this action for declaratory relief and Defendant's motion to dismiss is denied.

6. Defendant shall have thirty (30) days from the date of this Order to file an Answer to Plaintiff's Complaint.

* * *

Liens—Construction—Foreclosure—Failure to make required disclosures—Contractor's failure to include in construction contract the disclosures required by statute and city and county codes precludes contractor's lien rights—Provision of construction lien law stating that failure to provide disclosures does not bar enforcement of lien against person who has not been adversely affected does not require that homeowner prove that he was adversely affected in order to preclude enforcement of statutorily non-compliant lien

POINCIANA DEVELOPMENT GROUP LLC, Plaintiff, v. ROSS FRANK MARCHETTA, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-042802-CA-01, Section CA27. July 26, 2020. Oscar Rodriguez-Fonts, Judge. Counsel: Keith J. Merrill, Keith J. Merrill, P.A., Miami, for Plaintiff. Jason B. Giller, Jason B. Giller, P.A., Miami, for Defendants Ross Frank Marchetta and Mary Angela Vaccaro.

ORDER GRANTING DEFENDANT'S/COUNTER-PLAINTIFF'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS ON COUNT II OF THE PLAINTIFF'S/COUNTER-DEFENDANT'S AMENDED COMPLAINT

THIS CAUSE, having come before the Court on May 21, 2020, on Defendant's/Counter-Plaintiff's Motion for Partial Summary Judgment on the Pleadings on Count II of the Plaintiff's/Counter-Defendant's Amended Complaint, and the Court, being fully advised in the premises and having reviewed all relevant material, finds as follows:

1. The Plaintiff/Counter-Defendant, Poinciana Development Group, LLC ("Poinciana"), filed an Amended Complaint against the Defendant/Counter-Plaintiff, Ross Frank Marchetta ("Marchetta"), seeking, *inter alia*, foreclosure on a construction lien upon real property owned by Marchetta.

2. On October 17, 2017, Poinciana entered into a "Proposal/Contract" with Marchetta, whereby Poinciana was to provide "all labor, material and equipment necessary to complete [Marchetta's] driveway alterations, ramp and fountain based on plans provided by TJIA Architects dated 07/07/2017 . . . [and] [o]btain all required City of Miami Beach Inspections."

3. In exchange for completing the identified scope of work, the Proposal/Contract provided the following "Payment Terms": "Deposit required 30% @ Contract; Progress Payment #1 of 30% due at Form for Fountain & Ramp; Progress Payment #2 of 30% due at Form for Driveway Pads; Final Payment of 10% due at Completion including Final Inspection."

4. In its Amended Complaint, Poinciana alleges that Marchetta failed to pay an "interim bill for progress." Poinciana also alleges that it last performed services for Marchetta on December 21, 2017; recorded a lien on the property on February 2, 2018; executed a Final Payment Affidavit on March 20, 2018; and later served the Affidavit upon Marchetta.

5. Marchetta has moved for a Partial Judgment on the Pleadings on Count II of Poinciana's Amended Complaint which seeks foreclosure of the construction lien placed by Poinciana upon the real property owned by Marchetta.

6. Marchetta argues that it is entitled to a Partial Judgment on the Pleadings because Poinciana failed to include the mandatory disclosures required by state, county and local law in the Proposal/Contract. Marchetta argues that, pursuant to Section 713.015 of the Florida Statutes, Section 10-33.1 of the Miami-Dade Code and Section 14-82 of the City of Miami Beach Code, Poinciana was required to include certain disclosures, and its failure to do so extinguishes any lien rights Poinciana would have otherwise had.

7. In response, Poinciana argues that Marchetta's motion should be denied because the remedy sought by Marchetta (dismissal of its lien foreclosure action) is not permitted by the Miami-Dade County Code or the City of Miami Beach Municipal Code. Poinciana maintains that the Codes do not render the Proposal/Contract null and void and therefore unenforceable because the disclosures were not attached. Poinciana argues that the Codes provide for other remedies for nonconforming contracts other than extinguishment. Poinciana argues the applicability of *MGM Construction Services Corp. v. Travelers Casualty & Surety Co. of America, et al.*, 57 So. 3d 884 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D462a] to this matter.

8. Additionally, in a supplemental memorandum, Poinciana argues that Marchetta's motion should be denied because, pursuant to Florida Statute 713.015(2)(b), Marchetta has not alleged that it has been adversely affected by Poinciana's failure to include the disclosures, and a determination of such can only be made by testimony, which procedurally precludes the entry of a judgment on the pleadings.

9. Rule 1.140(c) of the Florida Rules of Civil Procedure provides that any party may move for a judgment on the pleadings after the pleadings are closed but within such time as not to delay trial. Fla. R. Civ. P. 1.140(c). A motion for a judgment on the pleadings allows a trial judge to examine the allegations of the bare pleadings and determine whether there are any issues of fact based thereon. *Bradham v. Hayes Enterprises, Inc.* 306 So. 2d 568, 570 (Fla. 1st DCA 1975). "If the bare pleadings reveal that there are no facts to be resolved by a trier of facts then the trial judge is authorized to enter a judgment based on the uncontroverted facts appearing from the pleadings as applied to the applicable law." *Id.* at 571. The motion is to be decided "on the pleadings only, without reference to any other affidavits, depositions or other showings of fact." *Shay v. First Federal of Miami, Inc.*, 429 So. 2d 64, 65 (Fla. 3d DCA 1983). On such a motion, all material allegations of the opposing party's pleading are to be taken as true, and all those of the movant which have been denied are taken as false. *Farag v. National Databank Subscriptions, Inc.*, 448 So. 2d 1098, 1100 (Fla. 2d DCA 1984). When reviewing a motion for judgment on the pleadings, the Court must consider the exhibits attached to any of the pleadings. *See* Rule 1.130(b), Fla. R. Civ. P. ("[a]ny exhibit attached to a pleading shall be considered a part thereof for all purposes."). Judgment on the pleadings should be found where, and with due respect to the principles outlined above, the matter turns on a question of law and it is clear that the moving party is entitled to a judgment as a matter of law. *McKeinzie v. Hollywood, Inc.,* 421 So. 2d 606 (Fla. 4th DCA 1982).

10. The Miami-Dade Code Section 10-33.1 provides that contracts for the repair, alteration, addition or remodeling of a residential structure *shall* include certain provisions and disclosures. *See generally* §10-33.1(a) (i-vii), Code of Miami-Dade County. Further, the Code provides that it is "unlawful for anyone to [f]ail to provide the disclosure required under Section 10-33 of this Code." *See* §10-22(m), Code of Miami-Dade County.

11. Under the City of Miami Beach Municipal Code, it is a violation for the failure to make the required disclosures pursuant to the Miami-Dade County Code. *See* §14-82(a)(13), Code of the City of Miami Beach ("[f]ail to provide the disclosure required under chapter 10 of the Code of Metropolitan Dade County.")

12. Florida Statute 713.015 provides that the instant Proposal/Contract must contain disclosures regarding the Florida's Construction Lien Law. *See* §713.015(1), Fla. Stat. This section advises the property owner of the lien rights a contractor a may acquire against the owner's property. *Id*. However, "[t]he failure to provide such written notice does not bar the enforcement of a lien against a person who has not been adversely affected." §713.015(2)(b), Fla. Stat.

13. It is undisputed that the Proposal/Contract between Poinciana and Marchetta did not contain the disclosures required under the

Florida Statutes, the Miami-Dade County Code and the City of Miami Beach Municipal Code.

14. The issue is thus, whether Poinciana's failure to include the necessary disclosures invalidates it claim of lien, and thus operates as a bar to its action in Count II of the Amended Complaint against Marchetta; or stated differently, it must be determined whether the lack of disclosures requires this Court to enter judgment in favor of Marchetta on the Count.

15. While the Court is aware of the scarcity of law on this issue, this Court nevertheless finds the matters in *Culpepper Constructors, Inc. v. Wolfe, II*, 2009 WL 10452778 (Fla. 13th Cir. Ct.) (Jan. 14, 2009) and *Basic Companies Inc. v. Willis*, 2005 WL 5525824 (Fla. 10th Cir. Ct.)(Sept. 16, 2005) instructive.

16. In *Culpepper*, a plaintiff/contractor asserted a claim against defendants-homeowners to foreclose a construction lien and for breach of contract. There, the Court specifically found that:

> Plaintiff's failure to include the warning language required by Section 713.015, Florida Statutes, constitutes a failure to comply with the provisions of part one of Chapter 713, *a prerequisite to the creation of an enforceable construction lien*. *See* Fla. Stat. § 713.05 ("[a] contractor *who complies with the provisions of this part shall*, subject to the limitations thereof, have a lien on the real property improved. . .") *Id.* at *1 (emphasis supplied).

17. Likewise, in *Willis*, the Plaintiff filed a complaint, comprised of two counts, the first of which sought to foreclose a claim of lien against an owner and the second which sought a judgment for monetary damages. The Defendant moved to dismiss both counts on the limited basis that "[t]he Contract attached to Plaintiff's Complaint fails to contain a mandatory provision required by Florida Statutes, Section 713.105." The Defendant further alleged that Plaintiff's failure to comply with the statutory disclosure requirements barred Plaintiff from foreclosing the lien and that the Contract was null, void and unenforceable. The Court found Defendant's argument prevailing on Count I, the foreclosure of lien count. After analyzing Section 713.015 and its legislative record, the Court found that Chapter 713, required to be strictly construed, demanded that the count to foreclose the lien was prohibited by law. The Court stated that "[b]ecause lien rights are purely a creature of statute and therefore must be strictly construed. . .,the proper remedy for failing to comply with Section 713.015, Fla. Stat., is the removal of Plaintiff's lien rights that Plaintiff seeks to enforce under the deficient contract." *Willis*, 2005 WL 5525824, at page 2.

18. The Court finds the reasoning in *Culpepper* and *Willis* (interpreting Florida State Lien Law) applicable notwithstanding the fact that the instant controversy primarily involves county and municipal disclosures. Black letter analysis of the instant code provisions mandates the extinguishment of Poinciana's lien rights. And while section 713.015(2)(b) states that the failure to provide disclosures does not bar the enforcement of a lien against a person who has not been adversely affected, this subsection, this Court finds, does not mandate that Marchetta prove that he has been adversely affected to preclude foreclosure of Poinciana's statutorily-non-compliant lien in the first instance. This Court disagrees with Poinciana's assertion that the burden falls to Marchetta.

19. Lastly, this Court finds the matter in *MGM Construction* non-persuasive to this matter. There, the court declined to find a contract entered into by a contractor and a subcontractor unenforceable because the subcontractor did not possess a specially contractor's license required by the Miami-Dade County Code of Ordinances because the legislative body, the County Commission, did not specifically promulgate that such contracts would be unenforceable due to non-licensure. Here, as noted in *Culpepper*, the Florida State Legislature specifically made the disclosures necessary to the creation of a valid and enforceable lien.

20. As such, this Court hereby GRANTS Marchetta's Motion for Partial Judgment on the Pleadings on Count II of Poinciana's Amended Complaint. Poinciana's failure to include the requisite disclosures precluded its lien rights.

* * *

Municipal corporations—Zoning—Gambling establishments—Motion to dismiss action seeking declaration that zoning administrators' letters verifying that gambling is permitted use in entertainment zone in which developer seeks to open gambling establishment and settlement agreement in federal case between city and developer that was executed despite mayoral veto and would allow developer to open gambling establishment are void, and further seeking injunctive relief directing city not to issue any orders, permits or approvals authorizing gambling establishment—Standing—Standing under city's citizens' bill of rights, which grants "to residents" standing to bring legal action to enforce city charter includes both natural persons and corporate entities—Residents are not required to plead special injury to proceed under citizens' bill of rights—Plaintiffs who have property in immediate vicinity of proposed gambling operation have standing to maintain action to enforce comprehensive plan, but plaintiffs who are owners of property in zoning districts in which entertainment uses are allowed but who do not allege facts showing that they will be aggrieved or adversely affected by proposed gambling operation do not—Special injury need not be demonstrated for standing to bring claim that settlement agreement is illegal and void—No merit to argument that action is impermissible collateral attack on federal court order dismissing litigation based on settlement agreement where federal court did not incorporate settlement agreement into order, federal court denied plaintiff's requests to intervene in federal case and deferred to state court to adjudicate state law illegality claims, and plaintiffs were not parties to settlement agreement—No merit to request to stay case as matter of comity—Because there is no prior action pending that raises issue of legality of settlement agreement, there is no case to which to defer—Sovereign immunity—City is entitled to dismissal of action based on sovereign immunity for discretionary decision of deciding to settle federal suit where plaintiffs allege that settlement is illegal and void—Validity of zoning administrators' letters does not present justiciable question ripe for adjudication where letters are merely opinions that have been superceded by new zoning ordinance, and developer derives any authority to operate gambling facility from settlement agreement, not letters—Sole issue for adjudication is lawfulness of settlement agreement

ERNESTO CUESTA, et al., Plaintiffs, v. CITY OF MIAMI, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-006298-CA-01, Section CA43. August 24, 2020. Michael Hanzman, Judge. Counsel: Eugene E. Stearns, Grace L. Mead, Jenea M. Reed, and Joseph J. Onorati, Sterns Weaver Miller Wessler Alhadeff & Sitterson, P.A., Miami; and Brian J. Shack, Assistant General Counsel, Braman Management Association, Miami, for Plaintiffs. Raquel A. Rodriguez, Buchanan Ingersoll & Rooney PC, Miami; and S. Carey Villeneuve, Buchanan Ingersoll & Rooney PC, Ft. Lauderdale, for Defendant.

CORRECTED ORDER ON MOTIONS TO DISMISS[1]

I. INTRODUCTION

Plaintiffs,[2] nine Miami-based businesses, Miami homeowners and Miami homeowners associations, Amended Complaint ("AC"), bring this action for "Declaratory and Injunctive Relief" seeking to invalidate "unlawful government conduct, including an unlawful zoning interpretation and a related unlawful settlement agreement" which, in Plaintiffs' opinion, "would transform Miami [or more appropriately pave the way for Miami to be transformed] into a major gambling location without public input, procedural due process, or democratic accountability." AC ¶ 1. Defendants are the City of Miami ("City"), which is alleged to have unlawfully "allowed gambling as a

permitted use within [its] boundaries," and West Flagler Associates, LLC ("West Flagler"), a privately held entity that, pursuant to the City's alleged unlawful grant, intends to build "a large-scale gambling establishment on over 11 acres of land occupying nearly two City blocks in Miami's Edgewater neighborhood." AC ¶¶ 2, 9.

On July 2, 2020 West Flagler filed its Motion to Dismiss or Stay Amended Complaint (Docket #28). West Flagler first insists that Plaintiffs cannot challenge its proposed gambling establishment because it is authorized pursuant to a Final Order and Settlement Agreement reached in prior litigation between the City and West Flagler. *See West Flagler Association, LLC v. City of Miami*, case number 1:19-CV 21670-RNS (S.D. Fla.) ("Federal litigation.") In West Flagler's view, Plaintiffs are mounting an impermissible "collateral attack" on the order approving that private settlement agreement, and Plaintiffs' proper (and only) remedy "would have been to intervene in the Federal Litigation . . . and move to set aside the Federal Order pursuant to Federal Rule of Civil Procedure 60." Mot. p. 13. West Flagler also argues that Plaintiffs lack standing because: (a) it is not conferred upon the corporate Plaintiffs by the Citizens' Bill of Rights contained within the City Charter; and (b) none of the Plaintiffs have pled the requisite special injury. Mot. pp. 19-27.

On July 2, 2020 the City also filed a Motion to Dismiss Amended Complaint (Docket #30). Like West Flagler, the City also claims that this case is an "impermissible collateral attack" on the final order entered in the Federal litigation, and that Plaintiffs lack standing.[3] Mot. pp. 1-2. In addition, the City argues that: (a) "[t]he doctrines of sovereign immunity and separation of powers bar Count 2, which seeks to challenge [its] discretionary exercise of [its] executive level decision to settle [the federal] litigation" with West Flagler; (b) that there is no "case or controversy" or "justiciable question" regarding the "Zoning Verification Letters" that form the basis of Plaintiffs' claims; and (c) that "Counts 1, 3 and 4 [of the AC] fail to state a cause of action." Mot., pp. 1-2.[4]

Plaintiffs filed their opposition to Defendants' motions on July 22, 2020, and Defendants filed their replies in support of their motions on August 11, 2020. After careful consideration of the parties' thorough submissions, the Court now enters this Order disposing of both motions.

II. FACTS AS PLED[5]

A. West Flagler Secures the 2012 Gambling Letter

West Flagler (and/or its affiliates) owns and operates the "Magic City Casino, a gambling facility within the City of Miami that predates Miami 21 ("Zoning Code") and resulted from a public voter referendum and constitutional amendment." AC ¶ 40. In 2012, West Flagler (though unidentified at the time) secured from a City Zoning Administrator what the AC refers to as the "2012 Gambling Letter." According to Plaintiffs, that letter unlawfully interpreted the Zoning Code to permit gambling as a permissible use in all areas zoned for "entertainment establishments." AC ¶ 6.[6]

Plaintiffs allege that the 2012 Gambling Letter was unlawfully issued because: (a) the lawyer who requested this interpretation on behalf of West Flagler was "acting as an unregistered lobbyist;" (b) a Zoning Administrator cannot legally "offer an interpretation of the Zoning Code that does not relate to a specific structure or premises;" and (c) even when a Zoning Administrator interpretation relates to a specific structure or premises, that interpretation must be published and distributed to interested parties who have a right to appeal. AC¶¶ 3, 5, 70, 71.[7] Plaintiffs also allege that this interpretation was abjectly incorrect, as "[b]oth the Comprehensive Plan and Miami 21 foreclosed the Zoning Administrator's interpretation opening up over one-third of the City of Miami to gambling," and that it also runs afoul of the Home Rule Powers Act,[8] which permits zoning changes only by way of specified "procedures for adoption of ordinances and resolutions"—procedures the City ignored. AC ¶¶ 7, 75, 81, 82.

Aside from being an impermissible interpretation issued absent authority, Plaintiffs also claim that "the Zoning Administrator's actions prevented input from the City officials authorized to weigh in on the decision—including, the Planning Director, the Planning, Zoning, and Appeals Board, the City Commission, and the Mayor." AC ¶ 76. This is because the Zoning Administrator placed the letter into a "Zoning Verification File" containing items that "are not publicly noticed, posted online, or readily available for public inspection or comment." AC ¶ 77.

B. West Flagler Acquires Properties in the Edgewater Neighborhood and Secures a State Permit to Operate Pari-mutuel Wagering and Card Room Gambling

After obtaining the 2012 Gambling Letter, West Flagler executed a Memorandum of Understanding ("MOU") granting it a right to acquire "eighteen (18) abutting or adjoining parcels totaling 11.79 acres located at about Biscayne Boulevard and 30th Street in Miami's Edgewater neighborhood ("MOU Property")." AC ¶ 83. West Flagler then "applied to the State of Florida, Division of Pari-mutuel Wagering for a license to conduct pari-mutuel wagering and card room gambling at the MOU Property." AC ¶ 84. In its application, which was submitted "without notice to the City, the City Commission, or the Public," West Flagler offered the "2012 Gambling Letter as evidence that the City of Miami land development regulations, including Miami 21, allowed pari-mutuel wagering and cardroom gambling at the MOU Property." AC ¶ 84. The State then "requested more current evidence that gambling at the MOU Property comported with the City of Miami land development regulations." AC ¶ 85.

In November 2017, and in response to the State's request for more current evidence, West Flagler's unregistered lobbyist requested "zoning verification letters" for each of the eighteen parcels comprising the MOU Properties. AC ¶ 86. On January 30, 2018, another Zoning Administrator, Devin Cejas, complied with that request and issued eighteen (18) separate letters—one as to each folio number ("2018 Gambling Letters)[9]—wherein he opined that "pari-mutuel and other gaming operation uses are allowed and considered Entertainment Uses," and that a "permit issued by Florida Division of Pari-mutual Wagering for a new summer jai alai permit [would] also allow cardroom operations" to be conducted "on this location." AC ¶ 87, Ex. 4. According to Plaintiffs, the 2018 Gambling Letters also were "issued in secret," and "suffered from the same fundamental flaws" as did the 2012 Gambling Letter. AC ¶ 89. Like the 2012 Gambling Letter, the 2018 Gambling Letters also were placed in a "Zoning Verification File" and were "not publicly noticed, posted online, or readily available for public inspection or comment." AC ¶ 91.

In sum, Plaintiffs allege that the 2012 and 2018 Gambling Letters were: (a) secured illegally by an unregistered lobbyist; (b) issued by Zoning Administrators who lacked authority to interpret the Zoning Code;[10] and (c) foreclosed by the Comprehensive Plan, the Zoning Code, and the Municipal Home Rule Powers Act. But based upon the 2018 letters, which in turn were based on the 2012 letter, in July 2018 the "State of Florida issued a permit" authorizing West Flagler "to engage in pari-mutuel wagering at the MOU Property." AC ¶ 93.

C. The Public Reaction

The State's issuance of a permit prompted "news media stories" which "alerted the public, including the Plaintiffs and the City's elected officials, that in 2012 a Zoning Administrator had privately and without authority interpreted Miami 21 to open large swaths of the City of Miami to gambling." AC ¶ 94. "A public outcry followed," and certain of the Plaintiffs responded by proposing an ordinance that would: (a) "clarify that gambling differed from existing, permitted uses under the Zoning Code;" and (b) "forbid any 'gambling'

establishment without approval of 4/5ths of the City Commissioners." AC ¶ 95. On September 27, 2018, following "extensive debate at multiple publicly held meetings," the City Commission adopted Ordinance 13791 "clarifying that gambling differed from existing permitted uses, and requiring that any gambling uses be subject to review at a publicly noticed hearing and be approved by a 4/5ths vote of the City Commission." AC ¶ 96. The City then rejected the "Building Permit Application" filed by the MOU Property owner requesting permission to construct a "Gambling facility on the MOU Property."[11] AC ¶¶ 97, 98.

D. **The Federal Litigation**

In response to the City's passage of Ordinance 13791, and its refusal to issue a building permit, West Flagler brought suit in the United States District Court for the Southern District of Florida alleging that it had a "vested right" to obtain permits for "pari-mutuel, slot machine and/or other gambling uses" based on the 2012 and 2018 Gambling Letters. AC ¶ 99. West Flagler also brought claims under § 42 U.S.C. § 1983. Prior to the lawsuit, the City Attorney had "repeatedly asserted at public commission meetings that West Flagler had no vested right," and the City promptly moved to "dismiss the lawsuit, but failed to address whether the underlying letters relied on by West Flagler were valid or not." AC ¶ 101.[12] The district court denied the City's dismissal motion and the case proceeded to discovery.

E. **The Settlement and Mayoral Veto**

Rather than litigate the federal case, the City—based upon its counsel's recommendation—elected to settle the dispute by permitting West Flagler to operate a gambling facility without going through any "ordinance and public notice requirements," and by amending "the Miami 21 Code" to reflect this settlement which was, according to the AC, "predicated on the validity of the 2012 Gambling Letter." AC ¶¶ 104-108. The proposed settlement was approved on February 13, 2020 via "Resolution R-20-0048." AC ¶ 107. On February 21, 2020, Mayor Suarez vetoed that Resolution, explaining that "he opposed the settlement because of the unlawful nature of the 2012 Gambling Letter and the vagueness of the resolution, and because the settlement would 'circumvent the democratic process.' " AC ¶ 110. The AC alleges that the City Commission then waived its ability to "override the Mayor's veto" by failing to do so at the "next regularly scheduled or special meeting," which occurred on February 24, 2020. AC ¶ 111.

Despite the Mayoral Veto, the City proceeded to execute the Settlement Agreement and, together with West Flagler, filed a joint motion for dismissal of the Federal litigation without prejudice. AC ¶ 115.[13] On March 12, 2012 the district court entered an order dismissing the case without prejudice and "reserve[d] jurisdiction to enforce the parties' settlement agreement." AC ¶ 122.

III. **THE SUBSTANTIVE CLAIMS**

Through Count 1 of the AC, Plaintiffs request "a declaration that the 2012 Gambling Letter, the 2018 Gambling Letters, and the resulting 'Settlement Agreement' were each issued in violation of the Comprehensive Plan and State law and are therefore void." AC ¶ 142. They also seek "injunctive relief in the form of an order voiding the 2012 Gambling Letter, voiding the 2018 Gambling Letters, voiding the resulting "Settlement Agreement," [and] directing the City not to issue any development approvals, development orders, development permits, or any authorization for any gambling facilities. . . ." AC ¶ 143. This claim is brought pursuant to Florida Statute § 163.3215(3)—legislation which affords citizens the right to challenge a local government decision "granting or denying an application for, or to prevent such local government from taking any action on, a development order. . . ." *Id.*

Count 2 also seeks declaratory and injunctive relief based upon Plaintiffs' contention that the "Gambling Letters" and "Settlement Agreement" were issued "in violation of Miami 21 and are therefore void." AC ¶¶ 158, 159. Count 3 seeks declaratory and injunctive relief premised upon the allegation that the Gambling letters and Settlement Agreement "were each executed in violation of the Municipal Home Rule Powers Act (Florida Statute § 166.041(2)-(3)) and are therefore void." AC ¶¶ 172, 173. Count 4 seeks a declaration that the Settlement Agreement violates the "Miami City Charter" and is "void" because it was executed over the Mayoral Veto. AC ¶ 184.

IV. **ANALYSIS**

A. **Standing**[14]

Because its absence is irremediable, the Court will first examine the threshold question of Plaintiffs' standing (or lack thereof) to maintain these claims.[15] A party does not possess ***common law*** standing to sue "unless he or she can demonstrate a direct and articulable stake in the outcome of a controversy." *Brown v. Firestone*, 382 So. 2d 654, 662 (Fla. 1980); *Weiss v. Johansen*, 898 So. 2d 1009, 1011 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D680a] ("[s]tanding depends on whether a party has a sufficient stake in a justiciable controversy, with a legally cognizable interest which would be affected by the outcome of the litigation"); *Matheson v. Miami-Dade County*, 258 So. 3d 516, 519 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2293a] (generally "[a] plaintiff must demonstrate the existence of an actual controversy between the plaintiff and the defendant in which plaintiff has a sufficient stake or cognizable interest which would be affected by the outcome of the litigation in order to satisfy the requirements of standing"). The party bringing suit must also be "recognized in law as a 'real party in interest,' that is, 'the person in whom rests, by substantive law, the claim sought to be enforced' ". *Brady v. P3 Group (LLC)*, 98 So. 3d 1206, 1210 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2235b] (quoting Author's cmt. to Fla. R. Civ. P. 1.210).

In the context of an action for declaratory and supplemental relief, the concept of standing, which is grounded upon the "constitutional limitations upon the functions of the judicial department of government," dictates that:

> Before any proceeding for declaratory relief should be entertained it should be clearly made to appear that there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interests are all before the court by proper process or class representation *and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity*. These elements are necessary in order to maintain the status [sic] of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts.

May v. Holley, 59 So. 2d 636, 639 (Fla. 1952) (Emphasis added). Thus, in order to have ***common law*** standing, a plaintiff seeking declaratory relief must be "some person or persons" with a direct and articulable stake in an "actual" and "present" controversy, not merely a party seeking "legal advice" in order to "satisfy curiosity." *Bryant v. Gray*, 70 So. 2d 581, 584 (Fla. 1954).

In the context of a challenge to governmental action (or inaction), the concept of ***common law*** standing is even more refined because, theoretically speaking, every citizen/taxpayer is arguably "affected" by, and holds a "stake" in, governmental activity, as every action (or inaction) on the part of a sovereign impacts the public as a whole, and

every citizen/taxpayer is a member of that public. But the ***common law*** does not permit every citizen to challenge governmental conduct based solely upon her status as a citizen/taxpayer. Rather, to have ***common law*** standing to challenge governmental activity that is not "based on the violation of a provision of the constitution that governs the taxing and spending powers," a citizen/taxpayer must generally allege and demonstrate "special injury different from injuries to other citizens and taxpayers. . . ." *Herbits v. City of Miami*, 207 So. 3d 274, 281 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D2408a]; *Solares v. City of Miami*, 166 So. 3d 887 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1253a]; *Sch. Bd. of Volusia County v. Clayton*, 691 So. 2d 1066 (Fla. 1997) [22 Fla. L. Weekly S122a] ("[t]he requirement that a taxpayer seeking standing allege a "special injury" or a "constitutional challenge" is consistent with long established precedent"). This special injury requirement is, however, dispensed within cases where governmental action is challenged as illegal and void. *See, e.g., Kelner v. City of Miami Beach,* 252 So. 2d 870, 871 (Fla. 3d DCA 1971) (special injury requirement "has no application where a person affected seeks to challenge such action of the city on the ground that the action was illegal. . . ."); *Renard v. Dade County*, 249 So. 2d 500, 502 (Fla. 3d DCA 1971) (standing of special injury not necessary "when a plaintiff seeks to have an act of a zoning authority declared void. . . .").

Common law standing requirements must, however, yield "when legislation provides a cause of action and standing to private citizens." *Herbits,* 207 So. 3d at 281; *Fla. Wildlife Fed'n v. State Dept. of Envtl. Regulation*, 390 So. 2d 64 (Fla. 1980); *Citizens Growth Mgmt. Coal. of W. Palm Beach, Inc. v. City of W. Palm Beach, Inc.*, 450 So. 2d 204, 207 (Fla. 1984) (because § 163 did not—at that point in time—"specifically address the question of who has standing to enforce compliance with the Act," the statute "must not have intended to alter" common law standing requirements). Assuming such legislation is constitutional, a statute which specifically addresses the "question of who has standing" to enforce it *must*, like any other statute, be applied by a court as plainly written. *Id.*; *see also, e.g., Hill v. Davis,* 70 So. 3d 572, 575 (Fla. 2011) [36 Fla. L. Weekly S487a] (a court must "look first to the language of the statute and its plain meaning"). And if that statute dispenses with common law standing impediments, such as the need to demonstrate special injury, the statute will trump common law.

Plaintiffs say they are not required to plead or prove special injury for three reasons. First, they maintain that the Citizen's Bill of Rights affords standing to proceed with Count 4 without regard to whether they suffered a special injury or any injury at all. Second, Plaintiffs point out that Chapter 163 affords standing to any "aggrieved or adversely affected party," meaning anyone who "will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan. . . ." § 163.3215(3), Fla. Stat. (2020). "The alleged adverse interest may be shared in common with other members of the community at large but must exceed in degree the general interest in community good shared by all persons," Florida Statute § 163.3215(2); a standing threshold less exacting than the common law special injury test. *See, e.g., Save Homosassa River All., Inc. v. Citrus County, Fla.*, 2 So. 3d 329 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D2490c] (discussed *infra*). Finally, Plaintiffs insist that the special injury requirement is dispensed with in cases, such as this, where the common law claims challenge governmental action as being illegal and void.

Alternatively, Plaintiffs claim that they have pled special injury by alleging that their "properties, and . . . neighboords [sic] [will be impacted] by, among other things, increasing neighborhood traffic, increasing neighborhood congestion, increasing criminal activity, reducing open spacies, [sic] and reducing [Plaintiffs'] property values. AC ¶¶ 38, 136, 152, 166, 179. On this point, Defendants say that these types of allegations "have been consistently rejected as giving rise to special injury" because they plead "injuries that, if they occurred, would be suffered by the community at large and are not limited to the named Plaintiffs." West Flagler's Mot. p. 24, citing, *Exch. Investments, Inc. v. Alachua County*, 481 So. 2d 1223, 1225 (Fla. 1st DCA 1985) (". . . traffic is a matter of general concern and does not grant standing. . . in zoning matters"); *Skaggs-Albertson's Properties, Inc. v. Michels Belleair Bluffs Pharmacy, Inc.*, 332 So. 2d 113, 116-17 (Fla. 2d DCA 1976) (increased traffic congestion that may be caused by development of neighboring property did not give rise to special injury); *Florida Palm-Aire Corp. v. Delvin*, 230 So. 2d 26, 27-28 (Fla. 4th DCA 1969) ("[t]he proofs establish plaintiffs' injuries, *i.e.*, obstruction of view, increased use of utilities, increased traffic, etc., to be not special but those which follow as a natural consequence of increased population and thereby sustained by the public as a whole in that particular area"); *Henry L. Doherty & Co. v. Joachim*, 200 So. 238, 240 (Fla. 1941) (holding resident did not have "special injury" to establish standing to maintain action against city to enjoin the closure of a public walkway adjacent to his property because claimed injury, if any, was suffered by the public as a whole).

Citing *Herbits*, and two trial court orders (*Brickell Homeowners Association Inc., v. City of Miami*, case number 2019-006750 CA 01 (Ruiz, J), and *Amal Kabbani et al vs. City of Miami*, case number 2020-00950 CA 01 (Miller, J)), West Flagler also maintains that the Citizen's Bill of Rights does not confer standing based solely upon residency or, in other words, eliminate a resident's need to plead and prove special injury, except in cases involving claims for "truth in government" violations. Mot. pp. 21-22. As previously mentioned, the City takes no position on whether its residents are required to plead a special injury in order to maintain a claim based upon a violation of its Charter. But like West Flagler, the City says the Citizens' Bill of Rights affords no standing to corporate entities. Defendants also dispute Plaintiffs' reliance on the illegality exception, and claim that Plaintiffs have not pled sufficient facts showing they are "aggrieved or adversely affected" as required to maintain an action pursuant to Chapter 163, *et. seq*.

In sum, the standing questions presented are: (a) whether the Citizens' Bill of Rights confers standing on corporate entities or only natural persons; (b) whether a resident proceeding under the Citizens' Bill of Rights is required to plead and prove special injury; (c) whether Plaintiffs have adequately pled facts demonstrating that they are "aggrieved or adversely affected" by City action involving a development order; (d) whether Plaintiffs' common law claims of illegality/voidness may be pursued in the absence of any special injury or injury at all; and (e) if pleading special injury is required, have Plaintiffs adequately pled it.[16]

i. **Is Standing under Citizens' Bill of Rights limited to Natural Persons?**

In Count 4 Plaintiffs claim that the Settlement Agreement—executed over the Mayor's veto—violates the City Charter, and in particular § 4(g)(5). In November 2016 the voters approved a provision to be added to the City Charter which provides:

> ***Residents*** of the City shall have standing to bring legal actions to enforce the City Charter, the Citizens' Bill of Rights, and the Miami-Dade County Citizens' Bill of Rights as applied to the City. Such actions shall be filed in Miami-Dade County Circuit Court pursuant to its general equity jurisdiction and, if successful, the plaintiff shall be entitled to recover costs, but not attorney's fees, as fixed by the court. Any public official, or employee who is found by the court to have willfully violated this section shall forthwith forfeit his or her office or employment.

Miami City Charter Citizens' Bill of Rights § C. (Emphasis added).

Whether the word "Residents" encompasses corporate entities is academic here because two of the Plaintiffs (Cuesta and Friedman) are natural persons who fall comfortably within this provision. But in the absence of any contrary appellate precedent, the Court finds that "Residents" include both natural persons and legally organized juridical entities whose principal place of business is within the City limits. *See, e.g., In re Advisory Opinion to Governor,* 243 So. 2d 573, 579 (Fla. 1971) (explaining that the term "residents" and "citizens" have "been held more often than not to apply to corporations as well as to natural persons"); *Fla. Wildlife*, 390 So. 2d at 68 (". . . most courts which have considered the question have concluded that corporations are citizens for the purpose of pursuing rights granted to citizens"); Citizens' Bill of Rights, Subsection B (providing that rights afforded to citizens are "large and pervasive powers").[17]

ii. **Count 4—Must a Resident Proceeding Pursuant to the Citizens' Bill of Rights Plead Special Injury?**

Section C of the Miami City Charter Citizens' Bill of Rights "must be given its plain and obvious meaning," *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984), and if that provision "is clear, certain and unambiguous, [this Court has] only the simple and obvious duty to enforce [it] according to its terms." *DMB Inv. Tr. v. Islamorada, Vill. of Islands*, 225 So. 3d 312, 317 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1615a]. This Court is without power to construe an unambiguous statute in a way which would extend, modify, or *limit,* its express terms. . .," as to do so would be "an abrogation of legislative power." *Holly,* 450 So. 2d at 219; *Martinez v. Hernandez*, 227 So. 3d 1257, 1259 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D2061a] ("[t]he rules of statutory construction are applicable to the interpretation of municipal charters").

The Citizens' Bill of Rights clearly and unambiguously grants "[r]esidents of the City. . . standing to bring legal action to enforce the City Charter, the Citizens' Bill of Rights, and the Miami-Dade Charter Citizens' Bill of Rights as applied to the City." No requirement other than residency is imposed, and adding a requirement that a resident also demonstrate a special injury would amount to a judicial edit that would limit standing to a subset of residents. Had the voters intended to afford standing to only a subset of residents (*i.e.*, those who suffered special injury) the provision could easily have said just that—particularly since this common law standing requirement is ubiquitous. *See, e.g., Fla. Wildlife*, 390 So. 2d at 67 ("[i]f the legislature had meant for the special injury rule to be preserved in the area of environmental protection, it could easily have said so"). Thus, even if this Court believed that the decision not to impose a special injury standing requirement upon residents seeking to enforce the City Charter was unwise, it could not judicially engraft that limitation into the Charter. *See, e.g., Westphal v. City of St. Petersburg*, 194 So. 3d 311, 321 (Fla. 2016) [41 Fla. L. Weekly S331a] ("[t]he gap in benefits caused by the Legislature's decision to reduce the duration of entitlement to temporary total disability benefits may be an unintentional, unanticipated, and unfortunate result. But even if potentially unwise and unfair, it is not the prerogative of the courts to rewrite a statute. . .").

For good or ill, the voters decided to bestow upon all "[r]esidents of the city" standing to enforce the City Charter, and this Court may not place an additional hurdle on the track. This Court's task is to enforce the provisions as written. Accordingly, the Court concludes that all residents of the City have standing to enforce the City Charter through the Citizens' Bill of Rights regardless of whether they have suffered a special injury or any injury at all. This Court respectfully disagrees with decisions holding otherwise,[18] and believes *Liebman v. City of Miami*, 279 So. 3d 747 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1836a] forecloses any debate on this point, as that case assumed, as a given, that the November 2016 Charter amendment dispensed with the common law special injury standing requirement in cases alleging a violation of the City Charter. Citing the 2016 amendment, the *Liebman* court flat out said that "it eliminated standing as an affirmative defense to lawsuits filed by residents against the City." *Id.* at 751.[19]

iii. **Count 1—Chapter 163 Claim**

Assuming the City has granted West Flagler an application for "a development order"—something the Court does not decide today—Florida Statute § 163.3215 (3) provides:

> Any aggrieved or adversely affected party may maintain a de novo action for declaratory, injunctive, or other relief against any local government to challenge any decision of such local government granting or denying an application for, or to prevent such local government from taking any action on, a development order, as defined in s. 163.3164, which materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan adopted under this part. The de novo action must be filed no later than 30 days following rendition of a development order or other written decision, or when all local administrative appeals, if any, are exhausted, whichever occurs later.

Section § 163.3215(2) then provides that:

> As used in this section, the term "aggrieved or adversely affected party" means any person or local government that will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, and environmental or natural resources. The alleged adverse interest may be shared in common with other members of the community at large but must exceed in degree the general interest in community good shared by all persons. The term includes the owner, developer, or applicant for a development order.

Id. (Emphasis added). "Thus, a person's standing to bring a challenge under section 163.3215(3) depends on (1) whether the interests the person alleges are protected or furthered by the local government comprehensive plan; if so, (2) whether those interests exceed in degree the general interest in community good shared by all persons; and (3) whether the interests will be adversely affected by the challenged decision." *Homosassa*, 2 So. 3d at 337 (initial citation omitted).

As the *Homosassa* court explained, this "expanded statutory [standing] test" does not require that "a party must be harmed to a greater degree than the general public" or, in other words, suffer a special injury. *Id.* at 337, 338. Instead, the statutory test employed in Chapter 163 "gives oversight to the segment of the public that is most likely to be knowledgeable about the interest at stake and committed to its protection," while at the same time eliminating "gadfly" litigation. *Id.* at 338. To accomplish this balance the statute again affords standing to any person "aggrieved or adversely affected" by a local comprehensive plan, and identifies "multiple examples [of] the kinds of interests the legislature intended to protect," "including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, and environmental or natural resources." *Id.* (quoting Fla. Stat. § 163.3215(2)).

While "property ownership alone is insufficient to show a person is one who will suffer an adverse effect to an interest protected or furthered by the plan," *Fla. Rock Properties v. Keyser*, 709 So. 2d 175, 177 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D874a] (citing *Parker v. Leon County,* 627 So.2d 476 (Fla.1993)), the "greater-in-degree" standard "self-evidently would be met if the plaintiff is an adjacent property owner." *Homosassa*, 2 So. 3d at 339. "Everyone else has to figure out how to surmount the tag-line test" by demon-

strating an adverse interest "greater in degree" than the "community good shared by all persons.' " *Id.* As the *Homosassa* court put it, a plaintiff not owning adjacent property must allege (and eventually prove) an adverse effect that is "something more" than that which may be suffered by any concerned citizen. *Id.*

Turning to the allegations here, Plaintiffs Friedman, Morningside Civic Association, 2020 Biscayne Boulevard LLC, 2060 N.E, 2d Avenue, LLC, 246 N.E. 20 Terrace, LLC and Paraiso Beachclub Operator, LLC, each are alleged to own property in the immediate vicinity of West Flagler's proposed operations. AC ¶¶ 30, 31-34, 35 and 36. Each therefore possess statutory standing to maintain § 163 claims. *See, e.g., Keyser*, 709 So. 2d 175*; Homosassa*, 2 So. 3d 329.

As for Plaintiffs' Cuesta and Brickell Homeowners Association, they allege to be to be owners of property "in zoning districts in which entertainment uses are allowed," but do not allege facts sufficient to show they will be "aggrieved or adversely affected" by West Flagler's proposed operation to an extent that will "exceed in degree" any harm that may be realized by members of the community at large. So if the issues properly before the Court include the validity of the 2012 and 2018 gambling letters, or the more general question of whether gambling is now permitted in all zoning districts where entertainment uses are allowed, these Plaintiffs *might* have standing to pursue Count 1. But as the Court will explain in Subsection D, *infra*, the validity/correctness of those letters does not present a justiciable case or controversy as between *these* combatants. Nor is the Court being called upon to address the general issue of whether gambling is permitted in all areas zoned for entertainment uses. Rather, the only justiciable controversy before the Court is the legality of the Settlement Agreement itself. While the questions of whether these letters were legally issued and legally correct *might* be relevant to West Flagler's claims against the City, *see e.g., Corona Properties of Florida, Inc. v. Monroe County*, 485 So. 2d 1314 (Fla. 3d DCA 1986), those questions are not relevant here. As a result, Plaintiffs Cuesta and Brickell Homeowners Association lack standing to maintain Count 1. *See, e.g., Pichette v. City of N. Miami*, 642 So. 2d 1165 (Fla. 3d DCA 1994); *Combs v. City of Naples*, 834 So. 2d 194 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1952b].

iv. **Counts 2 and 3**

The Court rejects Defendants' claim that special injury must be demonstrated for purposes of the claims advanced in Counts 2 and 3, as Plaintiffs allege that the Settlement Agreement is illegal and void. This is not a case where a plaintiff merely seeks to enforce an existing ordinance, or challenges governmental action as being arbitrary or contrary to the general welfare. Rather, these Plaintiffs claim that the Settlement Agreement violates established law or, in other words, is blatantly illegal. *Kelner,* 252 So. 2d 870*; Renard,* 249 So. 2d 500*; Upper Keys Citizens Ass'n, Inc. v. Wedel,* 341 So. 2d 1062, 1064 (Fla. 3d DCA 1977) (" 'special injury' requirement has no application where a person affected seeks to challenge a zoning action on the ground that said action was illegally enacted"); *P.C.B. P'ship v. City of Largo*, 549 So. 2d 738, 742 (Fla. 2d DCA 1989) (". . . a party generally may not seek to enforce an illegal contract"); *Local No. 234 of United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. of U.S. & Canada v. Henley & Beckwith, Inc.*, 66 So. 2d 818, 821 (Fla. 1953) ("an agreement that is violative of a provision of a constitution or a valid statute, or an agreement which cannot be performed without violating such a constitutional or statutory provision, is illegal and void"); *Gables Ins. Recovery, Inc. v. Citizens Prop. Ins. Corp.*, 261 So. 3d 613 (Fla. 3d DCA 2018) (same) [43 Fla. L. Weekly D2178a].

In sum, the Court concludes that: (a) *all* Plaintiffs have standing to proceed under Count 4; (b) *all* Plaintiffs have standing to proceed under Counts 2 and 3; and (c) Plaintiffs Friedman, Morningside Civic Association, 2020 Biscayne Boulevard LLC, 2060 N.E, 2d Avenue, LLC, 246 N.E. 20 Terrace, LLC and Paraiso Beachclub Operator, LLC, have standing to proceed under Count 1.

B. **THE FEDERAL LITIGATION**

Having disposed of Defendants' standing arguments, the Court now turns to their claim that this action is an impermissible collateral attack upon the district court's order dismissing the Federal litigation without prejudice. Defendants essentially insist that adjudicating Plaintiffs' illegality claims would run afoul of that dismissal order, and that because they privately settled their litigation, these claims are somehow immune from judicial review, at least in this Court. Defendants in fact go so far as to say that the alleged violations of law Plaintiffs raise are "issues" that "have now been settled." *See, e.g.,* West Flagler's Mot. p. 6. Defendants are incorrect, and the fact that they settled litigation claims between them so as to permit West Flagler's proposed operation does not cleanse an otherwise illegal transaction (assuming it is illegal—as the Court must at *this* stage of the case).

First, the federal order of dismissal did not adjudicate the legality of the Defendants' private settlement. Everyday courts (including this one) are presented with orders of dismissal premised upon private settlement agreements that resolve pending litigation. These courts (including this one) are also sometimes asked to "approve" the parties' agreement and retain jurisdiction to enforce it. By agreeing to do so, we are not blessing the agreement—bestowing on it the imprimatur and dignity of a court order—or adjudicating its legality. Rather, we are merely acknowledging that the parties have privately resolved their dispute. That is precisely what the district court did here, and the parties' settlement agreement is simply a contract—nothing more. *See, e.g., Robbie v. City of Miami*, 469 So. 2d 1384 (Fla. 1985). It is not a court order or judgment, and the district court did not adjudicate any of the claims advanced here. And even if it had, Plaintiffs would not be bound by that adjudication. *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"). Nor are any preclusion questions implicated. *See, e.g.*, *Miller's Ale House, Inc. v. Boynton Carolina Ale House, LLC*, 702 F.3d 1312 (11th Cir. 2012) [23 Fla. L. Weekly Fed. C1741a].

Second, the issue before this Court is not the wisdom of the parties' private settlement, whether the City reached a good or bad deal with West Flagler, or whether "West Flagler provided significant consideration and made numerous material concessions in reaching its settlement with the City." West Flagler's Mot. p. 10. For purposes of Defendants' dismissal motions, the Court accepts that: (a) both sides faced litigation risk; (b) the Settlement Agreement was a reasonable compromise of the dispute between the City and West Flagler; and (c) the Settlement Agreement was negotiated at arm's length and did not result from collusion.[20] The question here, however, is whether the City's grant of authority is illegal. If it is, it matters not whether that grant is conveyed through a settlement reached in litigation, or by any other method. The City is not permitted to enter into illegal contracts or authorize businesses to operate illegally, period. *See, e.g., Neapolitan Enterprises, LLC v. City of Naples*, 185 So. 3d 585, 593 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D299a] ("[a] municipality 'engages in an 'ultra vires' act when it lacks the authority to take the action under statute or its own governing laws' "). The City's approval of West Flagler's proposed operation is either illegal or not. If it is illegal, it is not rescued by the mere fact that it is contained within a contract

settling litigation.

Finally, the district court denied Plaintiffs' motion to intervene—recognizing that the state law issues raised in this case will be litigated in this Court, and that there is no case remaining before it. *See Ameritox, Ltd. v. Millennium Labs., Inc.*, 803 F.3d 518, 540 (11th Cir. 2015) [25 Fla. L. Weekly Fed. C1570a] ("[s]tate courts, not federal courts, are the final expositors of state law"). For that simple reason, what Defendants claim to be "[t]he only available method to challenge" the Settlement Agreement (*i.e.*, "intervene in the Federal litigation . . . and move to set aside the [dismissal] order pursuant to the Federal Rules of Civil Procedure 60," *see,* West Flagler Mot. p.13), is not available in any event.

Given these undeniable circumstances, Defendants' reliance on cases such as *Greenwich Ass'n, Inc. v. Greenwich Apartments, Inc.*, 979 So. 2d 1116 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D986a] and principals of comity is misplaced. In *Greenwich,* a condominium association sued a neighboring complex over a dispute involving the use of a parking structure it owned. *Greenwich* 979 So. 2d at 1117. The parties then entered into a settlement agreement that was executed by the president of the association and incorporated into a final order dismissing the case. *Id.* The association—a party to the initial action—later brought a new lawsuit seeking reformation or cancellation of that settlement agreement based upon the claim that it had not been put to the vote of the unit owners and was therefore invalid as an *ultra vires* act. *Id.* at 1118.

Because the settlement agreement reached was *subsumed into a court order* entered in a case *where the plaintiff was a party*, and because the settlement agreement was at worst voidable—not void—the trial court, and later the Third District, concluded that plaintiff's remedy was not an independent action, but rather an appeal from the "judgment or to the rights provided by Florida Rule of Civil Procedure 1.540(b)." *Id.*; *see also, Palmer v. Palmer,* 109 So. 3d 257, 258 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D384a] ("an agreement that is merely voidable is not subject to collateral challenge once it has been incorporated into the final judgment"); *Miller v. Preefer*, 1 So. 3d 1278, 1282 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D383a] (". . . a challenger's options are limited to taking a timely appeal from the judgment or filing a timely motion to set aside the judgment on one of the limited grounds for relief set forth in Florida Rule of Civil Procedure 1.540(b)").

This result makes perfect sense in cases, like *Greenwich* and *Palmer*, where a *party* to the prior action desires to mount a challenge to a settlement they agreed to in *that* case, that was *incorporated* into a final judgment, and which, in a worst case scenario, is only voidable. So if, for example, the City wanted to exit the settlement by claiming that it was entered into *sans* authority, *or* it was entered into as a result of a mistake, *or* it was entered into as a result of a fraud or inequitable contract committed by West Flagler, its remedy would be a Rule 60 motion filed in the district court. The same would be true if West Flagler challenged the settlement *it* entered into in order to settle *its* litigation.

In this case, the district court did not incorporate the parties' agreement into a court order, none of the Plaintiffs were parties to the Federal litigation, none of them entered into the agreement they now challenge, and none of the issues framed by the AC were previously adjudicated. On top of that, these Plaintiffs claim that the Settlement Agreement is not merely voidable but rather void due to illegality. So even if the Court were to indulge the fiction that the Settlement Agreement was somehow transformed into a court order simply because the district court dismissed the case based upon it, ***even*** a court order may be challenged as void (as opposed to voidable) through an independent action. In fact, this Court has thrice entertained such a claim. *See M.H. v. Dept. of Children and Families*, 21 Fla. L. Weekly Supp. 241b (11th Jud. Cir. 2013); *Florida Action Films Inc. v. Green East #2, Ltd.*, 24 Fla. L. Weekly Supp. 531a (11th Jud. Cir. 2016); *Dacra Development Corp. v. Colombo,* 27 Fla. L. Weekly Supp. 882b (11th Jud. Cir. 2019).

In sum: (a) the parties' Settlement Agreement is *not* a court order or judgment and, as a result, Rule 60 has no application here at all, as [t]he purpose of Rule 60(b) is to define the circumstances under which a party may obtain relief from a final judgment," *Bankers Mortg. Co. v. U.S.*, 423 F.2d 73, 77 (5th Cir. 1970); (b) the parties' settlement was not incorporated into a court order; (c) Plaintiffs were *not* parties to the federal litigation; (d) the claims advanced here were not adjudicated (or even raised) in the federal litigation; and (e) even if the Settlement Agreement was considered to be a judgment, Plaintiffs' illegality claims may be pursued in an independent action.

As for Defendants' related request to stay this case as a matter of comity, there is no prior action pending that raises *any* of the issues framed by Plaintiffs' AC and, as a result, no previously filed case to defer to or await the outcome of. *See, e.g., OPKO Health, Inc. v. Lipsius*, 279 So. 3d 787 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2275a] (finding it an abuse of discretion to refuse to stay a subsequently filed state case in favor of a previously filed federal action involving the same parties and the same or substantially same issues); *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 129 So. 3d 1153 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D61a] (court abused its discretion in refusing to stay later action pending outcome of a previously filed federal action between the same parties raising substantially similar issues); *Pilevsky v. Morgans Hotel Group Mgmt., LLC*, 961 So. 2d 1032 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1733a] (same). Had the district court permitted Plaintiffs to intervene, *and* had it also agreed to actually adjudicate their claims in the previously settled case, Defendants comity argument might have legs. The district court did just the opposite by denying intervention and deferring to this Court to adjudicate Plaintiffs' state law illegality claims. There is therefore no basis upon which to dismiss or stay this case based upon principals of comity.

C. **SOVEREIGN IMMUNITY**

The City next challenges Count 2 of the AC as barred by the doctrine of sovereign immunity because, in its view, Plaintiffs seek "to have the Court second guess the City's executive level discretionary decision to settle" the Federal Litigation, and they have not "alleged facts with respect to Count 2 that fall within the waiver of sovereign immunity" provided in Florida Statute § 768.28. Mot. pp. 10-11. As the City points out, in *Detournay v. City of Coral Gables*, 127 So. 3d 869, 873 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D2552a], our appellate court observed that while the protection from suit the City seeks here is "often called sovereign immunity," it is "founded on the doctrine of separation of powers, one of the structural pillars upon which American freedoms rest: 'under the constitutional doctrine of separation of powers, the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government absent a violation of constitutional or statutory rights.' " *Id.* at 873 (citing *Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985)). This rule ensures that the judiciary will not "second guess" discretionary decisions implemented by the other branches of government. *Id.*

In *Detournay,* the majority applied *Trianon* in affirming the dismissal of a claim by plaintiffs asking that the court "require the City of Coral Gables to prosecute [a zoning] enforcement action against nearby property. . ." *Id.* at 870. In the court's view, the City's "discretion to file, prosecute, abate, settle, or voluntarily dismiss a building and zoning enforcement action is analogous to a prosecutor's discretion to file, prosecute, abate, settle, or dismiss a criminal or civil lawsuit," a purely "executive function that cannot be supervised by the

courts, absent the violation of a specific constitutional provision or law." *Id.*[21]

Detournay drew a dissent from Judge Logoa who believed that the majority "misappl[ied] the doctrine of separation of powers" by relying upon *Trianon*, a case involving—and limited to—"rules of governmental tort liability." *Detournay*, 127 So. 3d at 879. In her view, cases seeking declaratory and injunctive relief against governmental entities are properly viewed through a standing lense, and "once special damages are shown, enforcement of the zoning ordinance is no longer an action purely within the discretion of the state." *Id.* at 880. Judge Logoa believed that once a plaintiff alleges/proves standing, they have a right to secure "judicial enforcement [of zoning laws] against both municipalities and private parties" in accordance with the holdings in *Fortunato v. City of Coral Gables*, 47 So. 2d 321 (Fla. 1950), *Boucher v. Novotny*, 102 So. 2d 132 (Fla. 1958), and *Renard v. Dade County*, 261 So. 2d 832 (Fla. 1972). The Fourth District recently agreed with that analysis. *Haver v. City of W. Palm Beach, Inc.*, 45 Fla. L. Weekly D1406 (Fla. 4th DCA June 10, 2020) [45 Fla. L. Weekly D1406c].

This Court is of course bound to follow *Detournay* even if it disagrees with the decision. *See Pardo v. State*, 596 So. 2d 665 (Fla. 1992); *State v. Washington*, 114 So. 3d 182 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1535a] ("[w]hile a lower court is free to disagree and to express its disagreement with an appellate court ruling, it is duty-bound to follow it"). But *Detournay* provides the City no comfort here, as any immunity for discretionary decisions it would otherwise enjoy ends if it violates statutory law—something it is accused of in Count 2 which, in no uncertain terms, alleges that its approval of the Settlement Agreement was in violation of Miami 21 Code and hence an *ultra vires* act. *See also Chung v. Sarasota County*, 686 So. 2d 1358 (Fla. 2d DCA 1996) [22 Fla. L. Weekly D107b]; (county was obligated to "follow applicable zoning laws" prior to entering to settlement agreement); *Fla. Fish & Wildlife Conservation Comm'n v. Daws*, 256 So. 3d 907, 912 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D1891a] (". . . sovereign immunity will not bar a claim against the State based on violations of the state or federal constitution"). As *Detournay* itself recognizes, a municipality does not have discretion to violate the law. *See, e.g., Nichols v. City of Miami Beach*, 27 Fla. L. Weekly Supp. 707a (11th Jud. Cir., Oct. 7, 2019) (Hanzman, J) (invalidating municipal ordinance as being in conflict with state law).

Because Plaintiffs allege that the Settlement Agreement is illegal and void, and this allegation must now be taken as true, the City is not entitled to dismissal based upon immunity.

D. **IS THERE A JUSTICIABLE QUESTION PERTAINING TO THE ZONING LETTERS?**

The AC alleges that Plaintiffs "are in significant doubt as to the enforceability" of the 2012 and 2018 Gambling letters, and requests that the Court declare all of the Letters to be invalid and incorrect. The City seeks dismissal of these claims, arguing that they raise no "justiciable question" ripe for adjudication. Mot. pp 15-20. The Court agrees.

The Letters were nothing other than opinions issued by Zoning Administrators to West Flagler and West Flagler only. They did not grant West Flagler permission to do anything. Nor is there any allegation that these Letters were provided to any other person/entity who may at some point want to open gambling/gaming operations within city limits. To the contrary, and as the AC itself alleges, *after* the Letters were issued the City Commission passed a now extant ordinance which changes the definition of "entertainment establishment" and makes clear that no gambling facilities are permitted within city limits unless approved by a 4/5ths vote of the City Commission. Thus, there is no threat that other property owners will secure (or attempt to secure) approval to conduct gambling/gaming activities based upon these Letters.

As for West Flagler, it derives authority to operate its proposed jai alai/card room not through these Letters, but rather pursuant to the Settlement Agreement. It is that agreement, and that agreement *only*, that permits West Flagler to operate. If the Court concludes that the Settlement Agreement violates the law West Flagler will be unable to operate, and will instead retain the right to pursue its claims against the City based upon its alleged reliance on the Letters, alleged civil rights violations, or any other viable theory. Conversely, if this Court concludes that the Settlement Agreement is lawful, and that the City had the right and/or discretion to enter into it, it makes no difference whether the Letters were unlawfully solicited, unlawfully issued, or legally correct. Absent illegality, the City had the unfettered discretion to assess its risk and settle the dispute with West Flagler on any terms it deemed acceptable—a decision this Court may not second guess even *if* the Letters were unlawfully secured, and even *if* they are demonstrably incorrect. It also makes no difference whether the Settlement Agreement "resulted from" these Letters, or whether the City would have settled the case at all or on the same terms "but for" the existence of these Letters. Either the Settlement Agreement is illegal, and the City had no right to enter into it, or it was a permissible discretionary decision that the Court may not interfere with. If it is the latter, the fact that the Letters may have motivated the City to enter into the Settlement Agreement is of no moment.

Again, these Letters did not sanction the operation the Plaintiffs oppose. What allows that operation is the Settlement Agreement. The only thing the Letters do is provide West Flagler with a proverbial "leg to stand on" in a lawsuit against the City, *if* this Court invalidates the Settlement Agreement. The Letters do not, independent of the Settlement Agreement, authorize West Flagler to do anything. Only the settlement authorizes West Flagler's proposed gaming operation, and that gaming operation is the only thing Plaintiffs have standing to complain about. If the Settlement Agreement is declared illegal then that operation will not commence, at least pursuant to that agreement. If the settlement is legal, West Flagler will have the right to operate based on that Settlement Agreement irrespective of any issue concerning the Letters or, in other words, regardless of whether the Letters were lawfully issued or legally correct.

Put simply, these Plaintiffs have standing to determine whether the Settlement Agreement is legal, nothing more. If it is found to be illegal, and West Flagler elects to pursue claims against the City based, in part, upon the issuance of these Letters, the court presiding over *that* claim will decide whether the legality/correctness of those Letters is a relevant issue and, if so, whether the Letters were legally issued and correct. But because the legality/correctness of these Letters is irrelevant to the question of whether the City's Settlement Agreement is legal, this Court's ruling on these questions would be no more than "legal advice," *People's Tr. Ins. Co. v. Franco*, 45 Fla. L. Weekly D879b (Fla. 3d DCA Apr. 15, 2020), as a ruling that the Letters were (or were not) illegal/incorrect would accomplish nothing to advance the dispute between *these* parties. For this reason, the legality/correctness of these Letters (as opposed to the Settlement Agreement) does not present a controversy "in practical need for" declaratory relief. *May,* 59 So. 2d at 639.

V. **CONCLUSION**

Notwithstanding Plaintiffs' 186-paragraph Amended Complaint and the parties' hundreds of pages of briefing on motions to dismiss, this case is not particularly complicated. It is undisputed that City Zoning Administrators gave West Flagler letters in 2012 and 2018 (the "Letters") opining that it could operate jai alai/card room facility on property within certain "zoning transects." Those Letters may (or may not) have been illegally secured, illegally issued, and legally

correct. Either way, they were admittedly provided to West Flagler, and West Flagler then may (or may not) have reasonably relied upon them in deciding to enter into an agreement to purchase property in an area where—according to the Letters—it could lawfully operate its proposed gaming facility. It then secured a license from the State to conduct pari-mutuel wagering on that property.

When the City realized that the Letters issued by its Zoning Administrators *may* have been incorrect, or that the question those Letters addressed *may* be reasonably debatable, it adopted an ordinance clarifying that gambling is "different" from other permitted uses, and mandating that any proposed gambling uses be subject to review at a publicly noticed hearing and approved by a 4/5ths vote of the City Commission. The City then denied the MOU property owner's application for a building permit. This predictably impelled West Flagler to file suit claiming that the Letters gave it a "vested right" to obtain permits for "pari-mutuel, slot machines and/or other gambling uses," and alleging that the City violated its civil rights by denying it a permit for those uses.

The lawsuit filed by West Flagler presented the City with exposure *regardless* of whether the 2012 and 2018 Gambling Letters were illegally secured, illegally issued, or legally correct. The City faced exposure because the Letters were provided to West Flagler—period. To avoid this potential exposure the City—with the advice of its counsel—decided to settle the case. Through that Settlement Agreement: (a) West Flagler will receive a permit to build and operate a summer jai alai fronton on the MOU property (or part of it) as long as it holds a state permit; (b) West Flagler may seek approval to open a card room, which approval may be obtained by the vote of a simple majority of the Commission (*i.e.*, not subject to the new 4/5ths vote ordinance); (c) West Flagler gave up any right to operate (or ask for permission to operate) slot machines on the MOU property; and (d) the parties executed mutual releases. *See,* Settlement Agreement § 2(A)-(D).

The Settlement Agreement, which paves the way for West Flagler to operate the facilities Plaintiffs oppose, is either a legal transaction the City had the discretion to approve, or an illegal transaction that is void. That is the only justiciable question presented—a question that will be decided on the merits. If the Settlement Agreement resulted from a lawful exercise of discretion it will remain enforceable and West Flagler will be permitted to operate in accordance with its terms and conditions. If it is an illegal contract that is void, it will be West Flagler's prerogative to decide whether to pursue claims against the City based upon its alleged reliance on the Letters, or any other viable theory. But this Court's task is simple and singular: it will decide whether the Settlement Agreement is lawful—nothing more.

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

1. The City's Motion to Dismiss is **GRANTED** in part and **DENIED** in part. Plaintiffs' claims seeking Declaratory/Injunctive relief regarding the legality/correctness of the 2012 and 2018 Gambling letters are dismissed with prejudice. The claims of Plaintiffs Cuesta and Brickell Homeowners Association for violation of Chapter 163, *et seq.* (Count 1) are also dismissed with prejudice for lack of standing. In all other respects the City's Motion to Dismiss is **DENIED**;

2. West Flagler's Motion to Dismiss is **DENIED**, except to the extent the Court has granted the City's Motion directed to claims also brought against West Flagler;

3. Defendants' Motions to Stay based upon principles of comity are **DENIED**;

4. Defendants shall file their answers, affirmative defenses (if any), compulsory counterclaims (if any) and crossclaims (if any) within thirty (30) days of this Order;

5. This Court's previous order staying discovery is **VACATED**; and

6. The oral argument scheduled to occur on these motions on August 24, 2020 is cancelled. The Court will use the allotted time to conduct a case management conference.

---

[1]Corrects minor typographical errors only.

[2]Ernesto Cuesta, Brickell Homeowners Association, Inc., Ronald M. Friedman, 2020 Biscayne Boulevard, LLC, 2060 Biscayne Boulevard, LLC, 2060 NE 2nd Ave., LLC, 246 NE 20th Terrace, LLC, Morningside Civic Association, and Paraiso Beachclub Operator, LLC. (Collectively, "Plaintiffs").

[3]Unlike West Flagler, the City "takes no position on whether the *individual Plaintiffs* (Freidman and Cuesta) have standing to assert violations of [its] Charter under the Citizen's Bill of Rights without a showing of special injury." MTD p. 9.

[4]Both Defendants also request that the Court, based on principles of comity, stay this case "until the federal court rules on Plaintiffs' intervention motion." City's Motion p. 1; West Flagler's Motion p. 18, (advocating a stay until "the federal court has fully addressed all pending motions and disputes among these parties").

[5]For purposes of deciding the Defendants' motions to dismiss the facts alleged in the AC 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]. Defendants not surprisingly take issue with Plaintiffs' version of events and vehemently deny that the City opened up gambling in violation of law. According to Defendants, pari-mutuel wagering operations like the type West Flagler will offer have been authorized by the State "dating back to the 1930's," and have had the "consent of the residents of the City for decades." West Flagler's Motion p. 7; City Motion pp. 14-17 (arguing City has not engaged in "contract zoning," and insisting that pari-mutuel wagering is not "gambling" and has always been a permitted use in "entertainment establishments"). Whether any of the actions taken by the City (or West Flagler) were unlawful is a matter left for another day.

[6]The 2012 letter was sent to Ines Marrero-Priegues of Holland & Knight by Zoning Administrator Barnaby L. Min. Through that letter Min opined that "pari-mutuel, slot machine, and other gambling uses are allowed within the City of Miami" at "places of business that serve the amusement and recreational needs of the community" so long "as authorized by state statute." AC Ex. 2. While the Court is generally limited to the complaint's four corners when considering a motion to dismiss, it is required to consider exhibits attached to and incorporated into the complaint. *Rolle v. Cold Stone Creamery, Inc.*, 212 So. 3d 1073, 1076 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D517c].

[7]The AC also alleges that a Zoning Administrator is not authorized to interpret the "Zoning Code if there is a 'substantial doubt' about the interpretive issue. The Planning Director—not the Zoning Administrator—is vested with the authority to make such interpretations in the form of 'Use Determinations.' " AC ¶ 73.

[8]Fla. Stat. § 166.041(2)-(3)

[9]The Court may alternatively refer to the 2012 Gambling Letter and the 2018 Gambling Letters as the "2012 Letter," the "2018 Letters," and/or the "Letters" collectively.

[10]The 2018 Letters—unlike the 2012 Letter—relate to specific parcels of property. Issuing them would therefore be within the authority of a Zoning Administrator, assuming the absence of a "substantial doubt" about the interpretive issue. *See*, AC ¶ 73.

[11]The MOU contemplated that if West Flagler obtained a state gambling permit, then the owner of the properties would build the required facility at the location. AC Ex. 16 ¶ 26.

[12]The Court doubts that the validity of these letters could be challenged by way of a motion to dismiss and, unlike Plaintiffs, it does not fault the City for failing to raise the issue at that stage of the proceedings. *See* AC ¶ 102 (noting that the City, in its Motion to Dismiss, "did not raise any argument that the 2012 Gambling Letter violated Florida law, the Comprehensive Plan, or Miami 21, or that the Zoning Administrator lacked the authority to issue the letter").

[13]On the date the parties submitted their joint motion for dismissal (March 4, 2020), Plaintiffs had already threatened to sue "to void the 2012 Gambling Letter and enforce the Mayoral veto." AC ¶ 113. Obviously aware of that impending challenge, and not wanting to forfeit its claims if that challenge were successful, West Flagler wisely dismissed its case against the City without prejudice, preserving the right to refile in the event the Settlement Agreement is determined to be illegal and void.

[14]The Court appreciates the City's argument that the decision to settle its claim with West Flagler was not a "land-use" or "zoning" decision, and acknowledges that the resolution of this issue might impact a standing analysis. Reply to Pls.' Resp. to City's Mot. to Dismiss p. 2. The Court, however, is not in a position to adjudicate this issue on a motion to dismiss. If, on summary judgment or otherwise, the Court concludes that the Settlement Agreement does not represent a "land use" or "zoning" decision, it may re-visit whether that impacts Plaintiffs' standing on any particular claim. The Court also acknowledges the City's arguments that Count 3 fails to state a claim because the resolution approving the Settlement Agreement is not an "ordinance" for purposes of Chapter 166, *et. seq.*, and Count 4 fails to state a claim because "the Mayor lacked authority to veto the Resolution" authorizing the Settlement Agreement. City's Mot. p. 25. The Court also declines the City's invitation to decide these issues at this stage of the proceedings.

[15]"Determining whether a party has standing is a pure question of law. . ." *Alachua County v. Scharps*, 855 So. 2d 195, 198 (Fla. 1st DCA 2003) [28 Fla. L. Weekly D2157a].

[16]Because the Court finds that none of the claims alleged require a showing of special injury, it need not address this last point.

[17]Corporate entities are regularly deemed "citizens" and "residents' for other legal purposes. *See, e.g., Home Ins. Co. of New York v. Morse*, 87 U.S. 445 (1874) (corporation is a citizen of the State by which it is created for purposes of federal jurisdiction); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (corporation has constitutional right to engage in commercial advertising); *Citizens United v. Fed. Election Com'n*, 558 U.S. 310 (2010) [22 Fla. L. Weekly Fed. S73a] (corporations are afforded same right to free political speech as natural persons). The Court also notes that Florida Statute § 163.3215(2) defines an "aggrieved or adversely affected party" to include any "person" who will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan, and § 163.3164 (36) defines "person" to include a corporation.

[18]Contrary to West Flagler's representation—*Herbits*—which this Court would of course be bound to follow—does not hold, or even suggest, that a resident proceeding under the Citizen's Bill of Rights must demonstrate special injury.

[19]*Liebman* found that special injury had to be pled in that case *only* because the November 2016 amendment contained no language indicating that it was "intended to be applied retroactively." *Liebman*, 279 So. 2d at 751. While *Liebman* may not have technically held that special injury is no longer required because the amendment was not retroactive, and the court therefore did not have occasion to squarely address the question, *see Pedroza v. State*, 291 So. 3d 541, 547 (Fla. 2020) [45 Fla. L. Weekly S93a] (observing that "[a]ny statement of law in a judicial opinion that is not a holding is dictum"), this authority obviously undermines West Flagler's position.

[20]While Plaintiffs say that "there was no actual adversity between West Flagler and the City," Pls.' Opp. p. 6, the record in the Federal litigation suggests otherwise, and no facts indicating collusion have been alleged in the AC.

[21]*See also., Valdes v. State*, 728 So. 2d 736, 738-39 (Fla. 1999) [24 Fla. L. Weekly S109d] ("[t]his Court has long held that as the prosecuting officer, the state attorney has 'complete discretion' in the decision to charge and prosecute, and the judiciary cannot interfere with this "discretionary executive function").

* * *

Insurance—Health maintenance organizations—Contracts—Implied—Unjust enrichment—Quantum meruit—Out-of-network providers—Motion to dismiss amended complaint brought by out-of-network emergency medical provider against HMO for underpayment of claims is denied—No merit to argument that claims must be attached to complaint where HMO was on sufficient notice of identity of claims and action is based on HMO's alleged violation of section 641.513, parties' implied-in-fact contract and equitable rights—Complaint is not insufficient for failure to allege compliance with statute requiring that all claims against HMOs for underpayment be submitted within 12 months of payment of claim where complaint generally avers that all conditions precedent have been performed, waived, or otherwise satisfied—Provider has sufficiently stated cause of action for breach of contract implied-in-fact—No merit to argument that Florida HMO law prohibits implied-in-fact contracts between HMOs and out-of-network providers—Provider can assert both unjust enrichment and quantum meruit claims against HMO at same time—Difference between fair value of services rendered and amount HMO paid for those services is correct measure of damages for provider's unjust enrichment and quantum meruit claims—Provider has sufficiently stated cause of action for declaratory judgment where it alleges that declaratory judgment will afford relief from controversy regarding whether HMO's rates violate state law and uncertainty as to rates at which HMO must reimburse provider—Request for mandatory injunction is stricken because complaint does not assert facts to meet necessary elements for injunction

INPHYNET SOUTH BROWARD, LLC, Plaintiff, v. AVMED, INC. d/b/a AVMED HEALTH PLANS, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE20-004408 (07). August 31, 2020. Jack Tuter, Judge.

ORDER ON DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before the Court upon Defendant's Motion to Dismiss Amended Complaint. The Court, having considered the motion, the memorandum in support and the response, having heard argument of counsel, and being otherwise duly advised in the premises, rules as follows:

This case arises out of the alleged failure to correctly reimburse plaintiff's claims for medically necessary emergency medical services provided to defendant's insured members. On July 3, 2020, Plaintiff, InPhyNet South Broward, LLC ("Plaintiff") filed its Amended Complaint against Defendant, AvMed, Inc. d/b/a AvMed Health Plans ("Defendant"), alleging the following causes of action: (1) violation of section 641.513, Florida Statutes (count I); (2) breach of contract implied-in-fact (count II); (3) quantum meruit (count III); (4) unjust enrichment (count IV); and (5) declaratory judgment (count V). On July 13, 2020, Defendant filed the instant Motion to Dismiss Amended Complaint. On August 14, 2020, Defendant filed its Memorandum in Support of Defendant's Motion to Dismiss Amended Complaint. On August 18, 2020, Plaintiff filed a written response. A hearing was held by the Court on August 21, 2020.

It is well settled that "the function of a motion to dismiss a complaint is to raise a question of law as to the sufficiency of the facts alleged to state a cause of action." *Hitt v. North Broward Hospital District*, 387 So. 2d 482, 483 (Fla. 4th DCA 1980). "The motion admits as true all well pleaded facts as well as all reasonable inferences arising from those facts." *Id.* "The allegations must be construed in the light most favorable to plaintiffs and the trial court must not speculate what the true facts may be or what will be proved ultimately in trial of the cause." *Id.* Thus,

> [o]n a motion to dismiss for failure to state a cause of action, a trial court is restricted to a consideration of the well-pled allegations of the complaint. It must accept those allegations as true and then determine if the complaint states a valid claim for relief. A trial court has no authority to look beyond the complaint by considering the sufficiency of the evidence which either party is likely to produce, or any affirmative defense raised by the defendant.

Holland v. Anheuser Busch, Inc., 643 So. 2d 621, 623 (Fla. 2d DCA 1994) (*citing Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993)).

In the instant motion, Defendant argues that Plaintiff's Amended Complaint should be dismissed based on Plaintiff's failure to attach, or even identify the claims at issue. Footnote 1 of the Amended Complaint provides that the claims at issue are specifically identified in detail in an excel claims spreadsheet which was sent to counsel for Defendant. However, Defendant asserts that the spreadsheet notes 17,341 claims at issue but does not actually identify the claim numbers. Defendant argues the claim numbers are essential documents that must be attached to the Amended Complaint. Defendant further asserts that the failure to attach the governing HMO contracts fails to put Defendant on sufficient notice of Plaintiff's claims to allow it to formulate its defenses.

After careful consideration, the Court finds that Defendant is on sufficient notice of Plaintiff's claims to allow it to formulate its defenses. Further, the emergency claims themselves do not need to be attached to the Amended Complaint pursuant to rule 1.130[1] because the instant action was brought based on Defendant's alleged violation of section 641.513, the parties' implied-in-fact contract, and certain equitable rights under Florida law. Therefore, the instant motion is **DENIED** on this basis.

Next, Defendant argues that count I should be dismissed because Plaintiff has failed to allege compliance with section 641.3155(17), Florida Statutes. Section 641.3155(17), provides:

> Notwithstanding any other provision of this section, all claims for underpayment from a provider licensed under chapter 458, chapter 459, chapter 460, chapter 461, or chapter 466 must be submitted to the health maintenance organization within 12 months after the health maintenance organization's payment of the claim. A claim for underpayment may not be permitted beyond 12 months after the health maintenance organization's payment of a claim.

Florida Rule of Civil Procedure 1.120(c), states that "[i]n pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity." As Plaintiff has correctly pointed out in its Response, in paragraph 24 of the Amended Complaint, Plaintiff alleges that "[a]ll conditions precedent to the institution and maintenance of this action have been performed, waived, or otherwise satisfied." Therefore, the instant motion is **DENIED** on this basis. See also *Bank of America, Nat. Ass'n v. Asbury*, 165 So. 3d 808, 810 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D1230a] ("Under this rule a plaintiff is allowed to allege in a generalized fashion that all the conditions precedent to a cause of action, whatever they may be, have either occurred or been performed.").

Defendant also argues that count II for breach of contract implied-in-fact should be dismissed. Under Florida law, "[a] contract implied in fact is one form of an enforceable contract; it is based on a tacit promise, one that is inferred in whole or in part from the parties' conduct, not solely from their words." *Commerce Partnership 8098 Ltd. v. Equity Contracting Co., Inc.*, 695 So. 2d 383, 385 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1379b]. "A contract implied in fact is not put into promissory words with sufficient clarity, so a fact finder must examine and interpret the parties' conduct to give definition to their unspoken agreement." *Id.* "It is to this process of defining an enforceable agreement that Florida courts have referred when they have indicated that contracts implied in fact rest upon the assent of the parties." *Id.* (citation omitted). "Common examples of contracts implied in fact are where a person performs services at another's request, or "where services are rendered by one person for another without his expressed request, but with his knowledge, and under circumstances" fairly raising the presumption that the parties understood and intended that compensation was to be paid." *Id.* (citation omitted). Further, "[i]n these circumstances, the law implies the promise to pay a reasonable amount for the services." *Id.*

In the Amended Complaint, Plaintiff asserts a breach of contract implied-in-fact in addition to count I, and/or in the alternative. Therein, Plaintiff makes the following allegations:

> • Defendant knew that Plaintiff would provide emergency services to Defendant's Members . . . without seeking or obtaining prior authorization, as prior authorization is not required in connection with the provision of emergency services.
>
> • Plaintiff has rendered emergency services to Defendant's Members.
>
> • Defendant has been aware that Plaintiff was entitled to and expected to be paid the fair value of the emergency services they rendered to Defendant's Members.
>
> • Defendant has acknowledged its responsibility for payment of Plaintiff's services rendered to Defendant's Members by regularly and consistently paying Plaintiff for such services, although at rates lower than what Plaintiff is owed under the law.
>
> • Defendant has further acknowledged its responsibility for payment of the claims at issue in this action, as all such claims have been processed and adjudicated by Defendant and determined by Defendant to be covered services.
>
> • With respect to each of the claims at issue in this action, Plaintiff and Defendant have established a contract implied-in-fact pursuant to which Defendant must reimburse Plaintiff no less than the fair value of the services provided.

Based on the foregoing and after careful review of the allegations of the Amended Complaint, the Court finds that Plaintiff has sufficiently stated a cause of action for breach of contract implied-in-fact. Therefore, the instant motion is **DENIED** on this basis.

Defendant further argues that Florida HMO law prohibits the type of implied-in-fact contract advocated by Plaintiff. Defendant also maintains that the statute of frauds prohibits this type of contract. The Court respectfully disagrees. Section 641.315(1), Florida Statutes, provides, "[e]ach contract between a health maintenance organization and a provider of health care services must be in writing and must contain a provision that the subscriber is not liable to the provider for any services for which the health maintenance organization is liable as specified in s. 641.3154." Notwithstanding, Florida cases interpreting the Florida HMO statutes have held that out-of-network providers have a substantive right to assert implied-in-fact contract claims against HMOs. *See Lutz Surgical Partners, PLLC v. Blue Cross and Blue Shield of Florida, Inc.,* 2017 WL 10295955, at *3 (M.D. Fla. Dec. 14, 2017) ("[section 641.513(5)] creates an implied contract between an HMO and out-of-network provider that renders emergency services and care to the HMO's insured."). Accordingly, the instant motion is **DENIED** on this basis.

Next, Defendant argues that counts III and IV for quantum meruit and unjust enrichment should be dismissed. Defendant's arguments can be summarized into three points: (1) Plaintiff fails to state ultimate facts supporting these claims; (2) Plaintiff fails to plausibly allege that it conferred a benefit on Defendant that it accepted and retained; and (3) these claims cannot be pursued at the same time together with a section 641.513(5) claim.

In opposition, Plaintiff relies on *Merkle v. Health Options, Inc.*, 940 So. 2d 1190 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D2579a]. In *Markle*, an out-of-network emergency physician group sued various HMOs for violation of section 641.513(5), unjust enrichment and quantum meruit, account stated, and declaratory and injunctive relief based on the HMOs' deficient reimbursement of the provider's emergency services rendered to the HMOs' members. *Id.* at 1193. The Fourth District reversed the trial court's dismissal of the emergency provider's unjust enrichment and quantum meruit claims. The Court found that plaintiff properly alleged that its emergency services provided to the HMOs' members conferred the requisite benefit on the HMOs and otherwise properly pled these claims and that the trial court should not have considered the ultimate merits of the claims at the motion to dismiss stage. *Id.* at 1198-99. Additionally, and contrary to Defendant's contention in the instant motion, the Fourth District permitted the plaintiff to assert the unjust enrichment and quantum meruit claims in addition to their section 641.513(5) claim, and did not hold that these claims could not be asserted together at the same time. *See generally id.*

"The elements of a cause of action for unjust enrichment are: (1) plaintiff has conferred a benefit on the defendant, who has knowledge thereof; (2) defendant voluntarily accepts and retains the benefit conferred; and (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying the value thereof to the plaintiff." *Id.* at 1199. The elements of a quantum meruit claim are substantially identical. *See, e.g. Commerce Partnership*, 695 So. 2d at 386.

In the Amended Complaint, Plaintiff asserts claims for quantum meruit and unjust enrichment in addition to count I, and/or in the alternative. Therein, Plaintiff makes the following allegations:

> • Plaintiff has conferred a direct benefit upon Defendant by providing valuable emergency services to Defendant's Members. . .Defendant derives a direct benefit from Plaintiff's provision of emergency services to Defendant's Members because it is through Plaintiff's provision of those services that Defendant fulfills its obligations to its Members.
>
> • When Plaintiff provides covered emergency services to Defendant's Members, Defendant receives the benefit of having its contractual obligations to its Members discharged.
>
> • Defendant has knowledge of the benefits Plaintiff conferred on Defendant by providing emergency services to Defendant's Members, because, *inter alia*, Defendant received, processed, and adjudicated Plaintiff's Claims for such services and determined that they were covered services under Defendant's contracts with its Members.

• Defendant has voluntarily accepted and retained the benefits Plaintiff conferred on Defendant by providing emergency services to Defendant's Members because, *inter alia,* Defendant adjudicated Plaintiff's Claims for such services and determined that they were covered services under Defendant's contracts with its Members.

• Defendant voluntarily accepted, retained and enjoyed, and continues to accept, retain, and enjoy, the benefits conferred upon it by Plaintiff, knowing that Plaintiff expected and expect to be paid the fair value for its services. However, Defendant has failed to reimburse Plaintiff the fair value of the services Plaintiff has rendered to Defendant's Members at all times material.

• Under the present circumstances, it would be inequitable for Defendant to fail to reimburse Plaintiff the fair value of the emergency services it rendered to Defendant's Members, while retaining the benefits Plaintiff conferred upon Defendant.

Based on the foregoing, and after careful consideration of the allegations raised in the Amended Complaint, the Court finds that Plaintiff has sufficiently stated causes of action for unjust enrichment and quantum meruit. Accordingly, the instant motion is **DENIED** on this basis.

Defendant also argues that Plaintiff seeks an incorrect measure of damages for its unjust enrichment and quantum meruit claims. This Court respectfully disagrees. In counts III and IV, Plaintiff correctly seeks to recover damages for the difference between the fair value of the services Plaintiff rendered and the amounts Defendant paid for those services. *See Della Ratta v. Della Ratta*, 927 So. 2d 1055, 1059 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1325a] (unjust enrichment claims require proof that "the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it"), see also *Adventist Health System/Sunbelt, Inc. v. Medical Savings Insurance Company*, 2004 WL 6225293, at *4 (M.D. Fla. Mar. 8, 2004) (the scope of damages for a quantum meruit claim is determined by evaluating "the cost to the provider of producing that benefit and the fair market value of it."). Based on the foregoing, the instant motion to dismiss is **DENIED** on this basis.

Defendant argues that count V for declaratory judgment should be dismissed for various reasons, including: (1) it is impermissibly duplicative of the other counts; (2) it seeks damages for alleged past breach rather than a prospective declaration of rights under the statute; (3) fails to state a legally viable claim; and (4) it cannot be used as a mechanism to seek an adjudication on the merits when a contractual claim is also being made.

Under Florida law, "[t]he elements of an action seeking a declaratory judgment require the plaintiff to show there is [1] a bona fide adverse interest between the parties concerning a power, privilege, immunity or right of the plaintiff; [2] the plaintiff's doubt about the existence or nonexistence of his rights or privileges; [3] that he is entitled to have the doubt removed." *Grove Isle Ass'n, Inc v. Grove Isle Associates, LLLP*, 137 So. 3d 1081, 1093 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D648a] (internal quotation marks and citation omitted).

In the Amended Complaint, Plaintiff alleges that Defendant has and continues to reimburse Plaintiff for the emergency services it renders to Defendant's members at substantially less than the fair value of Plaintiff's services. Plaintiff further alleges that real and substantial justiciable controversies exist between Defendant and Plaintiff whether the reimbursement rates violate Florida law. Plaintiff maintains that such controversies require an immediate determination of Plaintiff's right of reimbursement and whether the rates of reimbursement that Defendant has paid to Plaintiff comply with Florida law. Plaintiff further asserts that declaratory relief will terminate and afford relief from uncertainty, insecurity and controversy concerning the rates at which Defendant must reimburse Plaintiff for the emergency services. Based on the foregoing and notwithstanding Defendant's position, the Court finds Plaintiff has sufficiently stated a cause of action for declaratory judgment. Therefore, the instant motion to dismiss is **DENIED** on this basis.

Finally, Defendant argues that Plaintiff improperly attempts to seek a "mandatory injunction" under the guise of seeking declaratory relief. In its "Prayer for Relief" on page 16 of the Amended Complaint, Plaintiff requests the Court "issue a mandatory injunction compelling Insurance Company to reimburse Emergency Provider no less than the reimbursement rates to which the Court declares Emergency Provider is entitled from Insurance Company for the emergency services Emergency Provider renders to Insurance Company's Members as an out-of-network provider." After careful consideration and review of the allegations contained in the Amended Complaint, while not specifically included in its declaratory judgment count, the Court nonetheless finds that Plaintiff improperly seeks a "mandatory injunction" where the Amended Complaint does not assert facts to meet any of the necessary elements required to seek an injunction. Therefore, the requested relief is hereby **STRICKEN**.

Accordingly, it is hereby:

ORDERED that Defendant's Motion to Dismiss Amended Complaint is hereby **DENIED** for the reasons stated above.

IT IS FURTHER ORDERED that Plaintiff's requested relief for mandatory injunction contained in its "Prayer for Relief" is hereby **STRICKEN**.

IT IS FURTHER ORDERED that Defendant shall file its answer to the Amended Complaint within twenty (20) days from the date of this Order.

---

[1]Florida Rule of Civil Procedure 1.130(a), provides, "**(a) Instruments Attached.** All bonds, notes, bills of exchange, contracts, accounts, or documents on which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, must be incorporated in or attached to the pleading. No documents shall be unnecessarily annexed as exhibits. The pleadings must contain no unnecessary recitals of deeds, documents, contracts, or other instruments."

* * *

Insurance—Declaratory judgments— Default— Vacation— Standing— Ancillary defendants who were dismissed from action lack standing to challenge order granting default final judgment and final judgment in insurer's favor

INTEGON PREFERRED INSURANCE COMPANY, Plaintiff, v. T. DISNEY TRUCKING AND GRADING, INC., JO & A TRUCKING INC, 3-D TRUCK SERVICES LLC, RODOLFO HERNANDEZ, SAMANTHA LEWIS SCHAFFER, SAMANTHA LEWIS SHAFFER as the Parent, Natural and Legal Guardian of ALLISON SHAFFER, a minor, TONYA LEE FITCH, TONYA LEE FITCH as the Parent, Natural and Legal Guardian of RYAN FITCH, a minor, DENNIS LEE SPRATT, MARILYN J. WEAVER-SPRATT, Defendants. Circuit Court, 20th Judicial Circuit in and for Lee County. Case No. 20-CA-000207. August 17, 2020. Alane C. Laboda, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Andrew W. Abel, Spivey Law Firm, Personal Injury Attorneys, P.A., Fort Myers, for Defendant Samantha Lewis Schaffer.

ORDER ON DEFENDANTS, SAMANTHA LEWIS SCHAFFER, INDIVIDUALLY AND AS THE PARENT, NATURAL AND LEGAL GUARDIAN OF A.S., A MINOR'S MOTION TO SET ASIDE ORDER ON PLAINTIFF, INTEGON PREFERRED INSURANCE COMPANY'S MOTIONS FOR DEFAULT FINAL JUDGMENT AGAINST DEFENDANTS, T. DISNEY TRUCKING AND GRADING, INC., JO & A TRUCKING INC., 3-D TRUCK SERVICES LLC, RODOLFO HERHANDEZ, TONYA LEE FITCH AND TONYA LEE FITCH AS THE PARENT AND LEGAL GUARDIAN OF R.F., A MINOR, DATED MAY 18, 2020/OBJECTION TO PLAINTIFF'S MOTION FOR ENTRY OF FINAL JUDGMENT

(ALANE C. LABODA, J.) THIS CAUSE having come before this Court at the hearing on August 10, 2020, on the Defendants, SAMANTHA LEWIS SCHAFFER, individually and as the Parent, Natural and Legal Guardian of A.S., a minor's Motion to Set Aside Order on Plaintiff, INTEGON PREFERRED INSURANCE COMPANY's Motions for Default Final Judgment Against Defendants, T.

DISNEY TRUCKING AND GRADING, INC., JO & A TRUCKING INC., 3-D TRUCK SERVICES LLC, RODOLFO HERHANDEZ, TONYA LEE FITCH AND TONYA LEE FITCH as the Parent and Legal Guardian of R.F., a minor, Dated May 18, 2020/Objection to Plaintiff's Motion for Entry of Final Judgment, and the Court having considered the same, and being fully advised in the premise, it is **ORDERED AND ADJUDGED** that:

1. The Defendants, SAMANTHA LEWIS SCHAFFER, individually and as the Parent, Natural and Legal Guardian of A.S., a minor's Motion to Set Aside Order on Plaintiff, INTEGON PREFERRED INSURANCE COMPANY's Motions for Default Final Judgment Against Defendants, T. DISNEY TRUCKING AND GRADING, INC., JO & A TRUCKING INC., 3-D TRUCK SERVICES LLC, RODOLFO HERHANDEZ, TONYA LEE FITCH AND TONYA LEE FITCH as the Parent and Legal Guardian of R.F., a minor, Dated May 18, 2020/Objection to Plaintiff's Motion for Entry of Final Judgment is hereby **DENIED**, as follows:

a. Since the Action for Declaratory Judgment was resolved in favor of INTEGON PREFERRED INSURANCE COMPANY, the ancillary Defendants, SAMANTHA LEWIS SCHAFFER, individually and as the Parent, Natural and Legal Guardian of A.S., a minor, were dismissed from this matter on May 27, 2020. Therefore, the Defendants, SAMANTHA LEWIS SCHAFFER, individually and as the Parent, Natural and Legal Guardian of A.S., a minor, lack standing to challenge the Order granting Default Final Judgment dated May 18, 2020, and the Order granting Final Judgment dated June 1, 2020, in addition to no merits to the arguments put forward at the hearing.

* * *

Volume 28, Number 7
November 30, 2020
Cite as 28 Fla. L. Weekly Supp. ____

COUNTY COURTS

Landlord-tenant—Eviction—Stay—Eviction case raising Covid-19 defense is stayed pursuant to Executive Order #20-180

WAYNE SELKIRK, Plaintiff, v. DOUG MORRIS and QUENTETA LYNUM, Defendants. County Court, 1st Judicial Circuit in and for Escambia County. Case No. 2020 SC 002413, Division 5. August 11, 2020. Pat Kinsey, Judge. Counsel: Wayne Selkirk, Pro se, Pensacola, for Plaintiff. Diana C. Chestnut, Legal Services of North Florida, Pensacola, for Defendant.

ORDER STAYING CASE

The court received this eviction case from the Clerk of Court because one of the defendants filed an Answer. The court reviewed the docket and found that the eviction is based on a Three Day Notice for non-payment of rent. The written Answer filed by counsel for Quenteta Lynum raises the Covid defense for both defendants. Therefore, based on the Executive Order #20-180 issued by the Governor of the State of Florida, this case is *STAYED* until at least September 1, 2020.

In addition, the court notes that the defendants have demanded a JURY TRIAL. Therefore, the plaintiff, or his attorney, if he decides to obtain counsel, will be responsible for providing legally appropriate Jury Instructions and Verdict Form in coordination with the defendants and counsel for Quenteta Lynum, prior to trial. Once the Stay is lifted by the Governor, the court will issue a Pretrial Order setting the case for a JURY TRIAL and outlining the specific responsibilities of the parties regarding the selection of a jury and the jury trial.

ORDERED AND ADJUDGED that pursuant to the Governor's Execution Order, this case is stayed until the moratorium is lifted for evictions based on non-payment of rent and/or the defendants' employment being returned to pre-Covid status.

* * *

Criminal law—Search and seizure—Vehicle stop—Careless driving—Where defendant lost traction momentarily and skidded on wet road, and defendant took immediate corrective measures and regained control of vehicle, stop for careless driving was not justified—Motion to suppress is granted

STATE OF FLORIDA, v. BRIAN D. OLCOTT, Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2019-CT-017407-AXXX-MA, Division CC-L. August 21, 2020. Michelle Kalil, Judge. Counsel: Samantha Mizeras, for State. Mitchell A. Stone, Mitchell A. Stone, P.A., Jacksonville, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE GATHERED FOLLOWING STOP, DETENTION AND/OR ARREST

This cause came before this Court on *Defendant's Motion to Suppress Evidence Gathered Following Stop, Detention and/or Arrest).* A hearing was conducted on July 15, 2020 and the parties presented evidence and testimony. The Court hereby finds as follows:

Officer Hillier testified that on October 26, 2019 he stopped Defendant for careless driving because Defendant was "driving sideways" on Lem Turner Road. The testimony and video entered into evidence establish it had recently rained when the Defendant turned right onto Lem Turner Road. As the Defendant accelerated through the turn the back tires lost traction and the back end of the pickup truck slid out to the left. The Defendant then immediately corrected, gained control, and drove within his lane of travel without incident. Officer Hillier activated his emergency equipment to stop the Defendant for careless driving, Florida Statute §316.1925(l).

There was no other basis presented by the State to justify the stop of the Defendant. The officer admited that the Defendant had violated no other traffic laws and there was no other reason to stop him. The testimony of the officer and the video in evidence prove that the loss of traction occurred momentarily on a wet road and was followed by an immediate corrective measure taken by the Defendant. At no time were any vehicles, property, or people endangered.

Florida Statute §316.1925(1), Careless Driving reads:

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

Based on the evidence introduced the State did not prove that any person or property was endangered by Defendant's driving. Moreover the surrounding circumstances establish a reasonable basis for the loss of traction. There was nothing else presented in evidence as far as the Defendant's driving to support the stop of the Defendant for careless driving or for any other reason. Therefore, the State failed to meet its burden of proof that Defendant committed a violation of Florida Statute §316.1925(1) and there was no other legal basis to stop Defendant. Thus, this Court does not find the stop to be lawful.[1] *Donaldson v. State,* 803 So.2d 856 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D106a], *State v. Johnsen,* 14 Fla. L. Weekly Supp. 1151a (Fla. 15th Judicial Circuit 2007).

Therefore, it is hereby **ORDERED AND ADJUDGED**

1. That Defendant's Motion to Suppress is hereby GRANTED.

2. That all evidence obtained following the stop of Defendant is suppressed.

[1]Defendant also moved to suppress evidence following the detention based on insufficient evidence of impairment and moved to suppress evidence based on no probable cause to arrest. However, the ruling of this Court based on the stop issue causes those issues to be moot.

* * *

Insurance—Personal injury protection—Standing—Assignment—Validity—Assignment of benefits is not invalid for failure to include claim number and date of loss—Document that clearly conveys intent to transfer right to bring suit for PIP benefits to medical provider confers standing on provider—Further, insurer that did not challenge assignment during adjustment of claim or in response to demand letter is estopped from challenging any alleged deficiencies in assignment after suit is filed—Insurer that is not party to assignment has no privity or standing to challenge its validity

LAKEWOOD CHIROPRACTIC CLINIC, P.A. a/a/o Marilyn Leyva-Fernandez ("LAKEWOOD"), Plaintiff, v. STATE FARM FIRE & CASUALTY COMPANY ("STATE FARM") Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2018-SC-2855, Division CC-D. August 24, 2020. Erin Perry, Judge. Counsel: Adam Saben, Shuster & Saben, Jacksonville, for Plaintiff. Hillary Lovelady, Kubicki Draper, Jacksonville, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S CROSS-MOTION FOR FINAL JUDGMENT AS TO STANDING AND CONDITION PRECEDENT

THIS CAUSE came before the Court for hearing on April 2, 2020. After having heard arguments of counsel, and being otherwise duly advised in the premises, the Court finds as follows:

Defendant, STATE FARM, argues that the Plaintiff, LAKEWOOD, has no standing to bring this lawsuit for payment of personal injury protection ("PIP") benefits. It argues that the document purporting to be the Assignment of Benefits, "does not included (sic) a date of signature, a date of loss, nor a claim number." See, paragraph 2 of State Farm's Motion for Final Judgment. Defendant brings forth no case law or statutory directive that requires an Assignment of Benefits to include the insurance company claim

number or a date of loss. The proper query for this Court is to ask whether the Assignment of Benefits contains enough indicia to indicate an intent to transfer the right to bring this PIP suit. Under the title "ASSIGNMENT OF BENEFITS", the document states, in pertinent part:

> I hereby IRREVOCABLY ASSIGN to LAKEWOOD CHIROPRACTIC, the rights and benefits under any policy of insurance, indemnity agreement, or any other collateral source as defined in Florida Statutes for any service and or charges provided by LAKEWOOD CHIROPRACTIC.

The Court finds that this language clearly conveys an intent to transfer the right to LAKEWOOD CHIROPRACTIC to bring a lawsuit to enforce payment of PIP benefits. Further, Plaintiff filed the affidavit of Dr. David Edenfield, the owner of LAKEWOOD CHIROPRACTIC and treating physician for the assignee. Dr. Edenfield attested that Ms. Leyva-Fernandez, and all patients, sign an Assignment of Benefits on the initial visit and that she had not treated at Lakewood Chiropractic prior to the date of loss in this case, September 28, 2013. Finally, STATE FARM issued payments to the Plaintiff in this case during the course of treatment. If there was any confusion or concern on the part of the Defendant regarding the Assignment of Benefits, as argued by counsel for State Farm, one would presume that the insurance carrier would have acted accordingly prior to issuing said payments. Therefore, the Court concludes that the Assignment of Benefits conveys standing to the Plaintiff, LAKEWOOD CHIROPRACTIC.

The Plaintiff also argues that, even assuming, *arguendo,* the Assignment of Benefits had a deficiency, same had no effect on the ability or intent of State Farm to pay this claim. Here, Plaintiff submitted bills to State Farm for payment related to the covered loss. Without a conveyance of assignment, State Farm has a duty to send payments to their insured, Marilyn Leyva-Fernandez, the only party to whom it is in privity of contract with for payment of PIP benefits. In this case, State Farm paid Lakewood Chiropractic directly, not the insured. State Farm now, for the first-time post suit, is raising the issues of standing and condition precedent when same could have been raised when the Defendant was adjusting the claim and responding in its Explanation of Review. Further, Plaintiff attached the Assignment to its pre-suit demand letter, pursuant to F.S. 627.736(10). In its demand letter response of March 4, 2017, State Farm never took issue with any deficiency in the Plaintiff's Assignment of Benefits. Thus, Plaintiff argues that the Defendant waived the right to challenge the assignment of benefits for the first time, post-suit and is now estopped from raising deficiencies in the Assignment as an affirmative defense. In *United Contractors, Inc. v. United Construction Corp.,* 187 So.2d 695 (Fla. 2d DCA 1966), The Second DCA wrote:

> 'Equitable estoppel' precludes a person from maintaining a position inconsistent with another position which is sought to be maintained at the same time or which was asserted at a previous time; and, as a general rule where a person has, with knowledge of the facts, acted or conducted himself in a particular manner, or asserted a particular claim or right, he cannot afterward assume a position inconsistent with such act or conduct to the prejudice of another who has acted in reliance on such conduct. The doctrine requires of a party consistency of conduct, when inconsistency would work substantial injury to the other party. *Id.,* at 701-2.

In this case, State Farm conducted itself in a manner that took no issue with the Assignment of Benefits. If State Farm brought the issue to the attention of Lakewood Chiropractic at the claim adjusting stage (such as with its Explanation of Review or as a request for supplemental information pursuant to F.S. 627.736(6)(b)) or in response to the Plaintiff's pre-suit demand letter, then Lakewood Chiropractic would have had an opportunity to correct the deficiency or, perhaps, forewent filing suit. In *O'Bryan v. Linton,* 41 So.2d 169, 171 (Fla. 1949), the Florida Supreme Court recognized the doctrine of estoppel in Florida and stated "a party who gives a reason for his conduct on anything involved in a controversy cannot, after litigation has started, change his ground and put his conduct upon a different consideration," *Also see, Reddick v. Globe Life and Accident Insurance Company,* 596 So.2d 435 (Fla. 1992). In this case, a change in position is exactly what the Defendant is trying to do; there was no challenge to the assignment prior to filing suit, in response to the pre-suit demand letter, or during the claims process. Now, post-filing suit, Defendant seeks to challenge standing and the assignment. "Florida courts and courts in other jurisdictions have not hesitated to apply waiver and estoppel when the circumstances indicate the insurer's conduct induced the insured to rely on that conduct to his detriment." *American States Ins. Co. v. McGuire,* 510 So.2d 1227 (Fla. DCA 1987). Applying the doctrine of estoppel at common law as well as the case law cited herein, the Court agrees with Plaintiff and finds that the Defendant is estopped from challenging any alleged deficiencies in the assignment of benefits in this case.

Finally, the Defendant is not a party to the assignment, and therefore, has no privity or standing to challenge the validity of the assignment. See, *Progressive Express Ins. Co. v. McGrath Community Chiropractic,* 913 So.2d 1281, 1289 (Fla. 2nd DCA 2005, Judge Davis, specially concurring) [30 Fla. L. Weekly D2622b] ("At the outset, Progressive, as a third-party to the assignment agreement between Mr. Joseph and the Provider, is not entitled to make this challenge").

Based on the foregoing, it is **ORDERED** and **ADJUDGED** that Plaintiff's Motion for Summary Judgment is **GRANTED** and the Defendant's Cross-Motion for Final Judgment is **DENIED**.

* * *

Insurance—Property—Dismissal—Motion to dismiss breach of contract action against insurer for failure to join co-owner of property as indispensable party is denied, as case can be resolved without including co-owner

NORMAN SCHEAR, Plaintiff, v. AUTO CLUB INSURANCE COMPANY OF FLORIDA, Defendant. County Court, 5th Judicial Circuit in and for Sumter County. Case No. 2020-CC-398. August 26, 2020. Paul L. Militello, Judge. Counsel: David Albert Spain, Morgan & Morgan, P.A., Orlando, for Plaintiff. Gina S. Glasgow, Groelle & Salmon, P.A., Maitland, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO JOIN INDISPENSABLE PARTY

THIS COURT having considered Defendant's Motion to Dismiss for Failure to Join Indispensable Party, filed on July 30, 2020; Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss, filed on August 14, 2020; and having reviewed the records of this case, finds as follows:

1. Plaintiff's Complaint, filed on June 24, 2020 asserts one claim for breach of contract.

2. Defendant maintains the Complaint should be dismissed for failure to join the co-owner of the property.

3. Florida law is well-settled that the trial court's standard of review regarding a motion to dismiss is as follows:

> The purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal. The trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations. It is not for the court to speculate whether the allegations are true or whether the pleader has the ability to prove them. The question for the trial court to decide is simply whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested.

Huet v. Mike Shad Ford, Inc., 915 So.2d 723, 725 (Fla. 5th DCA

2005) [30 Fla. L. Weekly D2728b]

Thus, this Court must confine its gaze to the four corners of the Complaint, "accept as true" the Plaintiff's allegations, and determine whether the Plaintiff has properly alleged a valid cause of action against the Defendant.

4. An indispensable party is one who must be joined in order to ensure complete and efficient resolution of the case involving the existing parties. *National Title Ins. Co. v. Oscar E. Dooly Associates, Inc.,* 377 So.2d 730 (Fla. 3d DCA 1979). Resolution of this case, however, may be completed without including the co-owner.

Based upon the foregoing, it is hereby;

ORDERED AND ADJUDGED:

1. Defendant's Motion to Dismiss for Failure to Join Indispensable Party is **DENIED**.

2. Defendant has ten (10) days to file a response to Plaintiff's Complaint.

* * *

Criminal law—Speedy trial—Discharge—State's delay in filing charges—Pandemic procedures—Temporary suspensions of time periods involving speedy trial period mandated by Florida Supreme Court's Administrative Order 20-32 and its amendments apply to speedy trial as it relates to filing of charges against the accused—Court rejects defendant's contention that Court intended only to suspend speedy trial as it relates to actual trial and not the filing of charges—Defendant's motion for speedy trial discharge based on state's having filed information 100 days following defendant's arrest is denied

STATE OF FLORIDA, v. TIMOTHY PAUL TAYLOR, Defendant. County Court, 5th Judicial Circuit in and for Lake County. Case No. 2020-MM-002932-A-JN. August 4, 2020. Jason J. Nimeth, Judge. Counsel: Latoya Jackson, State Attorney's Office, Tavares, for State. Brice Aikens, Orlando, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR DISCHARGE

THIS CAUSE, came before the Court on Defendant's Motion for Discharge, and the Court having heard the arguments of Brice Aikens, Esquire, Counsel for Defendant, and Latoyia Jackson, Esquire, Counsel for the State, at a hearing held on July 30, 2020, at 10:00 AM; having reviewed the Court's file, having reviewed the applicable case law, and otherwise being fully advised in the premises, finds as follows.

FACTS

Timothy Paul Taylor (hereinafter "Defendant") was arrested on March 29, 2020. On April 6, 2020, the Florida Supreme Court issued Administrative Order AOSC20-32—this administrative order has been subsequently amended. On June 12, 2020, the State filed an Announcement of No Information in Circuit Court with the stated intention of filing an Information in County Court. However, the State did not file an Information in this case until July 7, 2020, 100 days following Defendant's arrest. On that same day, Defendant filed this Motion for Discharge. Defendant has not waived his right to a speedy trial.

ANALYSIS

"As expressly guaranteed by both the state and federal constitutions and the Florida Rules of Criminal Procedure, a criminal defendant possesses the right to a speedy and public trial." *State v. Nelson,* 26 So. 3d 570, 574 (Fla. 2010) [35 Fla. L. Weekly S34a] (citing U.S. Const., Amendment VI; Art. I, § 16(a), Florida Const.; Fla. R. Crim. P. 3.191; Fla. R. Juv. P. 8.090). "[A]ll defendants are entitled to be brought to trial within a specific period prescribed by the rule without demanding the right to speedy trial." *Id.* Specifically, those individuals charged with a misdemeanor "shall be brought to trial within [ninety] days of arrest. . ." Fla. R. Crim. P. 3.191(1). Therefore,

> speedy trial time begins to run when an accused is taken into custody and continues to run even if the State does not act until after the expiration of that speedy trial period, [so t]he State may not file charges based on the same conduct after the speedy trial period has expired.

State v. Williams, 791 So. 2d 1088, 1091 (Fla. 2001) [26 Fla. L. Weekly S513a]; *Genden v. Fuller,* 648 So. 2d 1183 (Fla. 1994) (holding "that the speedy trial time begins to run when an accused is first taken into custody and continues to run when the State voluntarily terminates prosecution before formal charges are filed and the State may not file charges based on the same conduct after the speedy trial period has expired"). Violations of this rule discharges a defendant from the alleged crime(s); thus, the State is barred from "prosecution of the crime[s] charged and of all other crimes on which trial has not commenced nor conviction obtained. . . ." Fla. R. Crim. P. 3.191(n).

The question for this Court is whether Florida Supreme Court Administrative Order 20-32, and its amendments, apply to speedy trial as it relates to the filing of charges against the accused. The orders address jury trials under section III and speedy trial under section IV. Jury trials were first suspended on March 16, 2020, and remain suspended until thirty days after our circuit has transitioned to Phase II operations pursuant to Florida Administrative Order number AOSC20-32, Amendment 2. Fla. Admin. Order No. AOSC20-32, Amendment 5. "All time periods involving speedy trial procedure in criminal. . .court proceedings shall remain suspended until 90 days after" our circuit has transitioned to Phase III operations. *Id.* "[S]uspension shall be applied in the manner described in *Sullivan v. State,* 913 So. 2d 762 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2571c], and *State v. Hernandez,* 617 So. 2d 1103 (Fla. 3d DCA 1993)." *Id.*

Defendant argues that through the reference to *Sullivan* and *Hernandez,* the Court intended to only suspend speedy trial as it relates to the actual trial and not the filing of charges. In both cases, the defendant moved for discharge believing speedy trial had expired; however, the appellate courts determined speedy had not expired when taking into account the tolling of speedy trial mandated through administrative orders from the Florida Supreme Court. *Sullivan v. State,* 913 So. 2d 762, 763 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2571c]; *State v. Hernandez,* 617 So. 2d 1103, 1103-04 (Fla. 3d DCA 1993). These cases only addressed the calculation of speedy trial. *Id.*

Although *Sullivan* and *Hernandez* do not address the issue before this Court, the Florida Supreme Court has previously addressed the effect of an order extending speedy trial as it relates to the filing of charges against the accused. In *State v. Barnett,* 366 So. 2d 411 (Fla. 1978), speedy trial had expired by the time the State filed a charging document against the defendant; however, before the standard procedural time had expired, speedy trial was extended by the appellate court until ninety days following the issuance of a mandate. The Florida Supreme Court held that discharge was inappropriate because "[u]pon receipt of this mandate. . .the State had 75 days left within which to file new informations and bring the defendants to trial." *State v. Barnett,* 366 So. 2d 411, 416 (Fla. 1978). Thus, under *Barnett,* the tolling of speedy trial also extends the State's deadline for filing charges. This is consistent with the analysis that leads to the discharge of a defendant when the State fails to file charges within speedy trial—Rule 3.191 should not "be construed to allow the State to effectively toll the running of speedy trial period by allowing it to expire prior to filing of formal charges." *Williams*, at 791 So. 2d at 1089. Additionally, the issue of discharge looks solely to the time periods prescribed under Florida Rule of Criminal Procedure 3.191, and the Florida Supreme Court addressed Rule 3.191. Furthermore, the Florida Supreme Court specifically addresses speedy trial and jury trials under different sections; thus, the Court would have not needed

to address speedy trial in a separate section had it been limiting the speedy trial application only to that of jury trials.

IT IS THEREFORE ORDERED AND ADJUDGED that Defendant's Motion for Discharge is DENIED.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Erratic driving pattern—Single swerve onto shoulder of road was insufficient to justify stop for either civil infraction or welfare check where driving pattern was otherwise appropriate—Motion to suppress is granted

STATE OF FLORIDA, v. JOSEPH C. WRIGHT, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2020 CT 246. August 31, 2020. D. Melissa Distler, Judge. Counsel: Raymond Dailey, Assistant State Attorney, Office of the State Attorney, for State. Fleming K. Whited III, Whited Law Firm, Daytona Beach, for Defendant.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

THIS MATTER came before the Court on Wednesday August 19, 2020 on the Defendant's Motion to Suppress. The Court, having heard testimony from the arresting officer, Trooper Ken Montgomery, and having reviewed the AXON video recordings admitted into evidence, and having heard argument from both Counsel for the State and the Defendant, the Court makes the following findings of fact:

Findings of Fact:

Trooper Montgomery arrested the Defendant JOSEPH C. WRIGHT for Driving Under the Influence within Flagler County. The Defendant filed a First Amended Motion to Suppress based on Illegal Stop, challenging the basis for the traffic stop. Trooper Montgomery was the sole witness at the hearing on the motion.

Trooper Montgomery testified to a driving pattern that was also captured on his front facing video camera, which was stipulated to and admitted into evidence. Trooper Montgomery testified that he was driving westbound on State Road 100 when he witnessed a white pickup truck with a boat and trailer swerve to the right, into the bicycle lane and shoulder, and then back into its lane. When questioned why exactly he stopped the vehicle, Trooper Montgomery stated primarily for the careless manner of driving and primarily for a welfare check, contradicting himself within seconds. On cross examination and after reviewing the video again with defense counsel, the Trooper acknowledged that this section of SR100 does not seem to have a bicycle lane after initially insisting that it did. Furthermore, on cross examination, the Trooper also admitted that there were no pedestrians, bicyclists, or vehicles impacted by the one weave to the right over the white line and onto the shoulder briefly.

The video recording does reflect the white pickup truck with a boat and trailer attached. The video recording does reflect the above driving, with the right tires briefly (approximately 5 seconds) swerving off the right side of the road, then onto the shoulder for a second. The video recording also reflects that, immediately after the swerve to the right, the Defendant used his left turn signal when changing lanes from the outside right lane to the inside left lane in front of the trooper. This maneuver was conducted at a safe distance, approximated during the hearing to be at least seventy (70) feet. The video recording also reflects that the Defendant stopped appropriately at a light. When the light turned green, the truck then proceeded appropriately through the intersection. The Trooper testified that he had no complaints about the speed of the truck. The truck then put on his left turn signal to enter into a left turn lane to then make an appropriate u-turn before stopping at the next available street off of SR100.

The Defendant contests the validity of the stop, arguing that the minor deviation was disputed by the otherwise appropriate driving, and further arguing that every traffic deviation that does not constitute a civil infraction cannot turn automatically into a welfare check. The Defendant argued the following cases: *State v. Teamer,* 151 So.3d 421 (Fla. 2014) [39 Fla. L. Weekly S478a]; *Peterson v. State,* 264 So.3d 1183 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D641a]; *Crooks v. State,* 710 So.2d 1041 (Fla. 2nd DCA 1998) [23 Fla. L. Weekly D1323b]; *Shively v. State,* 61 So.3d 484 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1111b]. The Defendant also cited several cases in the motion along many Florida Supplement cases. The State alleges that this was a simple consensual encounter that turned into an investigatory stop upon seeing the open container. The State provided the following cases for the Court's review: *State DHSMV* v. *DeShong,* 603 So.2d 1349 (Fla. 2d DCA 1992); *Bailey v. State,* 319 So.2d 22 (Fla. 1975); *State v. Davidson,* 744 So.2d 1180 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2511a]; and *Yanes v. State,* 877 So.2d 25 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1282a].

Conclusions of Law:

Having heard the testimony of Trooper Montgomery under oath, coupled with the AXON recording of the Defendant's driving, the Court finds that, as a factual matter, the driving pattern of the Defendant, which included several minutes of appropriate driving and five seconds of a minor deviation without affecting any traffic, pedestrians, or bicyclists, was insufficient to justify the traffic stop of the Defendant's vehicle for either a civil infraction or a welfare check. *See Crooks v. State,* 710 So.2d 1041 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D1323b]; *Peterson v. State,* 264 So.3d 1183 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D641a]. Therefore, the Court finds that the State failed to meet its burden and concludes that, based upon the totality of the circumstances, there was insufficient reasonable cause for the Trooper to perform a traffic stop on the Defendant's vehicle.

Based upon the above findings of fact, it is therefore ORDERED AND ADJUDGED as follows:

The Defendant's Motion to Suppress is GRANTED. All evidence after the Defendant JOSEPH C. WRIGHT is seized by being pulled over, including any statements, the results of any field sobriety exercises and any matters related to the intoxilizer test are suppressed.

* * *

Consumer law—Debt collection—Credit card—Account stated—Affirmative defense alleging failure to provide notice of assignment required by Florida Consumer Collection Practices Act is legally insufficient—Such notice is not condition precedent to suit to collect assigned debt—Defense alleging claim for account stated to collect credit card debt is disallowed because it improperly circumvents Regulation Z and is legally insufficient—Defense that plaintiff failed to register as consumer collection agency is disproved—Statute of limitations defense fails where suit for account stated was filed within four years of closing date of account statement—Defense that account stated claim is precluded by existence of express credit card agreement is legally insufficient

PORTFOLIO RECOVERY ASSOCIATES, LLC, Plaintiff, v. BRANDAN FLUMAN, Defendant. County Court, 7th Judicial Circuit in and for St. Johns County. Case No. SP14-1561, Division 65. September 14, 2020. Alexander R. Christine, Jr., Judge. Counsel: Robert E. Sickles and Jason S. Lambert, Dinsmore & Shohl, LLP, Tampa, for Plaintiff. Donato Rinaldi, Rinaldi Law, P.A., Jacksonville, for Defendant.

ORDER GRANTING PLAINTIFF'S AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DEFENDANT'S AFFIRMATIVE DEFENSES

THIS CAUSE came before the Court on Portfolio Recovery Associates, LLC's ("Portfolio") Amended Motion for Partial Summary Judgment as to Defendant's Affirmative Defenses ("Motion"), and the Court, having reviewed the Motion and authorities cited therein, having heard the argument of counsel, having reviewed the Court file, and otherwise being advised in the premises,

states as follows:

1. Portfolio's Motion seeks summary judgment as to five of Defendant's Affirmative Defenses. In order to obtain summary judgment on these defenses, Portfolio bore the burden of either disproving each affirmative defense or establishing the legal insufficiency of each defense. *Florida Dept. of Agric. v. Go Bungee, Inc.,* 678 So. 2d 920, 921 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D1948a].

2. Portfolio's Motion attacked the following affirmative defenses asserted by Defendant:

a. Failure of Statutory Condition Precedent: Failure to Give Notice of Assignment (the "Second Affirmative Defense")

b. Improper Circumvention of Regulation Z (the "Third Affirmative Defense")

c. Failure to Comply with §§559.55-559.785 (the "Fourth Affirmative Defense")

d. Time-Barred Action (the "Fifth Affirmative Defense")

e. Cause of Action Not Available to Plaintiff (the "Sixth Affirmative Defense")

The Court will now address each of these Affirmative Defenses in turn.

Defendant's Second Affirmative Defense is legally insufficient

3. The crux of Defendant's Second Affirmative Defense is that Portfolio failed to complete a condition precedent before filing its lawsuit, specifically, sending a notice of assignment as required by § 559.715, *Florida Statutes.*

4. The Court finds that the Second Affirmative Defense is legally insufficient because Florida's District Courts of Appeal have held repeatedly that § 559.715, *Florida Statutes,* does not create a condition precedent to filing a lawsuit. *See e.g. Brindise v. U.S. Bank Nat'l Ass'n.* 183 So. 3d 1215, 1216 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D223a]; *Bank of Am., N.A. v. Siefker,* 201 So. 3d 811, 816-18 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D2319a]; *Nationstar Mortg. LLC v. Summers,* 198 So. 3d 1162 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D2105a]; *Deutsche Bank Nat. Tr. Co. v. Hagstrom,* 203 So. 3d 918, 923-24 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D1671b]; *Bank of New York Mellon v. Welker,* 194 So. 3d 1078, 1080 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D1478c]; *National Collegiate Student Loan Trust 2007-1 v. Lipari,* 224 So. 3d 309, 310 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D1710a]; *Valle v. First Nat'l Collection Bureau, Inc.,* 252 F. Supp. 3d 1332, 1342 (S.D. Fla. 2017) (finding that § 559.715, *Florida Statutes,* did not create a condition precedent to the collection of an assigned consumer debt).

5. While many of the aforementioned cases arise in the context of mortgage foreclosures, *Lipari,* which is binding on this Court, expands their reasoning and holding beyond foreclosures to other types of consumer debts. The Court sees no reason why it would not be applicable the debt that is the subject of this lawsuit, especially in light of *Valle.*

6. Further, while the Court notes that Defendant cites three contrary cases in its Second Affirmative Defense, these cases were all decided before *Brindise* and its progeny, including *Lipari.*

7. Accordingly, the Court finds Defendant's Second Affirmative Defense to be legally insufficient.

Defendant's Third Affirmative Defense is legally insufficient

8. Defendant's Third Affirmative Defense is that Portfolio is not allowed to bring a claim for account stated to collect a credit card debt because it improperly circumvents Regulation Z.

9. As an initial matter, courts have repeatedly found that account stated claims to collect credit card debts do not violate federal consumer protection laws. *See Carpenter v. Monroe Financial Recovery Group, LLC,* 119 F. Supp. 3d 623 (E.D. Mich. 2015); *O'Bryne v. Portfolio Recovery Associates, LLC,* 596 Fed. Appx. 565 (9th Cir. 2015); *O'Bryne v. Portfolio Recovery Associates LLC,* Case No. 12CV447-IEG NLS, 2013 WL 1223590 (S.D.Cal. Mar. 26, 2013); *Hashimi v. CACH, LLC,* No. 12cv1010-MMA (BLM), 2012 WL 3637383 (S.D. Cal. Aug. 22, 2012); *Hadsell v. Mandarich Law Group, LLP,* No. 12-CV-235-L RBB, 2013 WL 1386299 (S.D. Cal. 2013); *Bell v. Midland Funding, LLC,* 6:17-cv-673-ORL (M.D. Fla. Mar. 8, 2018). This is meaningful because Regulation Z is intended to promote and enforce consumer protection laws.

10. Further, while Defendant alleges in the Third Affirmative Defense that Regulation Z imposed various requirements on Portfolio's predecessor in interest, Defendant does not allege that either Portfolio or its predecessor in interest actually failed to comply with Regulation Z. Notably, Defendant filed no affidavits or evidence in support of this affirmative defense.

11. Defendant instead concludes only that Portfolio's act in bringing a claim for account stated is a circumvention of these requirements. While Regulation Z may impose requirements for disclosures and writings at the initiation of a consumer credit card account, it does not impose any such disclosures or writings in subsequent legal actions to collect on allegedly unpaid accounts. Further, Regulation Z does not expressly or implicitly prevent a claim for account stated being used to recover a consumer debt.

12. Accordingly, Defendant's Third Affirmative Defense is legally insufficient.

Defendant's Fourth Affirmative Defense is disproven by the record

13. Defendant's Fourth Affirmative Defense is that Portfolio failed to register as a consumer collection agency with the Office of Financial Regulation of the state of Florida as required by § 559.555, *Florida Statutes.*

14. The Court takes judicial notice of the records of the Office of Financial Regulation of the State of Florida filed in the record in advance of the hearing on the Motion that demonstrate that Portfolio has been registered as a consumer collection agency in Florida since March 10, 1999 and that it's current license does not expire until December 31, 2020.

15. This disproves Defendant's Fourth Affirmative Defense.

Defendant's Fifth Affirmative Defense is disproven by the record

16. Defendant's Fifth Affirmative Defense is that Portfolio's lawsuit is barred by the four-year statute of limitations set forth in § 95.11(3)(k), *Florida Statutes.*

17. "A statute of limitations runs from the time the cause of action accrues which, in turn, is generally determined by the date when the last element constituting the cause of action occurs." *Hearndon v. Graham,* 767 So. 2d 1179, 1184-85 (Fla. 2000) [25 Fla. L. Weekly S682a]; § 95.031, Fla. Stat.

18. The elements of a cause of action for account stated are:

> a. (Claimant) and (defendant) had [a transaction] [transactions] between them;
>
> b. [(Claimant) and (defendant) agreed upon the balance due] [or] [(Claimant) rendered a statement to (defendant) and (defendant) failed to object within a reasonable time to a statement of [his] [her] [its] account];
>
> c. (Defendant) expressly or implicitly promised to pay (claimant) [this balance] [the amount set forth in the statement]; and
>
> d. (Defendant) has not paid (claimant) [any] [all] of the amount owed under the account.

Fla. Std. Jury Instr. (Civ.) 416.39. Put more succinctly, a cause of action for account stated accrues when a claimant renders a statement to a defendant and the defendant fails to timely object. *See Farley v. Chase Bank, U.S.A., N.A.,* 37 So. 3d 936, 937 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1296a].

19. Because the claim for account stated relies on the rendition of a statement and the failure to object to that statement, the cause of action can accrue no earlier than the rendition of the statement. *See Hertzberg & Sanchez P.C. v. Friendship Dairies Inc.,* 14 Misc. 3d 136(A), 836 N.Y.S.2d 493 (App. Term 2007) (noting that the cause

of action for an account stated is measured from the date "the balance was struck"). This, of course, assumes that the failure to object and failure to pay elements accrue immediately, something this Court does not need to determine in order to reach its conclusion in this case.

20. Here, the statement relied on by Portfolio to establish its claim indicates its closing date is March 8, 2013. Portfolio filed this lawsuit on October 21, 2014, well within the four year statute of limitations upon which Defendant bases his Fifth Affirmative Defense. Accordingly, Defendant's Fifth Affirmative Defense is disproven.

Defendant's Sixth Affirmative Defense is legally insufficient

21. Defendant's Sixth Affirmative Defense is essentially an argument that Portfolio is prevented from asserting its claim for account stated due to the existence of the original credit card agreement between Defendant and Portfolio's predecessor in interest.

22. As an initial matter, it bears noting that Portfolio's claims are not based on any statement that it sent to Defendant but, rather, are based on account statements sent by its predecessor in interest. Portfolio is not enforcing an account stated claim it created; it is enforcing its predecessor's account stated claim by virtue of being the assignee of Defendant's account.

23. Further, the existence of the express credit card agreement does not preclude Portfolio's bringing of an account stated claim against Defendant. *See Farley,* 37 So. 3d at 937 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1296a]; *Portfolio Recovery Assoc., LLC v. Escotto,* 25 Fla. L. Weekly Supp. 997b (Fla. 13th Cir. Ct. 2018); *Portfolio Recovery Assoc., LLC v. Arocho,* 25 Fla. L. Weekly Supp. 999a (Fla. 13th Cir. Ct. 2018); *Portfolio Recovery Assoc., LLC v. Johnson,* 26 Fla. L. Weekly Supp. 260a (Fla. 13th Cir. Ct. 2018). *Escotto, Arocho,* and *Johnson* expressly hold this to be the case in credit card actions, and expressly distinguish cases similar to those relied on by Defendant in support of this affirmative defense.

24. Moreover, *Farley,* and multiple other District Court of Appeal cases either expressly or implicitly allow account stated claims where an express contract also exists between the parties. *See e.g. Dutch Inns of Am. v. Jenkins,* 301 So. 2d 119 (Fla. 3d DCA 1974); *Carpenter Contractors of Am., Inc. v. Fastener Corp. of Am. Inc.,* 611 So. 2d 564, 565 (Fla. 4th DCA 1983) (noting existence of both contract and account stated claims); *Gendzier v. Bielecki,* 97 So. 2d 604, 604 (Fla. 1957) (permitting recovery under account stated where parties had also entered into a written contract); *Robertson v. Goethel,* 369 So. 2d 365, 365 (Fla. 3d DCA 1979) (affirming summary judgment for account stated where written contract also existed).

25. Accordingly, Defendant's Sixth Affirmative Defense is legally insufficient. Therefore, it is hereby ORDERED and ADJUDGED as follows:

I. Plaintiff's Amended Motion for Partial Summary Judgment as to Defendant's Affirmative Defenses is GRANTED.

II. Summary Judgment is hereby entered in favor of Plaintiff and against Defendant as to the Second, Third, Fourth, Fifth, and Sixth Affirmative Defenses.

* * *

Insurance—Discovery—Written election of deductible

EMERGENCY PHYSICIANS, INC., d/b/a EMERGENCY RESOURCES GROUP, a/a/o Suete Williams, Plaintiff, v. GEICO INDEMNITY COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2015 31759 COCI, Division 84. May 23, 2019. Dawn P. Fields, Judge. Counsel: David B. Alexander, for Plaintiff. Richard Levasseur, for Defendant.

ORDER ON MAY 15, 2019 HEARING

THIS MATTER having come before this Honorable Court on Plaintiff's Motion to Compel Complete and/or Better Responses to Plaintiff's First Request to Produce to Defendant as to the Entire Application of Insurance for the Policy of Insurance at Issue, Including But Not Limited to, the Written Election of the Deductible Executed by the Named Insured (certificate of service dated February 12, 2019) and this Honorable Court having heard arguments of counsel on May 15, 2019 and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion to Compel Complete and/or Better Responses to Plaintiff's First Request to Produce to Defendant as to the Entire Application of Insurance for the Policy of Insurance at Issue, Including But Not Limited to, the Written Election of the Deductible Executed by the Named Insured (certificate of service dated February 12, 2019) is hereby **GRANTED**.

2. In light of Defendant's position that a deductible was allegedly elected by the named insured in this matter, the named insured would have had to make such election and Plaintiff is entitled to discovery regarding said election, if any.

3. The Plaintiff is entitled to the discovery requested in paragraph number six (6.) of Plaintiff's First Request to Produce, bearing certificate of service dated June 26, 2015.

4. Defendant shall produce to Plaintiff the documents requested in paragraph number six (6.) of Plaintiff's First Request to Produce, bearing certificate of service dated June 26, 2015; specifically the entire application of insurance for the policy of insurance at issue, including but not limited to, the written election of the Personal Injury Protection deductible executed by the named insured, within thirty (30) days from the date of this Order.

* * *

Insurance—Personal injury protection—Answer—Amendment—Motion to amend answer to assert affirmative defense of exhaustion of policy limits is denied where amendment after two years of litigation and three requests by medical provider to be notified if policy limits were exhausted would prejudice provider, would be futile and is untimely

EMERGENCY PHYSICIANS, INC., d/b/a EMERGENCY RESOURCES GROUP, a/a/o Lisa Cintron, Plaintiff, v. USAA CASUALTY INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2015-SC-9934-O. January 19, 2018. Martha C. Adams, Judge. Counsel: David B. Alexander, Orlando, for Plaintiff. Clay W. Schacht, Orlando, for Defendant.

ORDER ON DEFENDANT'S AMENDED MOTION FOR LEAVE TO AMEND ANSWER AND AFFIRMATIVE DEFENSES

THIS MATTER having come before this Honorable Court on Defendant's Amended Motion for Leave to Amend Answer and Affirmative Defenses, and this Honorable Court having heard argument of counsel on December 11, 2017 and being otherwise fully advised in the premises, states as follows:

1. This is a claim for Personal Injury Protection benefits arising out of a motor vehicle collision that occurred or about February 28, 2015.

2. On March 20, 2015, the Defendant, USAA CASUALTY INSURANCE COMPANY, received a medical bill for the emergency services and care provided to Lisa Cintron by Plaintiff, EMERGENCY PHYSICIANS, Inc. d/b/a EMERGENCY RESOURCES GROUP as a result of the above referenced loss. Said medical bill met the reservation requirements set forth within Fla. Stat. §627.736(4)(c).

3. The Defendant, USAA CASUALTY INSURANCE COMPANY, failed to pay Plaintiff's medical bill.

4. On June 26, 2015, the Defendant, USAA CASUALTY INSURANCE COMPANY received a Notice of Intent to Initiate Litigation (Demand Letter) dated June 16, 2015, from the Plaintiff, EMERGENCY PHYSICIANS, Inc. d/b/a EMERGENCY RESOURCES GROUP, as assignee of Lisa Cintron.

5. Said Notice of Intent to Initiate Litigation read in pertinent part as follows:

"Further, as this is a dispute between the assignee of the insured's rights and the insurer, pursuant to Fla. Statute §627.736(6)(f), please allow this to serve as our request of notification that the policy limits under Fla. Statute §627.736 have been reached within fifteen (15) days after the limits have been reached."

6. The Defendant failed to pay the amounts set forth within Plaintiff's Notice of Intent to Initiate Litigation.

7. The Plaintiff, EMERGENCY PHYSICIANS, Inc. d/b/a EMERGENCY RESOURCES GROUP, as assignee of Lisa Cintron, filed its Complaint in this matter on August 20, 2015.

8. Along with the Service of Process, Plaintiff sent correspondence to Defendant, once again requesting notification of policy limits being reached within fifteen (15) days of said limits being reached pursuant to Fla. Stat. §627.736(6)(f).

9. Thereafter, on September 25, 2015, Plaintiff sent correspondence to counsel for Defendant, requesting for a third time notification of policy limits being reached within fifteen (15) days of said limits being reached pursuant to Fla. Stat. §627.736(6)(f).

10. This matter has been actively litigated for well over two (2) years, with pleadings, motions, hearings and extensive discovery being conducted, including the deposition of Defendant's Corporate Representative. Further, on January 18, 2016, Defendant filed with the Court a Notice of Serving Offer of Judgment/Proposal for Settlement.

11. "Under Florida Rule of Civil Procedure 1.190(a), 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." *Rosario v. Procacci Commercial Realty, Inc.,* 717 So. 2d 148 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D2108b].

12. Fla. Stat. §627.736(6)(f) reads as follows:

"In a dispute between the insured and the insurer, or between an assignee of the insured's rights and the insurer, upon request, the insurer must notify the insured or the assignee that the policy limits under this section have been reached within 15 days after the limits have been reached."

13. Based upon the record before this Court and arguments of counsel on December 11, 2017, it is clear to this Court that the amendment sought by Defendant would prejudice the Plaintiff, the amendment would be futile, and the amendment is untimely.

IT IS THEREFORE, ORDERED AND ADJUDGED that:

1. Defendant's Amended Motion for Leave to Amend Answer and Affirmative Defenses is hereby **DENIED**.

* * *

Insurance—Answer—Amendment—Motion to amend answer to assert affirmative defense of exhaustion of benefits is granted—No merit to argument that amendment should be denied because insurer allegedly waived defense by failing to give notice within 15 days of exhaustion of benefits

EMERGENCY MEDICAL ASSOCIATES OF TAMPA BAY, LLC, a/a/o Mary Brogan, Plaintiff, v. USAA GENERAL INDEMNITY COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2016-SC-000837-O. August 1, 2017. David P. Johnson, Judge. Counsel: David B. Alexander, for Plaintiff. Melanie Smith, for Defendant.

ORDER ON DEFENDANT'S MOTION TO AMEND ANSWER

This cause having come before this court on Defendant's Motion to Amend Answer, and the Court having reviewed the file and being fully advised in the premises, it is

ORDERED and ADJUDGED as follows:

That the Defendant's Motion to Amend Answer is GRANTED. First, the Court notes that an overwhelming number of Florida cases establish that the right to amend a pleading is, for all intents and purposes, unassailable and trial court orders denying motions to amend are rarely, if ever, upheld. Furthermore, the Plaintiff's argument against allowing the Defendant to amend its Answer is that the affirmative defense to be added, exhaustion of benefits, has been waived due the failure to notice the Plaintiff within the 15 day requirement of Fla. Stat. §627.736(6)(f). The Court notes that the Plaintiff is not prohibited from raising this defense even if the Answer is amended. The Court also notes that Fla. Stat. §627.736(6)(f) states that the notice *must* be given within 15 days of the exhaustion of benefits. This issue will be considered upon the filing of the appropriate motions.

* * *

Insurance—Complaint—Motion to amend granted

PHOENIX EMERGENCY MEDICINE OF BROWARD, LLC, a/a/o Christine Quinn, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2014-SC-12930-O. July 20, 2020. Gisela T. Laurent, Judge. Counsel: David B. Alexander, for Plaintiff. Ronalda Stevens, Edward K. Cottrell, and Drew Krieger, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT AND PLAINTIFF'S MOTION TO COMPEL VERIFIED ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANT (NO RESPONSE TO DISCOVERY PROVIDED)

THIS MATTER having come before this Honorable Court on Plaintiff's Motion for Leave to Amend Complaint, bearing certificate of service dated October 7, 2019; and Plaintiff's Motion to Compel Verified Answers To Plaintiff's First Set of Interrogatories to Defendant (No Response to Discovery Provided), bearing certificate of service dated September 20, 2019, and this Honorable Court having heard arguments of counsel on July 20, 2020, reviewed the Court file and authority provided by the parties, and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Leave to Amend Complaint, bearing certificate of service dated October 7, 2019, is hereby **GRANTED**.

2. Plaintiff's Amended Complaint attached to Plaintiff's Motion for Leave to Amend Complaint, bearing certificate of service dated October 7, 2019, is hereby deemed filed and shall relate back to the filing of Plaintiff's original Complaint.

3. Defendant shall file an Answer to Plaintiff's Amended Complaint within twenty (20) days from the date of this Order.

4. Plaintiff shall have twenty (20) days from Defendant's filing of Defendant's Answer to Plaintiff's Amended Complaint to file Plaintiff's Reply to Defendant's Answer to Plaintiff's Amended Complaint.

5. Plaintiff's Motion to Compel Verified Answers To Plaintiff's First Set of Interrogatories to Defendant (No Response to Discovery Provided), bearing certificate of service dated September 20, 2019, is hereby **MOOT** as Defendant filed Defendant's Notice of Service of Unverified Answers to Plaintiff's First Set of Interrogatories on November 27, 2019 and Defendant filed Defendant's Notice of Filing Verified Jurat Page on December 2, 2019.

* * *

Insurance—Personal injury protection—Discovery—Insurance policy—Election of deductible—Documentation surrounding application of deductible to subject claim

PHOENIX EMERGENCY MEDICINE OF BROWARD, LLC, a/a/o Christine Quinn, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2014-SC-12930-O. July 20, 2020. Gisela T. Laurent, Judge. Counsel: David B. Alexander, for Plaintiff. Ronalda Stevens, Edward K. Cottrell, and Drew Krieger, for Defendant.

ORDER ON PLAINTIFF'S MOTION TO COMPEL COMPLETE AND/OR BETTER RESPONSES TO PLAINTIFF'S REQUEST TO PRODUCE TO DEFENDANT BEARING A CERTIFICATE OF SERVICE DATE JULY 16, 2019

THIS MATTER having come before this Honorable Court on Plaintiff's Motion To Compel Complete And/Or Better Responses To Plaintiff's Request To Produce To Defendant Bearing A Certificate Of Service Date July 16, 2019, bearing a certificate of service dated September 20, 2019, and this Honorable Court having heard arguments of counsel on July 20, 2020, reviewed the Court file and authority provided by the parties, and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion To Compel Complete And/Or Better Responses To Plaintiff's Request To Produce To Defendant Bearing A Certificate Of Service Date July 16, 2019, bearing a certificate of service dated September 20, 2019, is hereby **GRANTED** in part and **MOOT** in part.

2. Plaintiff's Motion To Compel Complete And/Or Better Responses To Plaintiff's Request To Produce To Defendant Bearing A Certificate Of Service Date July 16, 2019, bearing a certificate of service dated September 20, 2019, is hereby **GRANTED** as to Plaintiff's requests numbered one (1.) through four (4.).

3. Defendant shall produce to Plaintiff the documentation/items requested by Plaintiff in Plaintiff's requests numbered one (1.) through four (4.). Specifically, Defendant shall produce to Plaintiff the following documentation/items within thirty (30) days from the date of this Order:

1. The entire application of insurance for the policy of insurance at issue executed by the Named Insured or Christine Quinn;

2. Any Personal Injury Protection (PIP) deductible election forms signed by the Named Insured or Christine Quinn in the possession of Defendant;

3. Any documentation signed by the Named Insured or Christine Quinn in the possession of Defendant; and

4. Any information or documentation in the possession of Defendant regarding compliance by Defendant with Fla. Stat. §627.739 surrounding application of an alleged PIP deductible in the subject claim.

4. Plaintiff's Motion To Compel Complete And/Or Better Responses To Plaintiff's Request To Produce To Defendant Bearing A Certificate Of Service Date July 16, 2019, bearing a certificate of service dated September 20, 2019, is hereby **MOOT** as to Plaintiff's request number five (5.) as Plaintiff has withdrawn from the record Plaintiff's request number five (5.) via Plaintiff's Notice of Withdrawal, bearing certificate of service dated July 9, 2020.

* * *

Insurance—Personal injury protection—Discovery—Depositions—Corporate representative of insurer—Scope of inquiry

PHOENIX EMERGENCY MEDICINE OF BROWARD, LLC, a/a/o Christine Quinn, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2014-SC-12930-O. July 20, 2020. Gisela T. Laurent, Judge. Counsel: David B. Alexander, for Plaintiff. Ronalda Stevens, Edward K. Cottrell, and Drew Krieger, for Defendant.

ORDER ON PLAINTIFF'S AMENDED MOTION TO COMPEL THE DEPOSITION OF DEFENDANT'S CORPORATE REPRESENTATIVE PURSUANT TO FLA. R. CIV. P. 1.310(b)(6)

THIS MATTER having come before this Honorable Court on Plaintiff's Amended Motion to Compel the Deposition of Defendant's Corporate Representative Pursuant to Fla. R. Civ. P. 1.310(b)(6), bearing a certificate of service dated October 7, 2019, and this Honorable Court having heard arguments of counsel on July 20, 2020, reviewed the Court file and authority provided by the parties, and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that:

1. Plaintiff's Amended Motion to Compel the Deposition of Defendant's Corporate Representative Pursuant to Fla. R. Civ. P. 1.310(b)(6), bearing a certificate of service dated October 7, 2019, is hereby **GRANTED**.

2. Defendant shall designate its corporate representative(s) pursuant to Fla. R. Civ. P. 1.310(b)(6) based upon the areas of inquiry (paragraphs numbered one (1.) through twenty-three (23.)) set forth on pages one (1) through three (3) of Plaintiff's Amended Proposed Notice of Taking Deposition Duces Tecum attached to Plaintiff's Notice of Filing Amended Proposed Notice of Taking Deposition Duces Tecum, bearing certificate of service dated July 9, 2020.

3. Defendant's designated corporate representative(s) pursuant to Fla. R. Civ. P. 1.310(b)(6) shall answer deposition questions based upon the scope of inquiry (paragraphs numbered one (1.) through twenty-three (23.)) set forth on pages one (1) through three (3) of Plaintiff's Amended Proposed Notice of Taking Deposition Duces Tecum attached to Plaintiff's Notice of Filing Amended Proposed Notice of Taking Deposition Duces Tecum, bearing certificate of service dated July 9, 2020.

4. Defendant's designated corporate representative(s) pursuant to Fla. R. Civ. P. 1.310(b)(6) shall have with him/her at the time of the deposition(s) the documentation/items set forth within the duces tecum portion of Plaintiff's Amended Proposed Notice (paragraphs numbered one (1.) through seventeen (17.) and paragraphs twenty-one (21.) through twenty-six (26.)) set forth on pages three (3) through six (6) of Plaintiff's Amended Proposed Notice of Taking Deposition Duces Tecum attached to Plaintiff's Notice of Filing Amended Proposed Notice of Taking Deposition Duces Tecum, bearing certificate of service dated July 9, 2020.

5. Pursuant to Fla. R. Civ. P. 1.310(b)(6), the notice of taking deposition that shall control the deposition of Defendant's corporate representative(s) is Plaintiff's Amended Proposed Notice of Taking Deposition Duces Tecum attached to Plaintiff's Notice of Filing Amended Proposed Notice of Taking Deposition Duces Tecum, bearing certificate of service dated July 9, 2020.

6. The deposition of Defendant's corporate representative(s), pursuant to Fla. R. Civ. P. 1.310(b)(6) and as detailed above, shall be coordinated by the parties within ten (10) days from the date of this Order and shall occur within ninety (90) days from the date of this Order.

* * *

Insurance—Personal injury protection—Discovery—Documents—Election of deductible, application and policy renewals

PHOENIX EMERGENCY MEDICINE OF BROWARD, LLC, a/a/o Christine Quinn, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2014-SC-12930-O. July 20, 2020. Gisela T. Laurent, Judge. Counsel: David B. Alexander, for Plaintiff. Ronalda Stevens, Edward K. Cottrell, and Drew Krieger, for Defendant.

ORDER ON PLAINTIFF'S MOTION TO COMPEL COMPLETE AND/OR BETTER RESPONSES TO PLAINTIFF'S FIRST REQUEST TO PRODUCE TO DEFENDANT AS TO THE ENTIRE APPLICATION OF INSURANCE FOR THE POLICY OF INSURANCE AT ISSUE, INCLUDING BUT NOT LIMITED TO, THE WRITTEN ELECTION OF THE DEDUCTIBLE EXECUTED BY THE NAMED INSURED

THIS MATTER having come before this Honorable Court on

Plaintiff's Motion To Compel Complete And/Or Better Responses To Plaintiff's First Request To Produce To Defendant As To The Entire Application Of Insurance For The Policy Of Insurance At Issue, Including But Not Limited To, The Written Election Of The Deductible Executed By The Named Insured, bearing certificate of service dated July 19, 2017, and this Honorable Court having heard arguments of counsel on July 20, 2020, reviewed the Court file and authority provided by the parties, and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion To Compel Complete And/Or Better Responses To Plaintiff's First Request To Produce To Defendant As To The Entire Application Of Insurance For The Policy Of Insurance At Issue, Including But Not Limited To, The Written Election Of The Deductible Executed By The Named Insured, bearing certificate of service dated July 19, 2017, is hereby **GRANTED**.

2. Defendant shall produce to Plaintiff the documentation/items requested by Plaintiff in Plaintiff's First Request to Produce to Defendant number six (6.). Specifically, Defendant shall produce to Plaintiff the following documentation/items within thirty (30) days from the date of this Order:

> All documents signed by the Insured, including the application for insurance, the specific election for any deductible and any and all renewal policies.

* * *

Insurance—Discovery—Documents—Written election of deductible

EMERGENCY MEDICAL ASSOCIATES OF TAMPA BAY, L.L.C., a/a/o Christopher Bahl, Plaintiff, v. GEICO INDEMNITY COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2015-SC-14820-O. July 17, 2018. Faye L. Allen, Judge. Counsel: David B. Alexander, Orlando, for Plaintiff. Ronalda Stevens, Orlando, for Defendant.

ORDER ON JULY 17, 2018 HEARING

THIS MATTER having come before this Honorable Court on Plaintiff's Motion to Compel Complete and/or Better Responses to Plaintiff's First Request to Produce to Defendant as to the Entire Application of Insurance for the Policy of Insurance at Issue, Including But Not Limited to, the Written Election of the Deductible Executed by the Named Insured (certificate of service dated July 17, 2017) and this Honorable Court having heard arguments of counsel on July 17, 2018 and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion to Compel Complete and/or Better Responses to Plaintiff's First Request to Produce to Defendant as to the Entire Application of Insurance for the Policy of Insurance at Issue, Including But Not Limited to, the Written Election of the Deductible Executed by the Named Insured (certificate of service dated July 17, 2017)is hereby **GRANTED**.

2. In light of Defendant's clear position that a deductible was allegedly elected by the named insured in this matter, the named insured would have had to make such election and Plaintiff is entitled to discovery regarding said election, if any.

3. The Plaintiff is entitled to the discovery requested in paragraph number six (6.) of Plaintiff's First Reiuest to Produce.

4. Defendant shall produce to Plaintiff the documents requested in paragraph number six (6.) of Plaintiff's First Request to Produce; specifically the entire application of insurance for the policy of insurance at issue, including but not limited to, the written election of the Personal Injury Protection deductible executed by the named insured, within thirty (30) days from the date of this Order.

* * *

Criminal law—Operating unregistered vehicle—Where defendant did not own unregistered vehicle he drives for work purposes, and there was no evidence that defendant's position with vehicle owner was such that he has access to information necessary to complete registration application, defendant was not "owner or person in charge of a motor vehicle" to which section 320.2(1) ascribes duty to register vehicle—Judgment of acquittal

STATE OF FLORIDA, Plaintiff, v. WILLIAM JOHN MORRISON, Defendant. County Court, 10th Judicial Circuit in and for Polk County, Division M-7. Case No. 19CT-8011. May 7, 2020. Robert G. Fegers, Judge. Counsel: Ashlyn Kate Darden, Assistant State Attorney, Office of the State Attorney, Bartow, for Plaintiff. Manuel Paul Bass, II, Assistant Public Defender, Office of the Public Defender, Bartow, for Defendant.

FINAL JUDGMENT OF ACQUITTAL

THIS MATTER came to be tried before this court on the 10th day of March, 2020. This Court having fully considered the evidence presented, arguments of counsel, and being otherwise fully advised in the premises does hereupon **FIND, ORDER AND ADJUDGE** as follows:

1. Defendant is criminally charged with "Unregistered Motor Vehicle" as set forth in the Information filed December 18, 2019, to-wit, in part, the State Attorney:

> charges that William John Morrison on or about October 30, 2019, in the county of Polk and state of Florida, unlawfully did own, operate or drive an unregistered motor vehicle upon a highway of the state of Florida, contrary to Florida Statute 320.02.
> (2 DEG MISD).

2. The State announced at trial, with concurrence from defense, that Defendant is specifically charged with having violated Florida Statute 320.02(1), which provides:

> Except as otherwise provided in this chapter, every owner or person in charge of a motor vehicle that is operated or driven on the roads of this state shall register the vehicle in this state. The owner or person in charge shall apply to the department or to its authorized agent for registration of each such vehicle on a form prescribed by the department. A registration is not required for any motor vehicle that is not operated on the roads of this state during the registration period.

3. The penalty provision for a violation of Florida Statute 320.02(1) is set forth in Florida Statute 320.57(1), which provides:

> Any person convicted of violating any of the provisions of this chapter is, unless otherwise provided herein, guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

4. Prior to the commencement of this trial, the State and the Court agreed to the entry of an Order of No Imprisonment. (See Florida Statute 27.512 and Florida Rules of Criminal Procedure Rule 3.994.) This trial was held before the bench, consistent therewith.

5. The material facts are not in dispute. On October 30, 2019, Defendant was involved in an automobile accident. Sheriff's Deputy Anthony Bruno responded to the vehicle crash at approximately 7:30 p.m. Upon his arrival, Patrolman Bruno noticed the vehicle driven by Defendant, a 1998 white Chevy pickup truck, had no license tag. Defendant announced to the patrolman that he doesn't own the vehicle. Defendant, at the scene of the crash, identified Luis Aquino as the owner of the vehicle. At trial, Luis Aquino testified he owns the vehicle and that Defendant drives the vehicle for work purposes. He further testified the Defendant is not authorized to obtain the tag or register the vehicle.

6. The fact that Defendant does not own the vehicle is undisputed. As such, the issue in this case is quite simple to frame: Is the Defendant "in charge" of the vehicle whereby he "shall register the vehicle in this state"?

7. Florida Statute 320.02(1) states the "person in charge shall apply

to the department or to its authorized agent for registration of each such vehicle on a form prescribed by the department."

8. Generally, Florida Statute 320.02 **Registration required; application for registration; forms**, sets forth the registration requirements of a motor vehicle operated or driven on the roads of the state.

9. The registration application requires a great deal of information of which only an "owner" or "person in charge" will have knowledge. Florida Statute 320.02(2)(a) identifies the information required to be included in the application for registration, to-wit, generally:

> • The permanent street address of the owner or the permanent address of the business. The address provided must be accompanied by appropriate personal or business identification information. In the instance of an individual, it could be a passport and for a business it could be an employee identification number.
>
> • If the owner is a veteran, his/her personal address may be protected from disclosure. See Florida Statute 320.02(2)(a)(2).
>
> • If it is the initial registration of a vehicle in this state, the vehicle identification number must be verified as required by Florida Statute 320.02(3).
>
> • The applicable statute also requires notice of a change of address of the owner "within 30 days of such change." See Florida Statute 320.02(4).
>
> • Proof of insurance, and more specifically certain types of coverage in compliance with Florida Statute 320.02(5), is also required.

10. Parts of Florida Statute 320.02 and its use of the phrase "in charge of" support the position that the expression means more than a "driver." Specifically, by way of example, Florida Statute 320.02(7), as relates to large vehicles, provides "An owner or **person in charge** of such a motor vehicle who has been exempted from the use tax by the Secretary of the Treasury shall present proof of such exemption in lieu of proof of payment" (Emphasis added.) This language suggests the expression "in charge of" is not a reference to driver conduct but ownership or management of the vehicle.

11. Obviously, the decision in this case pivots on the expression "in charge of" and whether Defendant is "in charge" of the subject vehicle. Clearly, the operation of an unregistered motor vehicle on a state road is a criminal offense for which the "owner or person in charge," upon requisite proof thereof, is the person that committed the crime by his/her failure to register said motor vehicle with the State. Being a "driver" is not, in and of itself, enough to establish a person as an "owner" or a person as "in charge." If the legislature intended criminal culpability by merely being a "driver," that word, or a word of similar import such as "operator," would have been used in the statute instead of the expression "in charge of." Certainly, being a "driver" is a fact that may be considered in making a determination that the person is "in charge" of the vehicle but being a "driver" is simply not enough proof. Minimally, some evidentiary showing of Defendant's position with the owner of the vehicle whereby Defendant has access to the information necessary to properly complete the application required by the state may be persuasive. However, such evidence was not presented in this case.

12. As a parallel analysis, it is worth noting the treatment of an "operator" driving a vehicle without proof of registration as set forth within Florida Statute 320.0605(1)(a), which provides, in part:

> The registration certificate . . .shall, at all times while the vehicle is being used or operated on the roads of this state, be in the possession of the operator thereof . . . and shall be exhibited upon demand of any authorized law enforcement officer . . . A violation of this section is a noncriminal traffic infraction, punishable as a nonmoving violation as provided in Chapter 318.
>
> Moreover, note Florida Statute 316.605(1), which provides in part: Every vehicle, at all times while driven, stopped or parked upon any highways, roads or streets of this state, shall be licensed in the name of the owner . . . A violation of this subsection is a noncriminal traffic infraction, punishable as a nonmoving violation as provided in Chapter 318.

13. In conclusion, the Information alleges Defendant "**unlawfully did own, operate or drive an unregistered motor vehicle**." Those facts are conceded. However, the language in the Information does not track the statute cited therein as constituting a criminal offense. In context, the statute cited actually references a vehicle used on the road of this state and ascribes a duty to register said vehicle to the person who "owns" or who is "in charge of" said vehicle. The Defendant did not have said duty. The conduct of this Defendant as alleged in the Information is more closely aligned with the noncriminal offenses noted above. (See analysis in *Willis v. State,* 762 So.2d 1005 (5th DCA 2000) [25 Fla. L. Weekly D1655a].)

14. The State and Defendant point to *Riggins v. State,* 67 So.3d 244 (2nd DCA 2010) [35 Fla. L. Weekly D2480b] as controlling authority, but obviously with a differing perspective and interpretation. In this Court's review, the *Riggins* court simply addressed the fundamental proof needed by the State to prove its case, i.e., the vehicle is unregistered. The *Riggins* court analyzed whether the evidence of the Riggins vehicle being unregistered, as presented by the State at trial, constituted hearsay. The *Riggins* court did not analyze the issue decided herein. As such, this Court finds the parties reliance on *Riggins* is misplaced.

15. In conclusion, the Court finds the evidence insufficient to prove Defendant violated Florida Statute 320.02 (1), the crime for which Defendant is charged. For the foregoing reasons, the Court determines Defendant is **NOT GUILTY** and is hereby acquitted.

* * *

Insurance—Personal injury protection—Request for information or documentation—Medical provider's suit against insurer is not premature where medical provider provided evidence that it never received requests for information or documentation, and insurer failed to present evidence of provider's receipt of requests

NEW LIFE REHAB MEDICAL CENTER, a/a/o Manuel Paez Salazer, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2015-010242-CC-26, Section SD04. August 13, 2020. Lawrence D. King, Judge. Counsel: Vanessa Banni, Corredor & Husseini, P.A., Doral, for Plaintiff. Camille White, House Counsel for United Automobile Insurance Company, Miami, for Defendant.

AMENDED ORDER GRANTING PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE came before the Court for a Zoom virtual hearing on August 13, 2020, regarding Plaintiff's Motion for Final Summary Judgment. All counsel of record were present. The Court having reviewed said Motion, the Defendant's Response thereto, all exhibits, affidavits and depositions filed in support of the respective motion(s), having heard argument of counsel and being otherwise fully apprised in the premises hereby enters the following ruling.

WHEREFORE, IT IS ORDERED AND ADJUDGED that Plaintiff's Motion for Final Summary Judgment is **GRANTED**.

Respectfully, there exists no remaining genuine issues of material fact pursuant to Rule 1.510, Fla. R. Civ. P., related to the statutory Fla. Stat. 627.736 6(b) request letters alleged to have been mailed by Defendant. The substantial evidence before this Court contained in the Clerk of Court's record reveals that Plaintiff never received by United States Mail the five letters in dispute, and which letters were subject of the Defendant's Affirmative Defense. Plaintiff's Corporate Representative denied under oath ever receiving these 6(b) letters at any time. This evidence held up to the light most favorable to the non-moving party, clearly supports as a matter of law the relief sought in Plaintiff's motion. The persuasive attestations of Plaintiff's Corporate

Representative found in his affidavit, remained consistent with the testimony contained in his deposition, otherwise meeting the necessary factual elements and legal burden in this regard.

Indeed, the burden then appropriately shifted to Defendant to bring forth sufficient documentary evidence of Plaintiff's actual receipt of the 6(b) request letters. No such evidence was established or contained in the sworn deposition testimony, or contained in the affidavit of Defendant's Claims Representative. Moreover, the business records specifically maintained by Defendant for the purpose of confirming receipt by Plaintiff of the 6(b) letter(s), lacked the usual and customary signature confirmation, or tracking confirmation to affirmatively show that the letters were even mailed, or were ever received by Plaintiff for timely response. The mere assertion of mailing by Defendant's Claim's Representative without her personal knowledge or participation in the actual mailing process is at best only speculation, and insufficient to create a genuine issue of material fact to survive the entry of an order granting Plaintiff's Motion for Final Summary Judgment. Therefore, the suit for PIP benefits brought by Plaintiff is not premature. This is Defendant's only remaining affirmative defense, and it is therefore without merit.

Lastly, Defendant was not without remedy, as it could have timely availed itself of the supplemental requests provided for in section 6(c), however chose not to do so, and therefore waived any such statutory right. *See generally Millennium Diagnostic Imaging Center Inc. v. State Farm Mutual Automobile Ins. Co*., 129 So. 3d 1086, 1089 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D2077a]

* * *

Liens—Judgment lien—Motion to perfect motor vehicle lien is granted, but lien does not attach to first $2,000 of value of vehicle

SURF CONSULTANTS III, LLC, Plaintiff, v. JESSENIA GIL, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-009073-CC-23, Section ND01. March 11, 2020. Myriam Lehr, Judge. Counsel: Steven B. Sprechman, Sprechman & Fisher, P.A., Miami, for Plaintiff. Mandy L. Mills, Legal Services of Greater Miami, Inc., Miami, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO PERFECT MOTOR VEHICLE LIEN AND DENYING PLAINTIFF'S MOTION TO COMPEL PRODUCTION AND INTERROGATORIES

THIS CAUSE having come before the Court upon Plaintiff's Motion to Perfect Plaintiff's Judgment Lien on Motor Vehicle, Defendant's Objection to Plaintiff's Motion to Perfect Judgment Lien, and Plaintiff's Motion to Compel Production and Interrogatories, and the Court, having reviewed the pleadings and being otherwise duly advised in the premises, finds as follows:

1. Defendant submitted to Plaintiff requested discovery responses on March 5, 2020.

2. Plaintiff holds a Judgment Lien pursuant to its Judgment Lien Certificate filed on March 13, 2019.

3. Florida Statute section 55.204(1) mandates that "a judgment lien acquired under s. 55.202 lapses and becomes invalid 5 years after the date of filing of the judgment lien certificate." Fla. Stat. § 55.204(1).

4. Defendant is the title owner of a 2011 Hyundai Sonata, having VIN: 5NPEB4AC6BH210124 (hereafter, "the Vehicle")

5. Defendant filed an Affidavit and Inventory in this matter asserting that $2,000.00 of the value of the Vehicle is protected from imposition of a Judgment Lien pursuant to Article X, section 4, of the Florida Constitution and section 222.25(1) of Florida's Statutes.

6. Article X, section 4, of the Florida Constitution states that "[n]o judgment . . . shall be a lien thereon . . . the following property owned by a natural person: . . . personal property to the value of one thousand dollars."

7. Section 222.25(1) states, "[t]he following property is exempt from attachment, garnishment, or other legal process: (1) A debtor's interest, not to exceed $1,000 in value, in a single motor vehicle as defined in s. 320.01."

8. Plaintiff's Judgment Lien cannot encumber the $2,000.00 of claimed protected value in the Vehicle.

9. Plaintiff's Motion to Compel Production and Interrogatories is DENIED as moot.

10. Plaintiff's Motion to Perfect Plaintiff's Motor Vehicle Lien is GRANTED.

11. The Florida Department of Highway Safety and Motor Vehicles (FLHSMV) shall place a lien on its records and/or on the title of the Vehicle described in paragraph 4 of this Order, and note that Plaintiff's Judgment Lien does not attach to the first $2,000.00 of the value in the Vehicle.

* * *

Insurance—Personal injury protection—Coverage—Exhaustion of policy limits—Where benefits have been properly exhausted, insurer's liability for benefits has ended

HESS SPINAL & MEDICAL CENTERS, INC., a/a/o Vernon Slater, Plaintiff, v. THE STANDARD FIRE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Small Claims. Case No. 19-CC-036585. July 31, 2020. Michael C. Baggé-Hernández, Judge. Counsel: C. Spencer Petty, Irvin & Petty, P.A., St. Petersburg, for Plaintiff. Michael J. Wyatt, Cole, Scott & Kissane, P.A., Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come before the Court on June 3, 2020, on Defendant's Motion for Summary Judgment and the Court having reviewed the file and heard argument of counsel, and otherwise fully advised in the premise and the law, the Court finds as follows:

1. This is a Personal Injury Protection ("PIP") case brought against Defendant, The Standard Fire Insurance Company ("Defendant"), by Hess Spinal & Medical Centers, Inc. ("Plaintiff") as assignee of Vernon Slater ("Assignor"), for injuries allegedly sustained in a motor vehicle accident on March 30, 2019.

2. At the time of the alleged accident, the Assignor was covered under a policy of insurance issued by Defendant that provided Ten Thousand and 00/100 ($10,000.00) dollars in PIP benefits.

3. The undisputed facts reveal that all timely and properly submitted bills were paid in good-faith and pursuant to the policy and the Florida No-Fault Law and that the policy benefits at issue exhausted on or about July 2, 2019.

4. As cited in Defendant's Motion, the Court follows clear precedent and finds that an insurer's liability for benefits ends once the policy limit has been exhausted absent a showing a bad faith. *See Northwoods Sports Med. & Physical Rehab., Inc. v. State Farm Mutual Automobile Insurance Company,* 137 So. 3d 1049 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a]; *MTM Diagnostic, Inc. v. State Farm,* 9 Fla. L. Weekly Supp. 581e (Fla. 13th Jud. Cir. (App.), Nov. 20, 2000); *Progressive American Ins. Co. v. Stand-Up MRI of Orlando,* 990 So.2d 3 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1746a].

5. Based on the above, this Court has determined that Defendant has properly exhausted benefits.

6. Therefore, considering the foregoing, it is hereupon ordered and adjudged that Defendant's Motion for Summary Judgment is hereby GRANTED.

7. The Plaintiff shall take nothing by this action and the Defendant shall go hence without a day.

8. The Court reserves jurisdiction to tax fees and costs for the Defendant as the prevailing party.

* * *

Insurance—Personal injury protection — Application— Misrepresentations—In action by medical provider for PIP benefits, insurer's motion for summary judgment on ground that action is barred by final judgment in favor of insurer in declaratory action against insured finding that insured made material misrepresentation on policy application is denied—Where insurer failed to plead collateral estoppel or res judicata as affirmative defenses summary judgment would be inappropriate—Where insurer knew or should have known about assignment to provider prior to declaratory action but failed to name provider in that action, application of collateral estoppel or res judicata would be inequitable and conflict with provisions of declaratory judgment statute requiring that no declaration prejudice the rights of persons not parties to the proceedings

PHYSICIANS GROUP, L.L.C., a/a/o Beverly Walker, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, a foreign profit corporation, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 19-CC-033356, Division J. August 24, 2020. Daryl M. Manning, Judge. Counsel: Nicholas A. Chiappetta, Marten | Chiappetta, Lake Worth, for Plaintiff. Alfred Villoch, III, Savage Villoch Law, PLLC, Tampa, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE having come before the Court for hearing on May 14, 2020 upon Defendant's Motion for Summary Judgment and the Court, having reviewed the motions, the Court file, the case law presented, and having heard argument of counsel and being otherwise fully advised in the premises, the Court makes the following findings of fact and conclusions of law:

BACKGROUND

1. The Court has been asked to determine whether the application of res judicata or collateral estoppel is appropriate in this case to preclude a judicial determination of the merits as to whether Named Insured made a material misrepresentation on the insurance policy application.

2. On June 28, 2018 an omnibus insured, Beverly Walker, assigned her right under the applicable insurance policy to the Plaintiff in exchange for the medical service provide from June 28, 2018 through July 02, 2018.[1]

3. On November 01, 2018, after execution of the assignment and notice of the Plaintiff's claim, the Defendant filed a declaratory action in Pinellas County against the Named Insured and Omnibus Insured ("Pinellas Action"). The Plaintiff was not named in the Pinellas Action.

4. On June 14, 2019, the Plaintiff filed this instant action against the Defendant seeking to recover unpaid Personal Injury Protection benefits.

5. On January 03, 2019, the Defendant in this action obtained a default final judgment against the Named Insured in the Pinellas Action.

6. On February 20, 2020, the Defendant in this action, obtained a default final judgment against the Omnibus Insured in the Pinellas Action.

7. On March 10, 2020, the Defendant filed its Motion for Summary Judgment/Disposition, which included both of the Pinellas Action's default final judgments ("Default Judgments"). The Defendant now attempts to utilize the Default Judgments as evidence to support its Motion for Summary Judgment/Disposition.

8. The Plaintiff claimed lack of knowledge with regards to the Pinellas Action, and that it first became aware of the Pinellas Action on March 10, 2020.

9. On July 23, 2019, the Defendant filed and served its Answer and Affirmative Defenses ("Answer"). The Defendant in its Answer, alleged three affirmative defenses, none of which are res judicata or collateral estoppel.

10. On May 14, 2020, this Court heard arguments on Defendant's Motion for Summary Judgment/Disposition and the Plaintiff's Response in opposition.

11. The Defendant urged the Court to follow assignment law, and rule that the Default Judgments in the Pinellas Action extinguished the Plaintiff's rights as an assignee.[2]

12. The Plaintiff argued that: (1) the Defendant's use of the Default Judgments inescapably require the Court to apply the equitable doctrine of res judicata or collateral estoppel, and as such, either doctrine must be plead as an affirmative defense; (2) section 86.091, Florida Statutes expressly precludes application of res judicata or collateral estoppel; (3) section 86.091, Florida Statutes does not allow a declaratory decree to have a binding effect on non-parties; and (4) that the Plaintiff was an indispensable party to the Pinellas Action who was deprived of due process as a result of the Defendant's intentional choice to exclude it from the Pinellas Action.

FINDINGS

13. As a preliminary matter, the Plaintiff correctly points out that res judicata and collateral estoppel are affirmative defenses that must be plead. *See*, *e.g.*, *Thews v. Wal-Mart Stores E., LP*, 210 So. 3d 723, 724 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D376a]; *Neapolitan Enterprises, LLC v. City of Naples,* 185 So. 3d 585, 589 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D299a] (normally affirmative defenses such as res judicata and collateral estoppel must be raised in an answer). Generally, "courts are not authorized to grant relief not requested in the pleadings." *Pond v. McKnight,* 339 So.2d 1149 (Fla. 2d DCA 1976).

14. In this case, neither res judicata or collateral estoppel have been plead by the Defendant. Therefore, the Court finds summary judgment inappropriate. *See*, *e.g.*, *Bank of N.Y. Mellon v. Reyes,* 126 So.3d 304, 309 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D665a] ("[A] judgment which grants relief wholly outside the pleadings is void.").

15. Florida's declaratory action statute is a *substantive legal right*.[3] See 86.101, Fla. Stat. Section 86.091, provides:

> When declaratory relief is sought, all persons may be made parties who have or claim any interest which would be affected by the declaration. No declaration shall prejudice the rights of persons not parties to the proceedings.[4]

16. In *Pagan v. Sarasota County Pub. Hosp. Bd.,* 884 So. 2d 257, 264 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1869a], The Second District Court of Appeals addressed trial court's declaratory decree. The trial court ordered and adjudged that "nothing adjudicated in this action will be binding or have any effect by way of res judicata, [or] collateral estoppel" on the intervenors. See § 86.091, Fla. Stat. (2001). The Second DCA found that the language in the order could be misread to have binding effect on the dismissed intervenors or other non-parties. The Second District Court of Appeals went on to state that section 86.091, Florida Statutes does not permit a declaratory decree to have a binding effect on non-parties.

17. Similarly, in *Reinstein v. Pediatric Gastroenterology, Hepatology & Nutrition of Florida, P.A.,* 25 So. 3d 54, 59 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D2550b], the Second District Court of Appeals made clear, by way of inference, that in order for declaratory decree to be binding against an adverse person in interest, the interested person must be a named party before the court. Notably, the Second District Court of Appeals found reversible error in dismissing Dr. McClenathan because it found Dr. Reinstein had a right to obtain declaratory relief that would be binding on Dr. McClenathan.

18. The Defendant argues that the distinguishing point in this case is the fact that the Plaintiff is an assignee, and therefore, in privity with the named parties in the Pinellas Action. As such, the Defendant implicitly alleges that application of the equitable doctrines of res judicata or collateral estoppel are appropriate. However, an insured

assignor who assigns all of their rights under a policy is not a proper defendant in an action for declaratory relief. *See Citizens Prop. Ins. Corp. v. Ifergane,* 114 So. 3d 190, 195 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2205a].

19. On the other hand, the Plaintiff argues that it was an indispensable party to the Pinellas Action. *See Allman v. Wolfe,* 592 So. 2d 1261, 1263 (Fla. 2d DCA 1992)(assignee is an indispensable party to action for rescission). The Plaintiff alleges that by virtue of being indispensable, it was not afforded due process in the Pinellas Action, and that due process requires that an indispensable party be permitted to defend a lawsuit. *See Green Emerald Homes, LLC v. 21st Mortgage Corp.,* 44 Fla. L. Weekly D1449b (Fla. 2d DCA June 7, 2019). Lastly, the Plaintiff argues that the Default Judgments are void or non-binding because it was not a party to the Pinellas Action. *See*, *Tannenbaum v. Shea,* 133 So.3d 1056, 1061 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D137a] ("A judgment is void if, in the proceedings leading up to the judgment, there is [a] violation of the due process guarantee of notice and an opportunity to be heard."); *See* §86.091, Fla. Stat.

20. Even when the elements of res judicata or collateral estoppel are met, neither equitable doctrine should be applied when they will "defeat the ends of justice". *See Alvarez v. Cotarelo,* 626 So. 2d 267, 268 (Fla. 3d DCA 1993; *State v. McBride,* 848 So.2d 287, 291 (Fla.2003) [28 Fla. L. Weekly S401a] (res judicata will not be invoked where it would defeat the ends of justice); *Aeacus Real Estate Ltd. Partnership v. 5th Ave. Real Estate Development, Inc.,* 948 So. 2d 834 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D275a] (res judicata is an equitable doctrine not to be invoked where it will inflict pernicious results.); *Universal Construction Co. v. City of Fort Lauderdale,* 68 So.2d 366 (Fla.1953).

21. Here, the Defendant knew or should have known about the assignment prior to the Pinellas Action. As such, it was incumbent upon the Defendant to include the Plaintiff in that action. The Defendant's failure to name the Plaintiff in the Pinellas Action requires this Court to find that the application of res judicata or collateral estoppel would inflict a pernicious result that would defeat the ends of justice. Therefore, this Court finds that utilizing an equitable fiction such as res judicata or collateral estoppel would not be proper based upon the facts of this case.

22. While the Defendant argues the possibility of inconsistent judgments in the form of "granting greater rights to the assignee." This is simply not true. The Court is simply a ruling in favor of adjudicating the matter on the merits. Further, it provides the Plaintiff with due process, which was not previously provided in the Pinellas Action. Adjudicating the matter on the merits will provide resolution through a proper determination as to whether the policy at issue should have been "voided" at all.[5]

23. In sum, the Court finds that it would be inequitable to allow the Defendant to utilize the equitable doctrine of res judicata or collateral estoppel in this case as it would defeat the ends of justice. Since, "courts [are] more interested in the fair and proper administration of justice than in rigidly applying a fiction of the law designed to terminate litigation," either equitable doctrine is inappropriate in this case. *See*, *e.g.*, *Universal Construction Co.,* 68 So.2d 366 (Fla.1953). Lastly, application of either equitable doctrine would conflict with the legal provisions in section 86.091, Florida Statutes. To rule otherwise, could potentially violate the Separation of Powers doctrine.

Accordingly, it is hereupon ORDERED and ADJUDGED, as follows:

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

[1]Pursuant to section 627.736(5)(c), the Plaintiff is required to bill the Defendant within Thirty-Five (35) days from the date of treatment unless a Notice of Initiation of Treatment is sent to the Defendant, in which case the Plaintiff has Seventy-Five (75) days from the date of treatment to bill the Defendant. In either case, the Defendant should have had notice of Plaintiff's claim prior to instituting the Pinellas Action.

[2]**N.B.** While an assignment may confer rights, it also confers standing to the assignee.

[3]Courts of equity have no power to overrule established law. *Orr v. Trask,* 464 So. 2d 131, 135 (Fla. 1985).

[4]Res judicata and collateral estoppel are equitable doctrines utilized to bar parties from re-litigating claims and issues previously decided by a final adjudication on the merits. *Anderson v. Vanguard Car Rental USA Inc.,* 60 So. 3d 570 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1019a].

[5]The Plaintiff alleged that it maintains an avoidance, which it was precluded from alleging in the Pinellas Action, and could potentially change the outcome of the instant proceeding.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Erratic driving pattern—Where defendant drove too closely behind vehicle, drove 15 mph below speed limit, repeatedly applied his brakes for no apparent reason, and swerved within his lane several times, trooper had probable cause for traffic stop—Motion to suppress is denied

STATE OF FLORIDA, v. AARON MICHAEL HOPE, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 2019CT017708AXXX, Division C. September 1, 2020. Leonard Hanser, Judge. Counsel: Robert Scavone, Jr., Assistant State Attorney, for State. Matthew A. Goldberger and Jonathan Wasserman, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED IN UNLAWFUL SEIZURE

Defendant's Motion to Suppress Evidence Obtained In Unlawful Seizure came before the Court on August 20, 2020. Matthew A. Goldberger, Esq. and Jonathan Wasserman, Esq., represented Defendant. Robert Scavone, Jr., Assistant State Attorney, represented the State of Florida.

Based on the testimony, videotape, argument of counsel, and case law and statutes, the Court finds:

1. Defendant is charged with driving under the influence, a violation of § 316.193(1), Florida Statutes, pursuant to an information filed October 16, 2019.

2. On September 23, 2019, at approximately 12:30 a.m., Trooper Sayih of the Florida Highway Patrol was on road patrol in Palm Beach County, heading southbound on 1-95 in the Boynton Beach area. He noticed a black pick-up truck, also heading southbound, and paced the truck driving 50 m.p.h. in a 65 m.p.h. zone. Trooper Sayih observed the black truck following another vehicle at a distance unsafely closely behind based on the vehicles' speeds and traffic conditions. The trooper also noticed the black truck swerving within its lane, and the truck's brake lights being activated several times for no apparent reason. The black truck could have avoided following closely behind by changing lanes but did not do so.

3. Defendant contends that the driving pattern observed by Trooper Sayih did not establish legally sufficient reasonable suspicion to effect a traffic stop of the black pickup truck which the trooper came to know was being driven by Defendant. Accordingly, Defendant seeks to suppress all evidence acquired as the result of an allegedly unlawful stop.

4. The Court disagrees with Defendant's argument and finds the stop of Defendant was lawful. This finding is based on reviewing only the first 1:15 of the videotape, as urged by Defendant, along with the testimony.

5. The factual circumstances observed by the trooper support the stop. The Court finds the trooper's testimony to be credible and supported by the videotape admitted into evidence.

6. One factor supporting the lawfulness of the stop is that Defendant was driving too closely to the car in front, a violation of § 316.0895(1), Florida Statutes. The trooper testified to this occurring and the videotape also confirms this. The first 1:15 of the videotape covers a distance of at least one mile. During that entire time, Defen-

dant was less than five car lengths behind the car in front, based on a scale of having at least one car length per each ten miles per hour of speed behind the vehicle in front, the measuring calculation employed by Florida Highway Patrol according to the trooper's testimony. Furthermore, there are three occasions on the first 1:15 of videotape on which Defendant applies his brakes, for no apparent reason other than Defendant may be realizing he is driving too closely to the car in front.

7. Another aspect of Defendant's driving pattern supporting the lawfulness of the stop is that, as testified to by the trooper and shown on the videotape, Defendant clearly was weaving within his lane. In fact, on more than one occasion, Defendant's vehicle is shown as drifting to the left line then Defendant apparently overcorrecting and driving very closely to the right line. Defendant's swerving within the lane is observable during almost the entire first 1:15 of the videotape, a distance of approximately one mile.

8. The videotape and trooper's testimony confirm that the trooper had probable cause to stop Defendant for the traffic violation of following too closely. *Whren v. United States,* 517 U.S. 806, 116 S.Ct. 1769 (1996). Furthermore, the totality of the circumstances observed by Trooper Sayih and confirmed by the videotape indicate the stop was based on more than a "hunch", that it was based on an articulable factual basis, including following too closely, weaving within the lane, and driving 15 m.p.h. below the posted speed, providing reasonable suspicion for a stop. *Department of Highway Safety & Motor Vehicles v. DeShong,* 603 So.2d 1349 (Fla. 2d DCA 1992); *Esteen v. State,* 503 So.2d 356 (Fla. 5th DCA 1987).

For all of the reasons stated herein, Defendant's Motion is denied.

* * *

Insurance—Personal injury protection—Attorney's fees—Claim or defense not supported by material facts or applicable law—Insurer is entitled to award of attorney's fees where medical provider knew or should have known that it lacked standing due invalid assignment

PALM BEACH SPINAL CARE CENTER, LLC., a/a/o Shawn Coicou, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 502019SC002076XXXXMB. September 10, 2020. Sandra Bosso-Pardo, Judge. Counsel: Michael Fischetti, for Plaintiff. Manshi Shah, The Law Office of Jeffrey Hickman, West Palm Beach, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR SANCTIONS PURSUANT TO SECTION 57.105, FLORIDA STATUTES

THIS CAUSE having come on to be heard on August 27, 2020, on Defendant's Motion for Sanctions Pursuant to Section 57.105, Florida Statutes, the Court having reviewed the aforementioned motion, the relevant legal authority, heard argument of counsel, and been sufficiently advised on the premises, it is hereby ordered:

1. Defendant's Motion for Sanctions Pursuant to Section 57.105, Florida Statutes is **GRANTED.**

2. On March 19, 2020, Defendant served Plaintiff with Defendant's Motion for Sanctions Pursuant to Section 57.105 because Plaintiff failed to submit an assignment of benefits assigning the Insured's personal injury protection benefits to the Plaintiff provider. Therefore, Plaintiff lacked standing to bring the instant suit and Plaintiff knew or should have known that he was unable to proceed with the invalid assignment. The complaint was not supported by the material facts necessary to establish the claim, to wit the assignment was invalid.

3. Plaintiff failed to dismiss the instant suit within 21 days, and on April 15, 2020, Defendant filed their Motion for Sanctions Pursuant to Section 57.105, Florida Statutes.

4. Defendant's Motion for Summary Judgment—No Assignment of Benefits was set for July 17, 2020.

5. On July 16, 2020, Plaintiff filed a Notice of Voluntary Dismissal Without Prejudice.

6. "In general, when plaintiff voluntarily dismisses action, defendant is prevailing party for purpose of awarding attorney's fees." *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 919 (1990). "A determination on the merits is not a prerequisite to an award of attorney's fees where the statute provides that they will inure to the prevailing party." *Id.*

7. Therefore, the court finds that the Defendant is entitled to an award of attorneys fees under FS 57.105.

The Court reserves jurisdiction to determine Defendant's amount of attorneys' fees and costs.

* * *

Insurance—Personal injury protection—Declaratory actions—Dismissal—Declaratory action is dismissed where medical provider does not truly seek construction of any policy provisions and is disguising breach of contract action as declaratory action

DAVID N. MIGDAL, D.C., d/b/a SOUTHERN CHIROPRACTIC LIFE CENTER (Patient: Jacqueline Erian), Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 502020CC004129XXXXSB. September 16, 2020. Marni A. Bryson, Judge. Counsel: Manshi Shah, The Law Office of Jeffrey R. Hickman, West Palm Beach, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR DECLARATORY JUDGMENT

THIS CAUSE having come upon on Defendant's Motion to Dismiss Plaintiff's Complaint for Declaratory Judgment, and the Court having reviewed the aforementioned motion, heard argument of counsel, and otherwise being sufficiently advised on the premises, it is hereby ordered:

1. Defendant's Motion to Dismiss Plaintiff's Complaint is **GRANTED.**

2. In Plaintiff's Complaint, in the Wherefore paragraph Part B, Plaintiff requests this Court to "retain jurisdiction to order any supplemental relief, as may be necessary to do complete justice in this matter and between the parties."

3. In *Bristol West Ins. Co. v. MD Readers, Inc.*, MD Readers sought a declaration of the correct statutory formula for calculating payments under PIP benefits for the physician fees in connection with radiological readings. 52 So. 3d 48, 50 (Fla. Dist. Ct. App. 2010) [35 Fla. L. Weekly D2832a]. MD Readers moved to certify a class of health care providers receiving payment for services from Bristol West under PIP benefits. *Id.* Bristol West Ins. Co. objected to class certification alleging the declaratory judgment was simply a disguise for money damages, and MD Readers had not submitted a demand letter pursuant to section 627.736(11), Florida Statutes. *Id.* The lower Court certified the class, and Bristol West Ins. Co. appealed to the Fourth District Court of Appeals. *Id.* The Fourth DCA affirmed the class certification, and stated that MD Readers "denied any right in this action, including supplementary relief, to seek damages, we conclude that the court did not err in certifying a class for the sole purpose to declare the correct calculation to be applied for reimbursement of MRI services from August 2004 to August 2005." *Id.* at 51.

4. Here, in Plaintiff's Wherefore paragraph Part B, Plaintiff is seeking "supplemental relief," and therefore, Plaintiff is disguising a breach of contract action as a declaratory action.

5. Moreover, in response to Defendant's Motion to Dismiss, Plaintiff argued *Green v. State Farm Mutual Automobile Ins. Co.* 225 So.3d. 229 (Fla. Dist. Ct. App. 2017) [42 Fla. L. Weekly D1119a]. However, the *Green* case is distinguishable from the current matter.

In *Green*, the Plaintiff filed a class action regarding whether State Farm could reimburse in accordance with a fee schedule when State Farm had not elected a fee schedule in their policy and whether State Farm provided notice to their insureds regarding their election to use fee schedules. *Id*. Here, the Defendant has provided notice in their policy of its election to use fee schedules. *GEICO Gen. Ins. Co. v. Virtual Imaging Servs., Inc.*, 141 So.3d 147 (Fla. 2013) [38 Fla. L. Weekly S517a].

6. In this matter, there is no policy interpretation needed.

7. Moreover, in paragraphs sixteen (16) and seventeen (17) of Plaintiff's Complaint, Plaintiff states that electrical stimulation should be reimbursed pursuant to the participating physician fee schedule of Medicare Part B. Therefore, Plaintiff has answered their own question, and it appears there is no doubt or confusion on Plaintiff's part.

8. The Plaintiff does not truly seek the construction of any of the clauses in the contract as Plaintiff fails to cite any provisions of the policy it is in doubt about.

9. Defendant's Motion to Dismiss Plaintiff's Complaint is **GRANTED.**

* * *

Insurance—Personal injury protection—Venue—Forum selection clause—Venue of PIP action in county where medical provider has its office and payment on policy is to be made is proper and valid—Forum selection clause that requires that any legal action to determine coverage be filed and maintained in county where policy was issued does not apply to venue for breach of contract action—Further, it would be unjust to enforce forum selection clause where terms and conditions of policy are dictated by Florida No-Fault Law, and that law does not authorize or mention forum selection clause

S. VIROJA, P.A., d/b/a SHREE MRI, a/a/o Posner Dumilor, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 502020SC008145XXXXSB RD. September 1, 2020. Reginald R. Corlew, Judge. Counsel: Nicholas A. Zacharewski, Simon & Zacharewski, LLP, Boynton Beach, for Plaintiff. Russell Kolodziej, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS RE: IMPROPER VENUE PURSUANT TO VENUE SELECTION CLAUSE & FLORIDA DOMESTIC CORPORATION STATUS VIA FLA. STAT. 47.051

This cause came to be considered on the Defendant's Motion to Dismiss Re: Improper Venue Pursuant to Venue Selection Clause & Florida Domestic Corporation Status Via Fla. Stat. 47.051, the court having reviewed the file and hearing argument of counsel, is Denying Defendant's Motion for the following reasons:

Relevant Facts:

The Plaintiff, S. VIROJA, P.A. d/b/a SHREE MRI brought this action for breach of contract seeking personal injury protection (PIP) benefits for treatment rendered to Posner Dumilor as the result of a motor vehicle accident. It is uncontested that Plaintiff is a corporation with a principle place of business in Palm Beach County; that the insured, Posner Dumilor, is a resident of Palm Beach County; that the subject services at issue in this action were rendered in Palm Beach County; that the subject motor vehicle accident took place in Palm Beach County; the referring phsyician is located in Palm Beach County, and the place where payment was to be made is Palm Beach County. Defendant is an insurance company with its principle place of business in Miami-Dade County. Defendant issued a policy of insurance to Posner Dumilor in Palm Beach County, Florida, through an insurance agent located in Palm Beach County, Florida.

Defendant's Argument

Defendant argued that Plaintiff's action must be dismissed and re-filed in Miami-Dade County for two reasons. First, Defendant argued that the policy contains a venue selection clause which provides: "**Any legal action against us to determine coverage under this policy shall be filed and maintained in the county where the policy was issued."** Second, Defendant argued that pursuant to Florida Statute Section 57.051, venue is proper in Miami-Dade County because Defendant is a Florida corporation with its principle place of business in Miami-Dade County and it transacts its ordinary business in Miami-Dade County. In the alternative, Defendant argued that the case should be transferred to Miami-Dade County.

Plaintiff's Argument

Plaintiff raised several objections to Defendant's arguments regarding the motion to dismiss and venue selection clause. First, Plaintiff argued that in a breach of contract action, venue is proper where the payment is to be made. Second, Plaintiff argued that Defendant's own venue selection language in the policy of insurance limits the clause to only those actions regarding coverage and not actions seeking payment of benefits. Next, Plaintiff argued there are several exceptions to forum selection clauses being upheld. Last, Plaintiff argued that the subject forum selection clause should be void as an impermissible restriction on the Florida No-Fault law and public policy.

Analysis

> **Florida Statute Section 47.051**—Actions against corporations.—Actions against domestic corporations shall be brought only in the county where such corporation has, or usually keeps, an office for transacting of its customary business, *where the cause of action accrued*, or where the property in litigation is located. Actions against foreign corporations doing business in this state shall be brought in a county where such corporation has an agent or other representative, where the cause of action accrued, or where the property in litigation is located. Fla. Stat. § 47.051 (2020) *(emphasis added)*.

Venue is proper in an action for breach of contract in the county where payments should have been made. *Florida Forms, Inc. v. Barkett Computer Services, Inc.*, 311 So. 2d 730 (Fla. 4d DCA 1975). *See also*, *Sheffield Steel Products, Inc. v. Powell Brothers, Inc.*, 385 So. 2d 161 (Fla. 5d DCA 1980).

In the instant case, Plaintiff's office and the place where payment is to be made is in Palm Beach County, Florida. As such, Plaintiff's choice of venue is proper and is valid. Therefore, Defendant's Motion to Dismiss for Improper Venue Under Florida Statute Section 47.051 is Denied.

As to Defendant's argument regarding the mandatory forum selection clause more analysis is needed. Defendant presented no binding case to this court that would authorize a PIP insurer to inject a forum selection clause into the policy of insurance. Defendant did not present any court orders authorizing the forum selection clause language that is the subject of this motion. Notwithstanding this Court finds the Defendant's own policy language would not apply to this action as the Plaintiff did not file a lawsuit for the court to "determine coverage" as is stated in the specific language of the Defendant's policy of insurance.

Under the subject policy of insurance, the Defendant utilized the terms "benefits" and "coverage throughout. For example, under "Duties After An Accident or Loss" on page 17, the policy provides. . . . "A person seeking *coverage or benefits* (including any assignees of the injured party) must." The subject policy provides "Any legal action against "us" *to determine coverage* under this policy shall be filed and maintained in the county where the policy was issued." (page 18). The court will interpret the policy against the Defendant as the drafter of the document and draw all reasonable inferences in favor of the insured. *See Pasteur Health Plan, Inc. v. Salazar*, 658 So. 2d 543 (Fla. 3d DCA 1995) [20 Fla. L. Weekly

D1083a] (holding that all ambiguities in insurance contracts, as contracts of adhesion, should be construed in the light most favorable to the insured). As such, in the instant case, the plaintiff is not seeking coverage under the policy. Plaintiff has filed a breach of contract action seeking benefits under the subject policy of insurance and Defendant's forum selection clause does not apply.

Florida has recognized exceptions to the enforcement of a forum selection clause in the following situations: 1) where the forum selection clause was tainted by fraud; 2) where the forum selection clause is the product of overwhelming bargaining power on the part of one party; and 3) where the forum selection clause is the sole basis upon which to create jurisdiction in a chose forum. *Bombardier Capital, Inc. v. Progressive Marketing Group* , 801 So. 2d 131 (Fla. 4d DCA 2001) [26 Fla. L. Weekly D2697a]. The court finds that the subject policy of insurance is a contract of adhesion and is the product of Defendant's overwhelming bargaining power. Florida law required the insured to purchase the policy of insurance. Defendant presented no evidence that the insured has the ability to negotiate, change, or modify any of the terms of the subject policy of insurance. Moreover, there is no obligation on the Defendant to provide the policy and the policy terms to the insured prior to purchasing the mandatory insurance. The court finds that it would be unjust to enforce the subject forum selection clause as the terms and conditions are dictated by the Florida No-Fault Law and nowhere does the Florida No-Fault Law authorize or mention a forum selection clause.

The court finds the cases cited by the Plaintiff as persuasive regarding Defendant's policy language. *See Hallandale Beach Orthopedics, Inc. v. United Automobile Insurance Company*, case No.: CONO 20-004218 (73)(Fla. 17th Jud. Cir. 2020) [28 Fla. L. Weekly Supp. 353a]; *Elite Spine Group, Inc. v. United Automobile Insurance Company*, Case No.: CONO 19-005033 (72)(Fla. 17th Jud. Cir. 2019). The court finds the cases cited by the Defendant regarding USAA's policy of insurance are not analogous to this situation as the forum selection clause differs from United's clause. USAA's clause is less restrictive as to venue than United's clause.

Conclusion

The Defendant's Motion to Dismiss Re: Improper Venue Pursuant to Venue Selection Clause & Florida Domestic Corporation Status Via Florida Statute Section 47.051 is hereby DENIED. Defendant shall file a responsive pleading to Plaintiff's Complaint within ten (10) days from the date of this Order.

* * *

Insurance—Personal injury protection—Attorney's fees—Where insurer confessed judgment as to medical provider's entitlement to penalty and postage, provider is entitled to award of attorney's fees under section 627.428—Even under case law holding that to be entitled to award of fees under section 627.428 a party must obtain PIP benefits that are provided for in PIP policy, provider is entitled to award of fees where PIP policy at issue makes payment of penalty and postage a PIP benefit

BEACHES OPEN MRI OF BOYNTON BEACH, LLC, a/a/o Gregory Allen Byer, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 502016SC011422XXXXMB RE. December 6, 2018. Nancy Perez, Judge. Counsel: Shannon M. Mahoney, Shannon M. Mahoney, PLLC, West Palm Beach, for Plaintiff. Juan Diaz Avila, Cole, Scott & Kissane, West Palm Beach, for Defendant.

ORDER DEEMING CONFESSION OF JUDGMENT, ENTERING FINAL JUDGMENT IN FAVOR OF PLAINTIFF, AND AWARDING PLAINTIFF'S ENTITLEMENT TO ATTORNEY'S FEES

This cause came before the Court on November 16, 2018 on Beaches Open MRI of Boynton Beach, LLC's ("Plaintiff") Amended Motion to Deem Confession of Judgment and Enter Final Judgment and Amended Motion for Determination of Plaintiff's Entitlement to Attorney's Fees.

After considering the attorneys' arguments, reviewing the relevant law, and examining the record, this Court FINDS, ORDERS and ADJUDGES that Defendant confessed judgment in this case, final judgment is entered herewith in Plaintiff's favor, and Plaintiff is entitled to its attorney's fees.

FACTS

Plaintiff provided an MRI to the insured, Gregory Allen Byer, for injuries arising from an automobile accident. Plaintiff billed State Farm Mutual Automobile Insurance Company ("Defendant") under the Personal Injury Protection ("PIP") coverage of insured's policy. Defendant issued no payment.

After receiving Plaintiff's demand letter pursuant to section 627.736(10), Defendant issued payment for benefits and interest, only. No payment was issued for penalty. No payment was issued for postage, which Plaintiff had also demanded.

Defendant's policy at issue provides:

> 17. **Legal Action Against Us**
>
> . . .
>
> d. In addition, legal action may only be brought against ***us*** regarding:
>
> . . .
>
> (2) No-Fault Coverage, if within 30 days after ***our*** receipt of written notice of in intent to initiate litigation for:
>
> (a) an overdue claim, we fail to pay the overdue claim, applicable interest, and a penalty of 10% of the overdue amount that ***we*** pay. Subject to a maximum penalty of $250;
>
> . . .
>
> (b)(iii) . . .
>
> Such postal costs shall be reimbursed by ***us,*** if requested, by the claimant in the notice, when ***we*** pay the claim.

Defendant's Policy Form 9810A at pp. 46, 47.

On October 13, 2016, Plaintiff filed the instant suit for penalty on the benefits and postage, and attorney's fees and costs for recovering the penalty and postage.

On January 29, 2018, four hundred and seventy-three (473) days after suit was filed, Defendant issued payment to Plaintiff for penalty and postage, but maintained that its post-suit payment of penalty and postage were not "benefits" and that, therefore, Plaintiff was not entitled to attorney's fees and costs.

On November 15, 2018, Defendant filed its Confession of Judgment as to the penalty and postage but maintained that Plaintiff was not entitled to attorney's fees and costs.

The first and second issues here are resolved by Defendant's payment of penalty and postage after suit was filed, followed by Defendant's Confession of Judgment filed November 15, 2018. Defendant confessed judgment resulting in entry of a Final Judgment.

The third issue is whether attorney's fees are awardable under the present facts.

ANALYSIS

The relevant statutes are sections 627.428, 627.736(8) and 627.7407(2), Florida Statutes. Section 627.428(1) states:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court . . . 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.

Under the plain language of section 627.428, entry of a judgment results in the entitlement of attorney's fees. *Rodriguez v. Government*

Employees Ins. Co., 80 So. 3d 1042, 1044, 1045 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2788a] *citing Ramirez v. United Auto. Ins. Co*., 67 So. 3d 1174, 1175 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D1823a]. The judgment need not be a money judgment; it is a well-established principle that an insured merely needs a judgment, order or decree in his/her favor to be entitled to an award of attorney's fees. *Old Republic Ins. Co. v. Monsees*, 188 So. 2d 893, 894 (Fla. 4th DCA 1966) (The application of the attorney's fee statute is not limited to suits for the recovery of money.); *Rodriguez*, 80 So. 3d at 1044, 1045 (Non-monetary judgment in favor of insured on insurer's fraud and unjust enrichment claims entitled insured to attorney's fees. . . . The failure to award fees to an insured who has obtained judgment in his favor is "directly contrary to the mandatory, non-discretionary requirements of law under 627.428. . . ") citing *Ramirez*, 67 So.3d 1174, 1175 *and Danis*, 645 So. 2d 420, 421.

So, here, when the Defendant confessed judgment in Plaintiff's favor and final judgment is herewith entered, Plaintiff is entitled to fees under section 627.428, regardless of whether there was a monetary recovery, or a recovery of "benefits". The judgment, alone, entitles Plaintiff to an award of fees. *Danis*, 645 So. 2d at 421; *Old Republic Ins. Co*., 188 So. 2d at 894; *Rodriguez*, 80 So. 3d at 1044, 1045. As a result, under section 627.428, Plaintiff is entitled to attorney's fees in this case.

Beyond Plaintiff's entitlement under section 627.428, section 627.736(8) specifically authorizes attorney's fees under section 627.428: "[in] **any dispute under the provisions of ss. 627.730-627.7405** . . . between an assignee of an insured's rights and the insurer, **the provisions of ss. 627.428 . . . apply** . . . ." (Emphasis added).

Read together, the statutory mandate is clear and unambiguous: any dispute must include disputes, such as this one, that centers on the entitlement and payment of penalty and postage. *See generally, Forsythe v. Longboat Key Beach Erosion Ctrl. Dist*., 604 So. 2d 452, 455 (Fla. 1992) ("It is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole. Where possible, courts must give fill effect to all statutory provisions and construe related statutory provisions in harmony with one another.") *citing Marshall v. Hollywood, Inc.*, 224 So. 2d 743, 749 (Fla. 4th DCA 1969), writ discharged, 236 So. 2d 114 (Fla.), cert. denied, 400 U.S. 964, 91 S.Ct. 366, 27 L.Ed.2d 384 (1970); *Fleischman v. Department of Professional Regulation*, 441 So. 2d 1121, 1123 (Fla. 3d DCA 1983).

This reading is consistent with precedent from our supreme court. *See Ivey v. Allstate Ins. Co.,* 774 So. 2d 679, 684 (Fla. 2000) [25 Fla. L. Weekly S1103a] ("This Court finds that Florida Statute 627.736(8) and 627.428 are clear and unambiguous and this Court is therefore not free to modify or limit the express terms of Florida Statute 627.736(8) and 627.428.") As a result, under section 627.736(8) and section 627.428, Plaintiff is entitled to attorney's fees in this case.

The Court recognizes conflicting, non-binding opinions on entitlement to fees following an insurer's post-suit payment for penalty and postage, including this Court's earlier opinion in *Med-Manage Group, a/a/o Annie Sainte-Croix vs. Infinity Insurance Company*, 24 Fla. L. Weekly Supp. 725a (15th Jud. Cir., Palm Beach County, September 14, 2016). These cases (1) hold that recovery of a "benefit" is required for entitlement to attorney's fees, and (2) rely on the Florida Supreme Court's opinion in *Petty v. Florida Insurance Guaranty Association* to conclude that an insurer's post-suit payment of penalty and postage does not entitle the insured to attorney's fees and costs. 80 So. 3d 313 (Fla. 2012) [37 Fla. L. Weekly S34a].

First, it is a well-established, and binding in the Fourth District that an insured merely needs a judgment in his/her favor to be entitled to an award of attorney's fees; a judgment need not be monetary. *Danis*, 645 So. 2d 420, 421; *Old Republic Ins. Co*., 188 So. 2d at 894; *Rodriguez*, 80 So. 3d at 1044, 1045.

Second, *Petty* does not apply. *Petty* involved a homeowner's insurance claim against Florida Insurance Guaranty Association ("FIGA") under the FIGA Act, which is governed by Florida Statutes Chapter 631. FIGA is a non-profit corporation created by statute to pay covered claims to insureds whose insurer has become insolvent. Section 631.51. Section 631.54 of the FIGA Act defines what claims are covered **under FIGA if the insurer becomes insolvent**. (Emphasis added).

In *Petty*, FIGA was not required to pay the insured's statutory claim to attorney's fees because attorney's fees were not a "covered claim" as defined under section 631.54. *Petty*, 80 So. 3d at 315-16.

The *Petty* opinion, and the definitions of FIGA, and Chapter 631 are not applicable to the instant case.

Even if this Court were persuaded by the non-binding opinions requiring recovery of a monetary benefit for entitlement to attorney's fees, Plaintiff would still be entitled to its attorney's fees based on the policy. The provisions of Chapter 627.736 ("the PIP Statute") are incorporated into every PIP policy under section 627.7407(2). Section 627.7407(2) provides "[a]ny personal injury protection policy in effect on or after January 1, 2008, shall be deemed to incorporate the provisions of the Florida Motor Vehicle No-Fault Law, as revived and amended by this act."

By incorporating the statute into every policy, any penalties or other damages provided for in the PIP Statute become part of the policy and recovery of any of those damages or penalties entitles the insured to attorney's fees. *See State Farm Mut. Auto. Ins. Co. v. Curran*, 83 So. 3d 793 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D2635c], *approved* 135 So. 3d 1071 (Fla. 2014) [39 Fla. L. Weekly S122a] (Florida Supreme Court approves opinion where 5th DCA recognizes that all PIP policies incorporate the PIP statute). As a result, Plaintiff is entitled to attorney's fees in this case.

Notably, in the case of Defendant, its own insurance policy language specifically requires the payment of penalty and postage, thereby making penalty and postage contractual, and a "benefit" under the policy. The language also specifically authorizes legal action against Defendant for its failure to pay the penalty and postage. *See Defendant's Policy Form 9810A at pp. 46, 47.*

Under Defendant's policy, when Defendant issues payment in response to a demand letter, Defendant is also required to pay penalty and, if requested, postage. This requirement contractually obligates Defendant to provide its insured with additional funds if Defendant was notified of an overdue claim. And, the policy authorizes the filing of a law suit against Defendant if Defendant fails to pay the penalty and postage. Thus, Defendant's own policy requirement to pay penalty and postage makes payment of penalty and postage a "benefit" under the policy. As a result of Defendant's policy language, Plaintiff is entitled to attorney's fees.

And finally, the Court notes again that Defendant tendered the penalty and postage after four hundred and seventy-three (473) days of litigation. Defendant contends it has no additional liability beyond the mandatory statutory penalty and postage. To allow an insurer to avoid section 627.428 attorney's fee liability for failing to comply, indefinitely, with a statutory penalty would (1) render the penalty and postage section of 627.736(10)(d) meaningless; (2) remove any incentive for an insurer to pay policy benefits timely, and (3) thwart the purpose behind Florida's PIP Statute. *See Borden v. E.-Eur. Ins*., 921 So.2d 587, 595 (Fla. 2006) [31 Fla. L. Weekly S34a] ("It is . . . a basic rule of statutory construction that 'the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.' "); *Ivey v. Allstate Ins. Co*., 774 So.2d 679, 683-84 (Fla. 2000) [25 Fla. L. Weekly S1103a] ("Without a doubt, the purpose of the no-fault statutory scheme is to

'provide swift and virtually automatic payment . . .' "). As such, the Court finds that the penalty provision of the Florida PIP Statute is both valid and enforceable and enforces same with an award of attorney's fees and costs to Plaintiff.

For the reasons herein, Plaintiff's Motions are GRANTED. Based on Defendant's payment and the filed Confession of Judgment, judgment is hereby entered in Plaintiff's favor in the amount of $201.69, for which let execution issue. Plaintiff is entitled to reasonable attorney's fees under section 627.428 and the policy, including fees and costs incurred. *State Farm v. Palma*, 629 So. 2d 830 (Fla. 1993).

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Where charge submitted was less than 200% of allowable amount under fee schedule, insurer's only options were to pay full amount of charge or 80% of fee schedule amount

FUSION CHIROPRACTIC, PLLC, a/a/o Michael Bowers, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COWE17016712, Division 83. Ellen Feld, Judge. Counsel: Steven Lander, Steve Lander and Associates, P.L., Fort Lauderdale, for Plaintiff. Emma Collum, Law Office of George L. Cimballa, III, for Defendant.

ORDER GRANTING

THIS CAUSE came before the Court on Plaintiff's Motion for Summary Judgment. The Court having reviewed the Motion, the entire Court file, the relevant legal authorities; having reviewed the parties' stipulations as to matters of fact; having heard argument of counsel, and being otherwise sufficiently advised in the premises

IT IS HEREBY ORDERED AND ADJUDGED:

The sole issue remaining in the case at bar is whether GEICO breached its policy of insurance in paying less than the charges at issue, when those charges are less than 80% of the fee schedule amounts. For the reasons set forth below Plaintiff's Motion for Summary Judgment is **GRANTED.**

1. The claimant, Michael Bowers, was insured by the Defendant, Geico, when involved in a motor vehicle accident on September 30, 2016.

2. Plaintiff provided chiropractic services to the claimant, and timely billed Geico for those services.

3. The parties stipulated as to the loss, coverage, medical necessity and relatedness, the sole issue remaining as to whether Defendant's payment at 80% of the billed amount was improper as a matter of law.

4. The CPT code at issue is as follows: 97110.

5. Plaintiff billed $66.38 for each time CPT code 97110 was performed.

6. Geico paid the above CPT code at 80% of the amount billed; to wit: $53.10.

7. Plaintiff filed suit for the underpayment, arguing that the Defendant, in paying less than the billed charge, and additionally, less than the amount due under fee schedule, breached its policy of insurance.

The Florida Supreme Court, in *Virtual III*, held that PIP insurers have "a choice in dealing with their insureds as to whether to limit reimbursements based on the Medicare fee schedules or whether to continue to determine the reasonableness of provider changes for necessary medical services rendered to a PIP insured based on the factors enumerated in [former] section 627.736(5)(a)1 [now (5)(a)]." *Geico Gen. Ins. Co. v. Virtual Imaging Services, Inc*., ("*Virtual III*") 141 So.3d 147, 152 (Fla. 2013) [38 Fla. L. Weekly S517a]. In making their "choice," PIP insurers cannot rely on the fee schedule method unless their policy "clearly and unambiguously" adopts that method in lieu of the default reasonable amount method. *Id.* at 158.

As noted in *Virtual III* , the PIP statute "has since been amended to include an election of the Medicare fee schedules as the method of calculating reimbursements, and the Legislature has now specifically incorporated a notice requirement into the PIP statute, effective July 1, 2012, *see § 627.736(5)(a)5.,* Fla. Stat. (2012)." (referencing ch.2012-197, § 10, Laws of Fla.). The subparagraph (5)(a)5. notice requirement provides:

> *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.* § *627.736(5)(a)5., Fla. Stat. (2012-2020).*

Recently, the 5th District Court of Appeals addressed the issue, holding that insurers that elect the fee schedule payment methodology are bound by that election, and accordingly, must pay 80 percent of the amount of said fee schedule. "As for payment of the charges, the statute authorizes insurers to limit reimbursement to 80% of an amount fixed through a fee schedule, see § 627.736(5)(a)1.a.-f., provided that they have elected in the policies to take advantage of these reimbursement limitations, see § 627.736(5)(a)5." *Geico Ind. Co. v. Accident & Injury Clinic, Inc. (a/a/o Frank Irizarry)*, 2019 WL 6974264, *3 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D3045b]. Specifically, "80% of the fee schedule" is the "required amount an insurer must pay." Id. The sole exception is when a provider submits a charge that is less than 80 percent of the fee schedule amount. "*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*." § 627.736(5)(a)5., Fla. Stat.

In *Irizarry*, the Fifth District held:

> "*the amount allowed under subparagraph 1" necessarily encompasses 80% of the applicable fee schedule option. Accordingly, if the billed amount is less than 80% of the fee schedule (the required amount an insurer must pay), the insurer* ***may opt to pay the lower billed amount in full.***

As paying the lower billed amount, in full, is an option for an insurer, what is the alternative option? The Fifth District Court of Appeals squarely answered that question, to wit: 80 percent of the fee schedule amount. An insurer who elects the fee schedule must pay 80 percent of the fee schedule amount, **except** when the charge is less than 80 percent of the fee schedule amount. This is the sole instance when an insurer is authorized to pay the lower, billed amount, in full. The legislative intent was to protect insurers from having to pay more than the charge submitted. More succinctly, the insurer may pay the lesser of: (1) 80 percent of the fee schedule amount; ***or*** (2) "the amount of the charge submitted," i.e., 100 percent of the lower billed amount. There is simply no third alternative.

Plaintiff's charge for CPT Code 97110 ($66.38), exceeds 200 percent of the fee schedule amount ($67.14). Thus, Geico's only option was to pay 80% of the fee schedule amount, to wit: $53.71, or the full amount of the charge, to wit: $66.38. Geico, however, paid $53.10, an underpayment of $0.61, each time billed.

For the reasons set forth herein, Plaintiff's Motion for Summary Judgment is GRANTED. The Plaintiff is directed to submit a Proposed Final Judgment, consistent with this ruling, within ten (10) days of this Order. The Court reserves jurisdiction as to the taxing of attorney's fees and costs pursuant to Florida Statutes 627.428 and 627.736.

* * *

Insurance—Personal injury protection—Answer—Amendment—Motion to amend answer to assert affirmative defense of exhaustion of policy limits more than two years after benefits were exhausted is granted, but medical provider is awarded attorney's fees as sanction for insurer's unreasonable delay in raising exhaustion issue

OCEANS CHIROPRACTIC, INC., a/a/o Jennifer Jones, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COWE18005920, Division 83. September 4, 2020. Ellen Feld, Judge. Counsel: Abdul-Sumi Dalal, Johnson | Dalal, Plantation, for Plaintiff. Frank Negron, Fort Lauderdale, for Defendant.

ORDER GRANTING LEAVE TO AMEND COMPLAINT DOCUMENT TITLE: ORDER ON DEFENDANT'S MOTION FOR LEAVE TO FILE AMENDED ANSWER AND AFFIRMATIVE DEFENSES

THIS CAUSE came to be considered on: *Defendant's Motion for Leave to File Amended Answer and Affirmative Defenses and Plaintiff's Ore Tenus Motion for Sanctions, and for Entitlement as to Attorneys' fees and costs,* and the Court having review the motion, heard argument from the respective parties, and upon agreement of the parties, it is hereby

ORDERED AND ADJUDGED as follows:

1. Defendant's Motion for Leave to Amend is Granted.
2. Plaintiff's Ore-Tenus Motion for Sanctions is hereby GRANTED.

On June 7, 2018 suit was filed in the case at bar. Service was effectuated on the Defendant on June 7, 2018. On July 30, 2018 the Defendant served its Answer and Affirmative Defenses, listing proper payment as its sole affirmative defense(s). At the time of Defendant's Answer and Affirmative Defense, benefits of $10,000.00 had been exhausted, more specifically benefits were exhausted pre-suit. This Court finds that exhaustion should have been pled as an affirmative defense. On July 16, 2020 more than two (2) years after the Defendant filed its Answer and Affirmative, and after the deadlines set forth in this Court's Uniform Trial Order Setting Pretrial Deadlines and Related Requirements, the Defendant notified Plaintiff of the exhaustion of benefits by way of filing its Motion for Leave to Amend its Answer and Affirmative Defenses. Notwithstanding Defendant's prior knowledge, Defendant was unable to explain the reasons for the ***significant delay***. (The attorney for the Defendant relayed *after* the hearing on their Motion for Leave to Amend that correspondence was sent to the Plaintiff explaining that exhaustion of the policy had occurred. That correspondence was by way of a Demand Response Letter sent before suit was filed).

The Defendant's conduct in failing to promptly notify the Plaintiff during the course of litigation by way of pleading exhaustion and/or sooner filing their Motion for Leave to Amend caused Plaintiff to spend attorney time and costs for which it would otherwise not have incurred had the issue of exhaustion been properly raised as required under Fla. R. Civ. Pro. 1.140.

The Court has inherent authority to award reasonable attorney's fees when the dilatory conduct of a party caused precipitates the adverse party from prosecuting a claim that it otherwise would have dismissed. *See Barnes v. Pro Imaging,* 15 Fla. L. Weekly Supp. 981b (Fla. 17th Cir. Court 2008). The Court is aware that sanctions should be imposed sparingly. *See Koch v. Koch,* 47 So. 3d 320 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D2091a]. However, the Court finds the unreasonable conduct of the Defendant caused an unnecessary waste of time and judicial resources.

Accordingly, Plaintiff is awarded attorney's fees and costs due to Defendant's dilatory conduct. This Court hereby reserves jurisdiction to determine the amount and reasonableness of same.

* * *

Criminal law—Driving under influence—Evidence—Field sobriety exercises—Expert testimony regarding administration or reliability of field sobriety exercises is precluded—Officer's testimony regarding his training and experience with regard to exercises goes to credibility and weight of evidence regarding his observations and does not make him expert witness subject to cross-examination under section 90.706

STATE OF FLORIDA, v. RONALD LEE BOOK, Defendant. County Court, 17th Judicial Circuit in and for Broward County, Criminal Action. Case No. 19-005520MU-10A (JKL) (CMB). August 27, 2020. Jill K. Levy, Judge. Counsel: Connor M. Boe, Assistant State Attorney, Naples, for State. J. David Bogenschutz & Jaclyn E. Broudy, Fort Lauderdale, for Defendant.

ORDER GRANTING STATE'S MOTION TO PRECLUDE EXPERT TESTIMONY REGARDING FIELD SOBRIETY EXERCISES AND HEARSAY EVIDENCE WITHOUT AN EXCEPTION

The State's Motion to Preclude Expert Testimony Regarding Field Sobriety Exercises and Hearsay Evidence Without an Exception having come on for hearing, and the Court having been advised in the premises on both the facts and the law respecting the said Motion, the State's Motion is GRANTED and it is hereby ORDERED AND ADJUDGED:

1.) There shall be no expert testimony regarding the field sobriety exercises, their administration, or their scientific reliability. See *State v. Meador*, 674 So.2d 816 (4th DCA 1996) [21 Fla. L. Weekly D1152a]. Field Sobriety Exercises, with the exception of the Horizontal Gaze Nystagmus exercise, are "simple psychomotor tasks within a juror's common experiences and understanding". *Id* at 831. An officer's observations of the defendant during these exercises should be treated no different than that of a lay witness. It is this Court's finding that an officer testifying to their training and experience does not go towards whether they are an expert, but to the credibility of the officer testifying. A witness' training and experience goes to the weight of the evidence, of what they have seen, heard and experienced, not the admissibility of that testimony. As Field Sobriety Exercises are within the common understanding of jurors per *Meador*, any expert testimony would only serve to enhance the significance of the exercises. It is the jury's decision of what weight to give these exercises.

2.) There shall be no mention of anything contained in any National Highway Traffic Safety Administration manuals or training materials, any training materials used by the Florida Highway Patrol, or any other materials that discuss administration, reliability, or accuracy of Field Sobriety Exercises. The officer shall be allowed to testify as to his training and experience with regards to the field sobriety exercises and that testimony does not per se make him an expert subject to cross-examination under §90.706. See, *State v. Feinstein*, 21 Fla. L. Weekly Supp. 587a (Fla. Broward Cty., December 9, 2013). Any cross-examination using any Statements of facts or opinions on a subject of science, art, or specialized knowledge contained in a published treatise, periodical, book, dissertation, pamphlet, or other writing on a lay witness would be hearsay without an exception. Fla. Stat. §90.706. If the Officer testifies as to his training and experience in giving the FSE's, the Defendant is precluded from cross examination or confronting that "training and experience" by any cross examination relating to what type of training he received, the source of that training, or any training manuals that direct how to proceed with FSE's, what kind of experience he has, and why the Officer gave those specific tests as opposed to any other tests he could have given.

* * *

Insurance—Personal injury protection—Answer—Amendment—Motion to amend answer to assert affirmative defense of exhaustion of policy limits one and a half years after benefits were exhausted is granted, but medical provider is awarded attorney's fees as sanction for insurer's unreasonable delay in raising exhaustion issue

BROWARD HEALTH & WELLNESS, P.A., a/a/o Katie Measel, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COWE18009188, Division 82. September 10, 2020. Natasha DePrimo, Judge. Counsel: Abdul-Sumi Dalal, Johnson | Dalal, Plantation, for Plaintiff. Frank Negron, Fort Lauderdale, for Defendant.

AGREED ORDER

THIS CAUSE came to be considered on: *Defendant's Motion for Leave to File Amended Answer and Affirmative Defenses and Plaintiff's Ore Tenus Motion for Sanctions, and for Entitlement as to Attorneys' fees and costs,* and the Court reviewed the motions and heard argument from the respective parties, subsequent to the hearing and after the Court's oral pronouncement in Court the parties entered into an agreement with regards to the above motions and accordingly the following is the agreed facts as set forth by the parties:

On September 14, 2018 suit was filed in the case at bar. Service was effectuated on the Defendant on September 14, 2018. On November 07, 2018 the Defendant served its Answer and Affirmative Defenses, listing proper payment as its sole affirmative defense(s). At the time of Defendant's Answer and Affirmative Defense, benefits of $10,000.00 had been exhausted, more specifically benefits were exhausted on or around October 03, 2018. The parties agree exhaustion should have been pled as an affirmative defense. On June 15, 2020 more than one and a half years after the Defendant filed its Answer and Affirmative, and after the deadlines set forth in this Court's Uniform Trial Order Setting Pretrial Deadlines and Related Requirements, the Defendant notified Plaintiff of the exhaustion of benefits by way of filing its Motion for Leave to Amend its Answer and Affirmative Defenses. Notwithstanding Defendant's prior knowledge, Defendant was unable to explain the reasons for the ***significant delay***. (The attorney for the Defendant relayed *after* the hearing on their Motion for Leave to Amend that correspondence was sent to the Plaintiff explaining that exhaustion of the policy had occurred. That correspondence was by way of an email allegedly sent by the Defendant to the Plaintiff on or around December 27, 2018).

The Defendant's conduct in failing to promptly notify the Plaintiff during the course of litigation by way of pleading exhaustion and/or sooner filing their Motion for Leave to Amend caused Plaintiff to spend attorney time and costs for which it would otherwise not have incurred had the issue of exhaustion been properly raised as required under Fla. R. Civ. Pro. 1.140.

The Court has inherent authority to award reasonable attorney's fees when the dilatory conduct of a party caused precipitates the adverse party from prosecuting a claim that it otherwise would have dismissed. *See Barnes v. Pro Imaging,* 15 Fla. L. Weekly Supp. 981b (Fla. 17th Cir. Court 2008). The Court is aware that sanctions should be imposed sparingly. *See Koch v. Koch,* 47 So. 3d 320 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D2091a]. The parties agree the unreasonable conduct of the Defendant caused an unnecessary waste of time and judicial resources.

ORDERED AND ADJUDGED as follows:

1. Defendant's Motion for Leave to Amend is Granted.

2. Plaintiff's Ore-Tenus Motion for Sanctions is hereby GRANTED.

Based on the agreement of the parties, the Court awards Plaintiff attorney's fees and costs due to Defendant's conduct. This Court hereby reserves jurisdiction to determine the amount and reasonableness of same.

* * *

Insurance—Homeowners—Assignment of benefits—Assignment agreement—Motion to dismiss property damage case with prejudice, alleging assignment agreement fails to meet requirements of section 627.7152—Statute requires that a written itemized statement of services be attached as part of assignment agreement, which plaintiff failed to do—Language of provision notifying assignor of its right to rescind the agreement did not violate requirements of the statute by omitting specific statutory language triggering a right to rescission based on a specified commencement date—Omitted triggering deadline is not relevant to case because agreement contains no commencement date—Complaint dismissed with leave to amend to so that plaintiff may attach required itemized statement

RESTORATION DOCTOR LLC, a/a/o Newton Gomez, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 20-12118 COCE 53. October 15, 2020. Robert W. Lee, Judge. Counsel: Edward De La Osa, Coconut Grove, for Plaintiff. Sarah Golden, Boca Raton, for Defendant.

ORDER GRANTING IN PART DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before the Court on October 14, 2020 for hearing of the Defendant's Motion to Dismiss Plaintiff's Complaint with Prejudice, or in the Alternative, Motion for More Definite Statement, and the Court's having reviewed the Motion and responses thereto; heard argument; reviewed the relevant legal authorities; and been sufficiently advised in the premises, the Court finds as follows:

This is a property damage case filed by a contractor who has purportedly been provided an assignment of benefits (assignment of agreement) from the homeowner. The Defendant moves to dismiss, claiming that the assignment fails to meet the requirements of Florida Statute §627.7152. Specifically, Citizens argues that the assignment fails for lack of correct disclosures set forth in the statute, and for lack of a written itemized statement of services. Citizens argues that the correct remedy is to dismiss this case with prejudice, thus eliminating any ability on the part of the Plaintiff to cure any defects in the assignment agreement. The Court will start with the itemized statement issue.

FIRST ISSUE - WHAT THE STATUTE SAYS: "An assignment agreement must [. . c]ontain a written, itemized, per-unit cost estimate of the services to be performed by the assignee." *Id.* §627.7152(4).

WHAT THE PLAINTIFF DID: The assignment agreement attached to the Complaint specifically notes in paragraph 7 that "[a] preliminary itemized per unit cost estimate of the services to be performed by Assignee is attached hereto and incorporated by reference." However, the itemized statement was not attached to the assignment agreement filed as part of the Complaint.

ANALYSIS: While the Plaintiff argues that it did provide the required itemized statement to the assignor and the insurer, and the Defendant acknowledges that it did receive a copy, the Defendant argues that what it was provided was not executed until a date after the date of the assignment. As a result, it could not have been provided at the same time, which is required by the statute. The Defendant concedes, however, that the sufficiency of the Plaintiff's "itemized statement" cannot be resolved on a motion to dismiss because it goes beyond the four corners of the complaint. Nevertheless, the Court disagrees with the Plaintiff's assertion that it is not required to be attached as part of the assignment agreement. Otherwise, the statute would not have used the word "contain" to describe the relationship between the itemized statement and the assignment agreement. Because this could potentially be cured without affecting the issue of standing, the Court would have no difficulty in granting the motion with leave to amend to attach the missing statement. The Court next considers the issue of the adequacy of the disclosure language in the assignment.

SECOND ISSUE - WHAT THE STATUTE SAYS: "An assignment agreement must [. . . c]ontain a provision that allows the assignor to rescind the assignment agreement without a penalty or fees by submitting a written notice of rescission signed by the assignor to the assignee within 14 days after the execution of the agreement, at least 30 days after the date work on the property is scheduled to commence if the assignee has not substantially performed, or at least 30 days after execution of the agreement if the agreement does not contain a commencement date and the assignee has not begun substantial work on the property." Fla. Stat. §627.7152(2)(a)2 (2019).

WHAT THE ASSIGNMENT SAYS: "Assignor understands and has been formally advised that this contract may be rescinded within fourteen (14) days of Assignor executing the same without penalty or fee so long as written notice of the intent to rescind the agreement is provided to the Assignee. Furthermore, Assignee understands and has been formally advised that this contract may be rescinded without penalty or fee should the work contracted for not be substantially completed within thirty (30) days of Assignor executing this agreement, or at least thirty (30) days after the execution of the agreement if the agreement does not contain a commencement date and the assignee [h]as not begun substantial work on the property." Assignment ¶11.

ANALYSIS: Citizens argues, in essence, that the that the Plaintiff must include a notice practically verbatim to what is in subsection (2)(a)2, noting that the language in Plaintiff's Assignment fails to comply with that subsection. Specifically, the language triggering a right to rescission based on a specified commencement date is missing. For instance, under the statute, if an assignment agreement has a commencement date five days after execution of the agreement, then the Assignor would actually have 35 days from the date of execution of the agreement to rescind if the work is not substantially completed. In this instance, such a scenario would cut off the Assignor's right of rescission on day 30 from execution. That's less than what the statute requires. However, there is no commencement date specified in the assignment agreement in the instant case. Therefore, the provision dealing with that scenario simply does not apply in this case. Citizens is looking for a "gotcha" when the statutory scheme does not require such a result. For this subsection—(2)(a)2—the assignment agreement is required to "*contain a provision that allows"* certain results under specified circumstances. That's what the agreement does in the instant case. It has omitted a triggering deadline that is simply not relevant in this case, and the Court does finds that the resulting language does not violate the requirements of the statute.

WHAT IS THE REMEDY? So, the assignment agreement in this case is not perfect. Citizens argues that the correct remedy is dismissal with prejudice, citing *Progressive Express Ins. Co. v. McGrath Community Chiropractic*, 913 So.2d 1281 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2622b]. Contrary to defense counsel's assertion, however, that case does not stand for that proposition. In that case, the district court of appeal overturned the circuit appellate court's decision that a case should not have been dismissed when the plaintiff in a PIP case amended the complaint to attach a new assignment which had been signed after the date the lawsuit was filed. The district court disagreed, noting that standing cannot be acquired post-suit, and therefore the case should have been dismissed. *Id.* at 1286. However, the remedy for the plaintiff was to file a new lawsuit. *Id.* If this Court were to dismiss the instant case "with prejudice," as Citizens is seeking, this would eliminate the Plaintiff's right to refile the lawsuit.

But the Court need not dismiss this case at this point. The sole problem is the failure to attach the required itemized statement. As noted, this can be cured if such a statement exists. Accordingly, it is hereby

ORDERED that the Defendant's Motion is GRANTED IN PART. The complaint in this case is dismissed with leave to amend within 15 days of the date of this Order. If, however, the Plaintiff fails to timely file an Amended Complaint correcting the deficiency, the Defendant may submit a proposed Order of Dismissal without further motion or hearing, but such proposed order shall be "without prejudice."

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Low level laser therapy—Billing for low level laser therapy was correct where medical provider billed using valid CPT code recognized by Healthcare Common Procedure Coding System that was in effect at time services were provided, irrespective of whether code is recognized by Medicare or workers' compensation—Despite fact that particular CPT code billed is not recognized by Medicare or workers' compensation, PIP insurer must nonetheless reimburse for low level laser therapy where that service is reimbursable under workers' compensation fee schedule under different CPT code

PERFORMANCE HEALTH AND CHIROPRACTIC, INC., a/a/o Thomas Henghold, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 19th Judicial Circuit in and for St. Lucie County. Case No. 562019SC002319AXXXHC. September 17, 2020. Edmond W. Alonzo, Judge. Counsel: Tara L. Kopp, Schuler, Halvorson, Weisser, Zoeller, Overbeck, P.A., West Palm Beach, for Plaintiff. Rebecca L. Brock, Miami, for Defendant.

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

THIS MATTER having come before the Court on August 20, 2020, on Plaintiff's Motion for Final Summary Judgment and Defendant's Motion for Summary Final Judgment and Motion for Protective Order and the Court having heard argument of counsel, and the Court being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED, as follows:

The first issue the Court needed to determine was whether the Plaintiff properly billed for the low-level laser therapy service when it chose S8948 as the code to bill.

Florida Statute 627.736(5)(d) states as follows: "All statements and bills for medical services rendered by a physician, hospital, clinic, or other person or institution shall be submitted to the insurer on a properly completed Centers for Medicare and Medicaid (CMS) 1500 form, UB f92 forms, or any other standard form approved by the office and adopted by the commission for purposes of this paragraph. **All billings for such services rendered by providers must, to the extent applicable, comply with the CMS 1500 form instructions, the American Medical Association CPT Editorial Panel, and the *Healthcare Common Procedure Coding System (HCPCS);* and must follow the Physicians' Current Procedural Terminology (CPT), *the HCPCS in effect for the year in which the services are rendered*, and the International Classification of Disease (ICD) adopted by the United States Department of Health and Human Services in effect for the year in which services are rendered**. . . . . In determining compliance with applicable CPT and HCPCS coding, guidance shall be provided by the CPT or the HCPCS in effect for the year in which services were rendered, the Office of the Inspector General, Physicians Compliance Guidelines, and other authoritative treatises designated by rule by the Agency for Health Care Administration." (Emphasis added)

Code S8948 is a valid Level II HCPCS code.[1] The CPT code is described as the application of a modality (requiring constant provider attendance) to one or more areas; low level laser; each 15 minutes.[2] Not only is S8948 a valid Level II HCPCS code but it is the specific code that describes the services rendered of low level laser therapy.

While the code itself is not recognized by Medicare or Workers Compensation, the code is recognized by commercial payers such as Blue Cross and Blue Shield.

Despite S8948 being a valid code, the Defendant argues that they do not have to reimburse for the low level laser therapy service because the Plaintiff did not bill a code that is recognized by Medicare or Workers Compensation, such as CPT code 97039 (unlisted modality). Defendant's analysis is incorrect. Florida Statute 627.736(5)(d) is the controlling provision which sets forth the billing requirements that must be followed by a provider in order to have been found to have submitted a valid bill for purposes of compliance with this Statute. The language is clear that if a provider submits a bill for a service and that billing for that service is in compliance with the HCPCS in effect for the year in which the services were rendered than the billing for that service is proper. The Statute does not require that the Plaintiff submit a bill for a service utilizing a code for the service that is recognized by Medicare or Workers Compensation. The Plaintiff cannot be found to have failed to comply with the statute because CPT code S8948 has not been eliminated from the general CPT coding system used outside of the Medicare system. It was a valid code in the medical community at the time the low level laser therapy service was rendered and recognized as an HCPCS Level II code. Even though the "code" is not recognized by the current Medicare or workers compensation fee schedules, the "services" are still considered properly billed codes.

Once the Court determined that the Plaintiff did submit a proper bill, in accordance with F.S. 627.736(5)(d), utilizing a valid CPT code in compliance with the HCPCS that was in effect at the time the services were rendered, the next issue for the Court to decide was whether the Defendant was required to issue reimbursement for the low level laser therapy service pursuant to the allowable amount set forth under the Workers Compensation Fee Schedule.

The PIP Statute sets forth the reimbursement method to be utilized by the insurers in determining whether to issue reimbursement for a service and how much the insurer would be required to pay.

Specifically, Florida Statute 627.736(5)(a)1.f. states the following:

> "The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:
>
> f. For all other services, supplies, and care, 200 percent of the allowable amount under:
>
> (I) The participating physicians fee schedule of Medicare Part B, except as provided in sub-sub-subparagraphs (II) and (III).
>
> (II) Medicare Part B, in the case of services, supplies, and care provided by ambulatory surgical centers and clinical laboratories.
>
> (III) The Durable Medical Equipment Prosthetics/Orthotics and Supplies fee schedule of Medicare Part B, in the case of durable medical equipment.
>
> However, if such **services, supplies, or care is** not reimbursable under Medicare Part B, as provided in this sub-subparagraph, the insurer may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers compensation, as determined under s. 440.13 and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided. ***Services, supplies or care that is not reimbursable under Medicare or Workers Compensation is not required to be reimbursed by the insurer.***

Pursuant to Florida Statute 627.736(5)(a)1.f., whether an insurer is required to issue reimbursement for a service rendered, *does not depend on whether a particular CPT code* is reimbursable by Medicare or workers compensation. Rather F.S. 627.736(5)(a)1.f. depends on whether the "**services, supplies, or care**" in question are reimbursable under Medicare Part B or workers compensation. This Court can not disregard the plain language of the statute.

Additionally, the Plaintiff cited to *Allstate Fire & Casualty Insurance Company v. Jorge Perez*.[3] In *Perez*, the court of appeal reviewed a county court Order concluding that the consultation services the doctor provided *were* reimbursable under Florida Statute §627.736(5)(a)(2)(f) despite the fact that the CPT code used to identify those services were no longer recognized by Medicare Part B. In *affirming* the county court's Order, the 2nd DCA stated in relevant part as follows:

> "Although CMS has eliminated the use of the CPT consultation codes for payment of [evaluation and management] services furnished to Medicare fee-for-service patients, those [evaluation and management] services themselves *continue to be covered services* if they are medically reasonable and necessary . . . ." *Id*.at 3 (emphasis added). Therefore, it is clear that the services represented by CPT code 99245 are still covered by Medicare Part B if they are medically reasonable and necessary. It then follows that the services are "reimbursable under Medicare Part B" for purposes of *section 627.736(5)(a)(2)(f)*. The language of *section 627.736(5)(a)(2)(f)* is clear. The statute focuses on whether services, supplies, or care is "reimbursable under Medicare Part B"; it does not require that CPT codes be recognized by Medicare for reimbursement purposes. *See Holly v. Auld,* 450 So. 2d 217, 219 (Fla. 1984) (" '[T]he statute must be given its plain and obvious meaning.' " (quoting *A.R. Douglass, Inc. v. McRainey*, 102 Fla. 1141, 137 So. 157, 159 (Fla.1931))). While CPT codes help to clearly identify services that may be reimbursable under the PIP statute, a CPT code alone does not dictate whether a service is reimbursable under the statute. As the county court ruled, it is the nature of the medical service that controls. This plain reading of the statute is consistent with the well-established rule in Florida that the PIP statute should be construed liberally in favor of the insured. *See State Farm Mut. Auto. Ins. Co. v. Pressley*, 28 So. 3d 105, 108 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D150b] (citing *Farmer v. Protective Cas. Ins. Co.*, 530 So. 2d 356 (Fla. 2d DCA 1988))
>
> We acknowledge that section 627.736(5)(d) requires providers to submit bills for services that comply with the CPT coding in effect for the year in which the services are rendered. We cannot say that Dr. Tedder failed to comply with this provision because there has been no allegation that CPT code 99245 was eliminated from the general CPT coding system used outside of the Medicare system. But we understand the confusion that is likely caused when a provider uses a CPT code that, while still valid in the medical community, is no longer recognized by the current Medicare Part B schedule but the services are considered covered and therefore reimbursable under Medicare Part B. As in this case, the insurer would have to look beyond the CPT code to determine whether the services represented in the code are reimbursable under Medicare Part B. We understand that this complicates the reimbursement process under the PIP Statute. **Nonetheless, we are bound by the plain language of section 627.736(5)(a)(2)(f), which does not require a CPT code to be recognized by Medicare Part B if the services are otherwise covered and reimbursable under Medicare Part B.** See *Overstreet v. State*, 629 So.2d 125, 126 (Fla. 1993) If the Legislature did not intend the results mandated by the statute's plain language, then the appropriate remedy is for it to amend the statute.") (This Court is not permitted to add words to a statute that were not placed there by the Legislature)." (Emphasis added) *Allstate Fire & Casualty Insurance Company v. Jorge Perez*.111 So.3d 960 (2nd DCA 2013) [38 Fla. L. Weekly D915a]

Similar to the Court in *Perez*, this Court finds that the PIP statute focuses on *whether the services, supplies, or care was reimbursable under Medicare Part B or the workers compensation fee schedule.* It does not require that the CPT code be recognized by Medicare or workers compensation for reimbursement purposes under the PIP statute. The Defendant's focus on the code itself is misplaced and agreed at the hearing that CPT code 97039 is a reimbursable code. Therefore, if low level laser therapy is reimbursable by Medicare Part

B or workers compensation, then the Defendant would be required to pay.

In its proposed order to this Court, the Defendant for the first time cited *Cintext Urgent Care v. State Farm* (27 Fla. L. Weekly Supp. 756a) (Broward County, 2019) for the proposition that Defendant was not required to issue reimbursement for CPT code 97039. However, the holding in that case was distinguishable and limited to the fact that the service wasn't reimbursable under the Participating Physician Fee Schedule of Medicare Part B. This did not change the Broward County Court's finding that the service was still reimbursable under workers compensation, or depart from the holding in Perez. In fact, the Court in *Cintex* found that the Defendant was required to issue reimbursement for CPT code 97039 at the workers compensation rate.

Florida Statute 627.736(5)(a)1.f. first requires the insurer to determine whether the services is reimbursable under Medicare Part B as provided in sub-sub paragraph (f) and if it is then the insurer is required to issue reimbursement at 200% of the Medicare allowable rate. If the service is not reimbursable under Medicare Part B, as provided in sub-sub paragraph (f) then the insurer may utilize the default mechanism and limit reimbursement to 80% of the maximum reimbursable allowance under workers compensation. F.S. 627.736(5)(a)1.f. (2017) The only scenario in which an insurer would not be required to issue reimbursement for the service rendered is if the "service, supplies, or care" was not reimbursable under either Medicare Part B as provided in sub-sub paragraph (f) or workers compensation.

Additionally, the Plaintiff has filed, in support of its Motion for Final Summary Judgment, an Affidavit of Dr. Frank Giampietro, D.C. which supports the reasonableness, relatedness, and necessity of the services rendered for the dates of service at issue. Additionally, attached to the Affidavit of Dr. Giampietro D.C. are all the bills and medical notes for the services rendered. Each of the times that the Plaintiff billed for the low level laser therapy, the provider also included a detailed description of the service rendered, the type and the time. The Plaintiff has met its burden of proving that the services rendered were reasonable, related and necessary.

Based upon the above, this Court finds that the low level laser therapy service, rendered by the Plaintiff, was properly billed by the Plaintiff as S8948 which was and still is a valid CPT code in effect at the time the services were rendered. This Court has determined that low level laser therapy was a reimbursable service under the workers compensation fee schedule and therefore this Court finds that the Defendant was required to issue reimbursement for the low level laser therapy service under the workers compensation fee schedule rate of $15.00 for CPT code 97039.[4] The low level therapy service was rendered a total of 21 times during the timeframe of the dates of service at issue in this lawsuit. Therefore, this Court finds that the Defendant owes the Plaintiff $315.00 in additional PIP and MedPay benefits. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Plaintiff's Motion for Final Summary Judgment is GRANTED and Defendant's Motion for Summary Final Judgment and Motion for Protective Order is DENIED. This Court reserves jurisdiction to determine Plaintiff's reasonable attorney's fees and costs.

---

[1]See Plaintiff's Notice of Filing Research and Articles Exhibit "H" (from HCPCS.CODES and sets forth the HCPCS Code Details for S8948 and showing that S8948 has been a valid code and in effect since 1/1/2004).

See Plaintiff's Notice of Filing Research and Articles Exhibit "I" (from HCPCS.CODES and sets forth the background and validity of HCPCS Level II Coding Procedures

[2]See Plaintiff's Notice of Filing Research and Articles Exhibit "F" ("Should I Bill for Laser Therapy")

[3]111 So.3d 960 (2nd DCA 2013)

[4]See the workers compensation fee schedule rate for CPT code 97039 attached to Plaintiff's Amended Motion for Final Summary Judgment as Exhibit "J"

* * *