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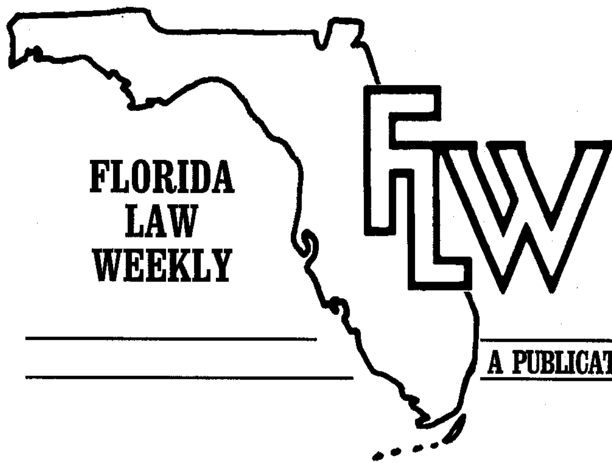

FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 639-748

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.

- **ATTORNEY'S FEES—OFFER OF JUDGMENT. The circuit court concluded that a prevailing defendant in a legal malpractice action was entitled to an award of attorney's fees under Florida's offer of judgment statute despite the fact that the defendant was neither obligated to pay, nor in fact paid, any of the fees incurred in the defense of the action under the terms of an indemnity agreement with his co-defendant law firm and the terms of an engagement letter with common counsel. The court found no merit to the argument that the fees incurred in the case should be apportioned between the attorney who made the offer of judgment and the law firm that did not make an offer, given that the claims against the attorney and the firm and the parties' defenses were identical.** *JAIN v. BUCHANAN INGERSOLL & ROONEY PC. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed September 18, 2020. Full Text at Circuit Courts-Original Section, page 700a.*

- **TORTS—LEGAL MALPRACTICE—LIMITATION OF ACTIONS. A cause of action for transactional legal malpractice based on an attorney's drafting of documents that allegedly left the plaintiff completely unprotected in a development transaction and gave the plaintiff's business partner and his girlfriend the ability to defraud the plaintiff accrued, and the two-year statute of limitations began to run, when the plaintiff first suffered injury as a result of the alleged malpractice. Application of the finality-accrual rule, providing that a transactional malpractice claim does not accrue until underlying or related litigation is concluded, is limited to cases in which the outcome of the underlying or related litigation would determine whether any malpractice occurred at all or whether the client ever suffered damages, which is not true of present claim.** *MIKHAYLOV v. BILZIN SUMBERG BAENA PRICE & AXELROD LLP. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed October 7, 2020. Full Text at Circuit Courts-Original Section, page 693a.*

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Bold denotes decision by circuit court in its appellate capacity.

ADMINISTRATIVE LAW

Department of Highway Safety and Motor Vehicles—Licensing—Driver's license—see, LICENSING—Driver's license
Licensing—Driver's license—see, LICENSING—Driver's license

APPEALS

Certiorari—Licensing—Driver's license suspension—Timeliness of petition **6CIR 643a**
Criminal—see, CRIMINAL LAW—Appeals
Licensing—Driver's license suspension—Certiorari—Timeliness of petition **6CIR 643a**
Licensing—Driver's license suspension—Reinstatement—Early reinstatement—Transcript—Absence—Affirmance of final agency order **11CIR 655a**
Transcript—Absence—Affirmance of lower court ruling **11CIR 655a**

ATTORNEYS

Fiduciary duty—Breach—Fraudulently obtaining loan using client's properties as collateral 11CIR 684a
Fiduciary duty—Breach—Use of income from client's LLCs to pay personal expenses 11CIR 684a
Malpractice—Attorney's fees—Offer of judgment—Apportionment of award between defendant-attorney who made offer and law firm that did not make offer—Identical claims and defenses 11CIR 700a
Malpractice—Attorney's fees—Offer of judgment—Fees incurred by law firm on behalf of defendant attorney 11CIR 700a
Malpractice—Attorney's fees—Offer of judgment—Fees paid by defendant's law firm employer under indemnity agreement 11CIR 700a
Malpractice—Transactional—Drafting of documents that left clients unprotected in developmental transaction, providing business partner and his girlfriend ability to defraud clients—Limitation of actions—Accrual of cause of action 11CIR 693a
Malpractice—Transactional—Limitation of actions—Accrual of cause of action—Finality-accrual rule—Applicability—Limitation to cases in which outcome of underlying or related litigation would determine whether malpractice occurred or whether client suffered damages 11CIR 693a
Malpractice—Transactional—Limitation of actions—Extension of period—Uncertainty as to amount of damages arising from pendency of clients' bankruptcy proceedings 11CIR 693a
Torts—Theft—Removal of money from client's LLCs—Disgorgement 11CIR 684a

ATTORNEY'S FEES

Amount—Excess of fees charged by counsel **15CIR 664a**
Justiciable issues—Claim or defense not supported by material facts or applicable law—Amount—Excess of fees charged by counsel **15CIR 664a**
Justiciable issues—Claim or defense not supported by material facts or applicable law—Costs award **15CIR 664a**
Justiciable issues—Claim or defense not supported by material facts or applicable law—Findings **15CIR 664a**
Justiciable issues—Claim or defense not supported by material facts or applicable law—Safe harbor period—Extension of period—Five-day mailing period **15CIR 664a**
Landlord-tenant—Prevailing party—Security deposit dispute CO 737b
Mutuality or reciprocity of obligation—Action for account stated **17CIR 667a**
Offer of judgment—Apportionment of award between defendant-attorney who made offer and law firm that did not make offer—Identical claims and defenses 11CIR 700a

ATTORNEY'S FEES (continued)

Offer of judgment—Fees incurred by law firm on behalf of defendant attorney 11CIR 700a
Offer of judgment—Fees paid by party's law firm employer under indemnity agreement 11CIR 700a
Prevailing party—Confession of judgment—Personal injury protection insurer—Post-suit payment of statutory penalty and postage—Standing—Medical provider/provider's attorney CO 712a
Prevailing party—Landlord-tenant—Security deposit dispute CO 737b
Prevailing party—Mutuality or reciprocity of obligation—Action for account stated **17CIR 667a**
Sanction for discovery violation—Amount 12CIR 703a

CIVIL PROCEDURE

Amendments—Answer to complaint—Addition of affirmative defense CO 737a
Amendments—Complaint—Denial—Prejudice CO 737c
Amendments—Complaint—Denial of motion—Futility CO 736c; CO 737c
Complaint—Amendment—Denial—Futility CO 736c; CO 737c
Complaint—Amendment—Denial—Prejudice CO 737c
Complaint—Answer—Amendment—Addition of affirmative defense CO 737a
Depositions—Insurer's corporate representative—Protective order—Deposition unlikely to lead to admissible evidence on purely legal issue CO 734a
Depositions—Insurer's litigation adjuster—Protective order—Deposition unlikely to lead to admissible evidence on purely legal issue CO 715a; CO 734a
Discovery—Depositions—Insurer's corporate representative—Protective order—Deposition unlikely to lead to admissible evidence on purely legal issue CO 734a
Discovery—Depositions—Insurer's litigation adjuster—Protective order—Deposition unlikely to lead to admissible evidence on purely legal issue CO 715a; CO 734a
Discovery—Failure to comply—Attorney's fees—Amount 12CIR 703a
Discovery—Failure to comply—Sanctions CO 742a
Discovery—Failure to comply—Sanctions—Findings **17CIR 666b**
Discovery—Interstate Depositions and Discovery Act—Florida corporation's production of documents for use in foreign litigation to which it is not party—Denial of motion to compel 2CIR 677a
Discovery—Non-parties—Foreign subpoenas—Interstate Depositions and Discovery Act—Florida corporation's production of documents for u se in foreign litigation to which it is not party—Denial of motion to compel 2CIR 677a
Dismissal—Failure to perfect service within 120 days CO 732a
Judgment—Offer—Attorney's fees—Apportionment of award between defendant-attorney who made offer and law firm that did not make offer—Identical claims and defenses 11CIR 700a
Judgment—Offer—Attorney's fees—Fees incurred by law firm on behalf of defendant attorney 11CIR 700a
Judgment—Offer—Attorney's fees—Fees paid by party's law firm employer under indemnity agreement 11CIR 700a
Offer of judgment—Attorney's fees—Apportionment of award between defendant-attorney who made offer and law firm that did not make offer—Identical claims and defenses 11CIR 700a
Offer of judgment—Attorney's fees—Fees incurred by law firm on behalf of defendant attorney 11CIR 700a
Offer of judgment—Attorney's fees—Fees paid by party's law firm employer under indemnity agreement 11CIR 700a
Sanctions—Discovery—Failure to comply CO 742a
Sanctions—Discovery—Failure to comply—Attorney's fees—Amount 12CIR 703a
Sanctions—Discovery—Failure to comply—Findings **17CIR 666b**
Service of pleadings and papers—Party represented by counsel—Inclusion of party's email address on e-filing portal CO 720b

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CIVIL PROCEDURE (continued)

Service of process—Failure to perfect within 120 days—Dismissal CO 732a
Summary judgment—Affidavit in opposition to motion—Adequacy **11CIR 656d; 11CIR 660a;** CO 720c
Summary judgment—Injection of new issues following adverse ruling by appellate court on sole issue presented in initial complaint CO 739a; CO 739b
Summary judgment—Opposing affidavit—Adequacy **11CIR 656d; 11CIR 660a;** CO 720c

CONSTITUTIONAL LAW

Due process—Criminal law—Refusal to submit to blood, breath or urine test—Constitutionality of statute—Admission of evidence of earlier refusal that was sustained under preponderance of evidence standard CO 716a
Equal protection—Criminal law—Refusal to submit to blood, breath or urine test—Constitutionality of statute—Disparate treatment of refusals in boating under influence case CO 716a

CONSUMER LAW

Debt collection—Attorney's fees—Prevailing party—Mutuality or reciprocity of obligation—Action for account stated **17CIR 667a**
Deceptive and unfair trade practices—Act outside state targeting business interests within state CO 715b
Deceptive and unfair trade practices—Directed verdict **11CIR 654a**

CONTRACTS

Accord and satisfaction—Insurance—Personal injury protection—Full and final payment—Conspicuous notice CO 714a; CO 730a; CO 733a; CO 735a
Municipal corporations—Water service—Conversion of water service deposits—Sufficiency of complaint 11CIR 681a
Municipal corporations—Water service—Overbilling—Sufficiency of complaint 11CIR 681a
Reformation—Directed verdict **11CIR 654a**

COURTS

Electronic submissions—E-filing portal—Inclusion of email address of party who is represented by counsel CO 720b

CRIMINAL LAW

Appeals—Anders appeal **11CIR 656b**
Arrest—Driving under influence—Probable cause—Odor of alcohol, glassy bloodshot eyes, and refusal to submit to field sobriety exercises CO 711b
Driving under influence—Arrest—Probable cause—Odor of alcohol, glassy bloodshot eyes, and refusal to submit to field sobriety exercises CO 711b
Driving under influence—Evidence—Refusal to submit to breath test—Unlawful DUI investigation CO 711b
Evidence—Driving under influence—Refusal to submit to breath test—Unlawful DUI investigation CO 711b
Evidence—Refusal to submit to breath test—Prior refusal, including driving record and statement to officer that this was not defendant's "first rodeo"—Stipulation by defendant that he had prior refusal **17CIR 669a**
Evidence—Refusal to submit to breath test—Unlawful DUI investigation CO 711b
Field sobriety exercises—Reasonable suspicion CO 711b
Judgment—Correction—Offense of conviction **11CIR 656a**
Post conviction relief—Amendment of motion—Claims legally or facially insufficient **15CIR 666a**
Post conviction relief—Denial—Attachment of portions of record showing no entitlement to relief **15CIR 666a**

CRIMINAL LAW (continued)

Post conviction relief—Denial—Attachment of portions of record showing no entitlement to relief—State's provision of portions of record during appeal **15CIR 666a**
Refusal to submit to blood, breath or urine test—Constitutionality of statute CO 716a
Refusal to submit to breath test—Evidence—Prior refusal, including driving record and statement to officer that this was not defendant's "first rodeo"—Stipulation by defendant that he had prior refusal **17CIR 669a**
Refusal to submit to breath test—Unlawful DUI investigation CO 711b
Search and seizure—Arrest—Driving under influence—Probable cause—Odor of alcohol, glassy bloodshot eyes, and refusal to submit to field sobriety exercises CO 711b
Search and seizure—Field sobriety exercises—Reasonable suspicion CO 711b
Search and seizure—Stop—Vehicle—Owner of vehicle having suspended license—Continued detention for purpose of conducting DUI investigation CO 711b
Search and seizure—Vehicle—Stop—Owner of vehicle having suspended license—Continued detention for purpose of conducting DUI investigation CO 711b
Sentencing—Guidelines—Departure—Reduction of sentence—Age and health of defendant—Increased risk to defendant's health if incarcerated during COVID pandemic 4CIR 679a
Sentencing—Guidelines—Departure—Reduction of sentence—Isolated incident for which defendant showed remorse 4CIR 679a
Sentencing—Guidelines—Departure—Reduction of sentence—Unsophisticated manner in which offense committed 4CIR 679a

DECLARATORY JUDGMENTS

Insurance—Independent medical examination—Duty of insured to attend in-person IME—COVID-19 pandemic CO 736a
Insurance—Personal injury protection—Breach by insurer—Delay in payment of claim—Failure to pay or deny within statutory time limits CO 736b

GUARDIANSHIP

Incapacitated persons—Permanent and persistent vegetative state—Discontinuance of life-prolonging procedures—Public guardian's petition 2CIR 673a

INSURANCE

Accord and satisfaction—Personal injury protection—Full and final payment—Conspicuous notice CO 714a; CO 730a; CO 733a; CO 735a
Attorney's fees—Amount—Excess of fees charged by counsel **15CIR 664a**
Application—Misrepresentations—Automobile insurance—Failure to disclose employee—Materiality 6CIR 704a
Application—Misrepresentations—Automobile insurance—Failure to disclose employee—Rescission of policy 6CIR 704a
Assignment—Personal injury protection—Validity of assignment—Omission of date, policy number, or name of insurer CO 713a
Attorney's fees—Justiciable issues—Claim or defense not supported by material facts or applicable law—Amount—Excess of fees charged by counsel **15CIR 664a**
Attorney's fees—Justiciable issues—Claim or defense not supported by material facts or applicable law—Costs award **15CIR 664a**
Attorney's fees—Justiciable issues—Claim or defense not supported by material facts or applicable law—Findings **15CIR 664a**
Attorney's fees—Justiciable issues—Claim or defense not supported by material facts or applicable law—Safe harbor period—Extension of period—Five-day mailing period **15CIR 664a**
Attorney's fees—Personal injury protection—Prevailing party—Confession of judgment—Post-suit payment of statutory penalty and postage—Standing—Medical provider/provider's attorney CO 712a

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INSURANCE (continued)

Attorney's fees—Prevailing party—Confession of judgment—Personal injury protection insurer—Post-suit payment of statutory penalty and postage—Standing—Medical provider/provider's attorney CO 712a
Automobile—Application—Misrepresentations—Failure to disclose employee—Materiality 6CIR 704a
Automobile—Application—Misrepresentations—Failure to disclose employee—Rescission of policy 6CIR 704a
Complaint—Amendment—Denial—Futility CO 736c; CO 737c
Complaint—Amendment—Denial—Prejudice CO 737c
Complaint—Answer—Amendment—Addition of affirmative defense alleging failure of medical provider to submit valid demand letter CO 737a
Declaratory judgments—Independent medical examination—Duty of insured to attend in-person IME—COVID-19 pandemic CO 736a
Declaratory judgments—Personal injury protection—Breach by insurer—Delay in payment of claim—Failure to pay or deny within statutory time limits CO 736b
Deductible—Personal injury protection—Application of deductible to reduced charges CO 718a
Deductible—Personal injury protection—Proper application CO 718a
Depositions—Corporate representative—Protective order—Deposition unlikely to lead to admissible evidence on purely legal issue CO 734a
Depositions—Litigation adjuster—Protective order—Deposition unlikely to lead to admissible evidence on purely legal issue CO 715a; CO 734a
Discovery—Depositions—Corporate representative—Protective order—Deposition unlikely to lead to admissible evidence on purely legal CO 734a
Discovery—Depositions—Litigation adjuster—Protective order—Deposition unlikely to lead to admissible evidence on purely legal CO 715a; CO 734a
Discovery—Failure to comply—Sanctions CO 742a
Discovery—Failure to comply—Sanctions—Findings **17CIR 666b**
Independent medical examination—Duty to attend—In-person IME—COVID-19 pandemic CO 736a
Misrepresentations—Application—Automobile insurance—Failure to disclose employee—Materiality 6CIR 704a
Misrepresentations—Application—Automobile insurance—Failure to disclose employee—Rescission of policY 6CIR 704a
Personal injury protection—Affirmative defenses—Accord and satisfaction CO 714a; CO 730a; CO 733a; CO 735a
Personal injury protection—Attorney's fees—see, INSURANCE—Attorney's fees
Personal injury protection—Claim form—Defects—Provider's professional license number CO 711a
Personal injury protection—Coverage—Medical expenses—Affirmative defenses—False or misleading charges—Overcharges **11CIR 658a**
Personal injury protection—Coverage—Medical expenses—Affirmative defenses—Judgment on pleadings **11CIR 658a**
Personal injury protection—Coverage—Medical expenses—Affirmative defenses—Judgment on pleadings—Considerations—Deposition testimony **11CIR 658a**
Personal injury protection—Coverage—Medical expenses—Amount less than 200% of allowable amount under fee schedule CO 743a
Personal injury protection—Coverage—Medical expenses— Deductible—Application of deductible to reduced charges CO 718a
Personal injury protection—Coverage—Medical expenses— Deductible—Proper application CO 718a
Personal injury protection—Coverage—Medical expenses—Delay in payment of claim—Failure to pay or deny within statutory time limits CO 736b
Personal injury protection—Coverage—Medical expenses—Lawfully rendered services—Massage services—Physiotherapy modalities performed by licensed massage therapist, ordered by chiropractic physician and performed under physician's control and supervision **17CIR 670a**

INSURANCE (continued)

Personal injury protection—Coverage—Medical expenses—Reasonable, related and necessary treatment—Relatedness and necessity—Summary judgment—Opposing affidavit—Peer review report—CPT codes not disputed in insurer's peer review report CO 720c
Personal injury protection—Coverage—Medical expenses—Reasonable, related and necessary treatment—Relatedness and necessity—Summary judgment—Opposing affidavit—Peer review report—Report not opining that insured was treated for anything other than injuries from covered accident CO 720c
Personal injury protection—Coverage—Medical expenses—Reasonable, related and necessary treatment—Relatedness and necessity—Summary judgment—Opposing affidavit—Peer review report—Report opining that certain CPT code should be recoded CO 720c
Personal injury protection—Coverage—Medical expenses—Reasonable, related and necessary treatment—Summary judgment—Peer review reports—Failure to consider **11CIR 658a**
Personal injury protection—Coverage—Medical expenses— Reasonableness of charges—Collateral estoppel—Issue not raised in provider's reply CO 724a; CO 727a
Personal injury protection—Coverage—Medical expenses— Reasonableness of charges—Collateral estoppel—Prior adjudications in multiple suits—Identity of issues—Charges for same CPT codes—Suits involving different accidents, patients, claims, causes of action, and assignments of benefits CO 724a; CO 727a
Personal injury protection—Coverage—Medical expenses— Reasonableness of charges—Collateral estoppel—Prior adjudications in multiple suits—Identity of issues—Confession of judgment by insurer CO 731a
Personal injury protection—Coverage—Medical expenses— Reasonableness of charges—Collateral estoppel—Prior adjudications in multiple suits—Identity of issues—Differing amounts, CPT codes, theories of breach, and motions for summary judgment CO 731a
Personal injury protection—Coverage—Medical expenses— Reasonableness of charges—Summary judgment—Opposing affidavits—Adequacy **11CIR 660a**
Personal injury protection—Coverage—Medical expenses—Standing—Assignment—Validity—Omission of date, policy number, or name of insurer CO 713a
Personal injury protection—Coverage—Medical expenses—Statutory fee schedules—Workers' compensation fee schedule—Applicability—Allowable amount under Medicare participating physicians fee schedule requiring determination on an individualized basis—Certification of question CO 740a
Personal injury protection—Coverage—Medical expenses—Summary judgment—Injection of new issues following adverse ruling by appellate court on sole issue presented in initial complaint CO 739a; CO 739b
Personal injury protection—Coverage—Medical expenses—Summary judgment—Opposing affidavit—Adequacy **11CIR 656d**
Personal injury protection—Deductible—Application of deductible to reduced charges CO 718a
Personal injury protection—Deductible—Proper application CO 718a
Personal injury protection—Discovery—Depositions—Corporate representative—Protective order—Deposition unlikely to lead to admissible evidence on purely legal issue CO 734a
Personal injury protection—Discovery—Depositions—Litigation adjuster—Protective order—Deposition unlikely to lead to admissible evidence on purely legal issue CO 715a; CO 734a
Personal injury protection—Discovery—Failure to comply—Sanctions CO 742a
Personal injury protection—Discovery—Failure to comply—Sanctions—Findings **17CIR 666b**
Personal injury protection—Provider's action against insurer—Answer—Amendment—Addition of affirmative defense alleging failure to submit valid demand letter CO 737a

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INSURANCE (continued)

Personal injury protection—Provider's action against insurer—Complaint—Amendment—Addition of claim for underpayment of specific CPT code—Denial of amendment—Futility CO 737c
Personal injury protection—Provider's action against insurer—Complaint—Amendment—Addition of claim for underpayment of specific CPT code—Denial of amendment—Prejudice CO 737c
Personal injury protection—Provider's action against insurer—Complaint—Amendment—Denial—Futility CO 736c
Res judicata—Collateral estoppel—Personal injury protection—Coverage—Medical expenses—Reasonableness of charges—Prior adjudications in multiple suits—Identity of issues—Charges for same CPT codes—Suits involving different accidents, patients, claims, causes of action, and assignments of benefits CO 724a; CO 727a
Res judicata—Collateral estoppel—Personal injury protection—Coverage—Medical expenses—Reasonableness of charges—Prior adjudications in multiple suits—Identity of issues—Confession of judgment by insurer CO 731a
Res judicata—Collateral estoppel—Personal injury protection—Coverage—Medical expenses—Reasonableness of charges—Prior adjudications in multiple suits—Identity of issues—Differing amounts, CPT codes, theories of breach, and motions for summary judgment CO 731a
Res judicata—Personal injury protection—Coverage—Medical expenses—Reasonableness of charges—Collateral estoppel—Prior adjudications in multiple suits—Identity of issues—Charges for same CPT codes—Suits involving different accidents, patients, claims, causes of action, and assignments of benefits CO 724a; CO 727a
Res judicata—Personal injury protection—Coverage—Medical expenses—Reasonableness of charges—Collateral estoppel—Prior adjudications in multiple suits—Identity of issues—Confession of judgment by insurer CO 731a
Res judicata—Personal injury protection—Coverage—Medical expenses—Reasonableness of charges—Collateral estoppel—Prior adjudications in multiple suits—Identity of issues—Differing amounts, CPT codes, theories of breach, and motions for summary judgment CO 731a
Rescission of policy—Automobile insurance—Misrepresentations—Application—Failure to disclose employee—Materiality 6CIR 704a
Rescission of policy—Misrepresentations on application—Automobile insurance—Failure to disclose employee—Materiality 6CIR 704a
Sanctions—Discovery—Failure to comply CO 742a

JUDGES

Disqualification—Bias—Adverse judicial rulings **11CIR 654a**
Judicial Ethics Advisory Committee—Disclosure, recusal, or disqualification—Attorney-client relationship—Attorney a former client of judge or member of law firm formerly represented by judge M 746a
Judicial Ethics Advisory Committee—Disclosure, recusal, or disqualification—Friendships—Friend of judge's spouse appearing as counsel of record M 746b
Judicial Ethics Advisory Committee—Disclosure, recusal, or disqualification—Practice of law—Post-judicial employer's advertisement of sitting judge's prospective employment M 748a
Judicial Ethics Advisory Committee—Matters prior to becoming judge—Sale of law office building M 747a
Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Civic organizations—NAACP M 745a
Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Lobbying, activist, and advocacy groups—NAACP M 745a
Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Social, fraternal, sororal or religious groups—NAACP M 745a

JURISDICTION

Service of process—Failure to perfect within 120 days—Dismissal CO 732a

LANDLORD-TENANT

Attorney's fees—Prevailing party—Security deposit dispute CO 737b
Eviction—Notice—Defects—Month-to-month tenancy—Failure to give 30-day notice required by city ordinance CO 720a
Eviction—Notice—Defects—Month-to-month tenancy—Requirement that tenant vacate in middle of monthly tenancy CO 720a
Eviction—Unlawful detainer—Former counsel's continued possession of property owned by client after client withdrew consent 11CIR 684a
Security deposit—Return—Attorney's fees—Prevailing tenant CO 737b

LICENSING

Driver's license—Cancellation—Non-immigrant foreign citizen—Renewal application unsupported by documents proving lawful presence in U.S. **11CIR 655b**
Driver's license—Suspension **4CIR 639a**
Driver's license—Suspension—Appeals—Certiorari—Timeliness of petition **6CIR 643a**
Driver's license—Suspension—Driving under influence—Lawfulness of detention—Odor of alcohol, physical appearance, and visible signs of impairment **6CIR 639b**
Driver's license—Suspension—Driving under influence—Lawfulness of stop—Vehicles stopped in roadway at green light and thereafter pulling into parking lot **6CIR 639b**
Driver's license—Suspension—Driving with unlawful alcohol level—Evidence—Breath test—Substantial compliance with administrative rules—Second breath sample—Necessity—Test performed on device listed in U.S. Department of Transportation conforming products list **12CIR 661a**
Driver's license—Suspension—Driving with unlawful alcohol level—Lawfulness of arrest—Field sobriety exercises **14CIR 663b**
Driver's license—Suspension—Driving with unlawful alcohol level—Lawfulness of detention—Motorcyclist—Ordering licensee to dismount motorcycle **14CIR 663b**
Driver's license—Suspension—Driving with unlawful alcohol level—Lawfulness of detention—Odor of alcohol and physical appearance **14CIR 663b**
Driver's license—Suspension—Driving with unlawful alcohol level—Licensee under age 21—Evidence—Breath test—Substantial compliance with administrative rules—Second breath sample—Necessity—Test performed on device listed in U.S. Department of Transportation conforming products list **12CIR 661a**
Driver's license—Suspension—DUI manslaughter—Evidence—Breath test—Below-limit test administered four hours after accident—Arresting officer's observations supporting finding of impairment despite breath test result **10CIR 653a**
Driver's license—Suspension—Refusal to submit to blood, breath or urine test—Confusion doctrine **7CIR 649a**
Driver's license—Suspension—Refusal to submit to blood, breath or urine test—Lawfulness of detention—Resisting lawful order to exit vehicle during investigatory stop **7CIR 649a**
Driver's license—Suspension—Refusal to submit to blood, breath or urine test—Lawfulness of request for breath test—Drug possession arrest **6CIR 647a**
Driver's license—Suspension—Refusal to submit to blood, breath or urine test—Lawfulness of stop—911 call from liquor store employee **7CIR 649a**
Driver's license—Suspension—Refusal to submit to blood, breath or urine test—Lawfulness of stop—BOLO for impaired driver combined with erratic driving pattern **6CIR 641a**
Driver's license—Suspension—Refusal to submit to blood, breath or urine test—Lawfulness of stop—Careless driving—Endangerment of licensee's own life, limb, or property **6CIR 645a**

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LICENSING (continued)

Driver's license—Suspension—Refusal to submit to blood, breath or urine test—Lawfulness of stop—Community caretaking **7CIR 649a**

Driver's license—Suspension—Refusal to submit to blood, breath or urine test—Lawfulness of stop—Erratic driving pattern **6CIR 641a; 6CIR 643b**

Driver's license—Suspension—Refusal to submit to blood, breath or urine test—Lawfulness of stop—Traffic infractions **6CIR 643b**

Driver's license—Suspension—Refusal to submit to blood, breath or urine test—Objective basis for stop **6CIR 645a**

Driver's license—Suspension—Refusal to submit to blood, breath or urine test—Request for counsel **7CIR 649a**

Driver's license—Suspension—Reinstatement—Early reinstatement—Appeals—Transcript—Absence—Affirmance of final agency order **11CIR 655a**

LIMITATION OF ACTIONS

Torts—Legal malpractice—Transactional—Accrual of cause of action—Finality-accrual rule—Applicability—Limitation to cases in which outcome of underlying or related litigation would determine whether malpractice occurred or whether client suffered damages 11CIR 693a

Torts—Legal malpractice—Transactional—Drafting of documents that left clients unprotected in developmental transaction, providing business partner and his girlfriend ability to defraud clients—Accrual of cause of action 11CIR 693a

Torts—Legal malpractice—Transactional—Extension of period—Uncertainty as to amount of damages arising from pendency of clients' bankruptcy proceedings 11CIR 693a

MUNICIPAL CORPORATIONS

Contracts—Water service—Conversion of water service deposits—Sufficiency of complaint 11CIR 681a

Contracts—Water service—Overbilling—Sufficiency of complaint 11CIR 681a

Utilities—Water service—Conversion of water service deposits—Sufficiency of complaint 11CIR 681a

Utilities—Water service—Overbilling—Sufficiency of complaint 11CIR 681a

PUBLIC UTILITIES

Municipal utility—Water service—Conversion of water service deposits—Sufficiency of complaint 11CIR 681a

Municipal utility—Water service—Overbilling—Sufficiency of complaint 11CIR 681a

REAL PROPERTY

Unlawful detainer—Former counsel's continued possession of property owned by client after client withdrew consent 11CIR 684a

RES JUDICATA

Collateral estoppel—Insurance—Personal injury protection—Coverage—Medical expenses—Reasonableness of charges—Prior adjudications in multiple suits—Identity of issues—Charges for same CPT codes—Suits involving different accidents, patients, claims, causes of action, and assignments of benefits CO 724a; CO 727a

Collateral estoppel—Insurance—Personal injury protection—Coverage—Medical expenses—Reasonableness of charges—Prior adjudications in multiple suits—Identity of issues—Confession of judgment by insurer CO 731a

Collateral estoppel—Insurance—Personal injury protection—Coverage—Medical expenses—Reasonableness of charges—Prior adjudications in multiple suits—Identity of issues—Differing amounts, CPT codes, theories of breach, and motions for summary judgment CO 731a

Insurance—Personal injury protection—Coverage—Medical expenses—Reasonableness of charges—Collateral estoppel—Prior adjudications in multiple suits—Identity of issues—Charges for same CPT codes—Suits involving different accidents, patients, claims, causes of action, and assignments of benefits CO 724a; CO 727a

RES JUDICATA (continued)

Insurance—Personal injury protection—Coverage—Medical expenses—Reasonableness of charges—Collateral estoppel—Prior adjudications in multiple suits—Identity of issues—Confession of judgment by insurer CO 731a

Insurance—Personal injury protection—Coverage—Medical expenses—Reasonableness of charges—Collateral estoppel—Prior adjudications in multiple suits—Identity of issues—Differing amounts, CPT codes, theories of breach, and motions for summary judgment CO 731a

TORTS

Attorneys—Civil theft—Removal of money from client's LLCs—Disgorgement 11CIR 684a

Attorneys—Malpractice—Attorney's fees—Offer of judgment—Apportionment of award between defendant-attorney who made offer and law firm that did not make offer—Identical claims and defenses 11CIR 700a

Attorneys—Malpractice—Attorney's fees—Offer of judgment—Fees incurred by law firm on behalf of defendant attorney 11CIR 700a

Attorneys—Malpractice—Attorney's fees—Offer of judgment—Fees paid by defendant's law firm employer under indemnity agreement 11CIR 700a

Attorneys—Malpractice—Transactional—Drafting of documents that left clients unprotected in developmental transaction, providing business partner and his girlfriend ability to defraud clients—Limitation of actions—Accrual of cause of action 11CIR 693a

Attorneys—Malpractice—Transactional—Limitation of actions—Accrual of cause of action—Finality-accrual rule—Applicability—Limitation to cases in which outcome of underlying or related litigation would determine whether malpractice occurred or whether client suffered damages 11CIR 693a

Attorneys—Malpractice—Transactional—Limitation of actions—Extension of period—Uncertainty as to amount of damages arising from pendency of clients' bankruptcy proceedings 11CIR 693a

Civil theft—Attorneys—Removal of money from client's LLCs—Disgorgement 11CIR 684a

Conspiracy—Interference with contract—Contract in breach before tortious acts took place—Relevance CO 715b

Conspiracy—Interference with contract—Intent—Sufficiency of evidence CO 715b

Fiduciary—Breach of duty—Attorney—Fraudulently obtaining loan using client's properties as collateral 11CIR 684a

Fiduciary—Breach of duty—Attorney—Preparation of documents allowing exercise of ownership and control over client's properties 11CIR 684a

Fiduciary—Breach of duty—Attorney—Use of income from client's LLCs to pay personal expenses 11CIR 684a

Interference with contract—Contract in breach before tortious acts took place—Relevance CO 715b

Interference with contract—Intent—Sufficiency of evidence CO 715b

Legal malpractice—Attorney's fees—Offer of judgment—Apportionment of award between defendant-attorney who made offer and law firm that did not make offer—Identical claims and defenses 11CIR 700a

Legal malpractice—Attorney's fees—Offer of judgment—Fees incurred by law firm on behalf of defendant attorney 11CIR 700a

Legal malpractice—Attorney's fees—Offer of judgment—Fees paid by defendant's law firm employer under indemnity agreement 11CIR 700a

Legal malpractice—Transactional—Drafting of documents that left clients unprotected in developmental transaction, providing business partner and his girlfriend ability to defraud clients—Limitation of actions—Accrual of cause of action 11CIR 693a

Legal malpractice—Transactional—Limitation of actions—Accrual of cause of action—Finality-accrual rule—Applicability—Limitation to cases in which outcome of underlying or related litigation would determine whether malpractice occurred or whether client suffered damages 11CIR 693a

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TORTS (continued)

Legal malpractice—Transactional—Limitation of actions—Extension of period—Uncertainty as to amount of damages arising from pendency of clients' bankruptcy proceedings 11CIR 693a
Limitation of actions—Legal malpractice—Transactional—Accrual of cause of action—Finality-accrual rule—Applicability—Limitation to cases in which outcome of underlying or related litigation would determine whether malpractice occurred or whether client suffered damages 11CIR 693a
Limitation of actions—Legal malpractice—Transactional—Drafting of documents that left clients unprotected in developmental transaction, providing business partner and his girlfriend ability to defraud clients—Accrual of cause of action 11CIR 693a
Limitation of actions—Legal malpractice—Transactional—Extension of period—Uncertainty as to amount of damages arising from pendency of clients' bankruptcy proceedings 11CIR 693a
Theft—Attorneys—Removal of money from client's LLCs—Disgorgement 11CIR 684a

* * *

TABLE OF CASES REPORTED

Accumed Wellness and Rehabilitation Center, Inc. (Desir) v. Infinity Auto Insurance Company CO 742a
Agorive NV v. DeWitt 11CIR 684a
Allen v. Capital One (USA) (NA) **11CIR 656c**
Ameris Bank v. Alvarez CO 720b
Atlantic Coast Orthopaedics LLC (Mazard) v. Allstate Fire and Casualty Insurance Company CO 737c
Barringer, Matter of Estate of 2CIR 677a
Baum Chiropractic Clinic, P.A. (Rogers) v. State Farm Mutual Automobile Insurance Company **17CIR 666b**
Capital One Bank (USA), N.A. v. Norman CO 732a
Carillo-Enriquez v. State **11CIR 656b**
Chris Thompson, P.A. (Cadau) v. GEICO Indemnity Company CO 737a
Columna, Inc. (Bailey) v. Allstate Insurance Company CO 734a
Doctor Rehab Center Inc. (Moran) v. United Automobile Insurance Company CO 735a
Doctor Rehab Center, Inc. (Diaz) v. United Automobile Insurance Company CO 724a
Dr. Kelly J. Huber, Inc. (Ramirez) v. Peak Property and Casualty Insurance Corporation CO 713a
Eco Stone Holding, LLC v. Calle CO 720a
First Health Chiropractic (Guerrero) v. Allstate Fire and Casualty Insurance Company CO 715a
Florida Supreme Court Judicial Ethics Advisory Committee, Opinion No. 2020-22 M 745a
Florida Supreme Court Judicial Ethics Advisory Committee, Opinion No. 2020-23 M 746a
Florida Supreme Court Judicial Ethics Advisory Committee, Opinion No. 2020-24 M 746b
Florida Supreme Court Judicial Ethics Advisory Committee, Opinion No. 2020-25 M 747a
Florida Supreme Court Judicial Ethics Advisory Committee, Opinion No. 2020-26 M 748a
Floyd v. State, Department of Highway Safety and Motor Vehicles **6CIR 643a**
Francis v. City of Tamarac **17CIR 671b**
Good Health Medical Rehab, Inc. (Belfeur) v. State Farm Mutual Automobile Insurance Company CO 740a
Hansbrough Center for Functional Neurology Inc. (Altieri) v. Allstate Fire and Casualty Insurance Company CO 739a
Harris v. State, Department of Highway Safety and Motor Vehicles **14CIR 663b**
Healthsource of Northwest Florida, LLC (Forte) v. Progressive American Insurance Company CO 711a
Huber, Inc., Dr. Kelly J. (Ramirez) v. Peak Property and Casualty Insurance Corporation CO 713a
Integon Preferred Insurance Company v. Action Plumbing Services, Inc. 6CIR 704a
Jain v. Buchanan Ingersoll and Rooney PC 11CIR 700a

TABLE OF CASES REPORTED (continued)

Kostilnik v. State, Department of Highway Safety and Motor Vehicles **6CIR 645a**
Kunnen v. Florida Department of Highway Safety and Motor Vehicles **6CIR 639b**
Lando Resorts Corporation v. Cabrera CO 715b
Louis v. Da Silveira **17CIR 671c**
Luzak v. Light 2CIR 677a
Marks, P.A. v. Allstate Fire and Casualty Insurance Company CO 736c
Mazariegos v. State **15CIR 666a**
MD Now Medical Centers, Inc. v. Auto-Owners Insurance Company **15CIR 664a**
Michael A. Marks, P.A. v. Allstate Fire and Casualty Insurance Company CO 736c
Mikhaylov v. Bilzin Sumberg Baena Price and Axelrod LLP 11CIR 693a
Mitchler v. Sunshine Holiday, LLC **17CIR 671a**
Moodie v. State **17CIR 663a**
Mugnaini v. Psaltis 12CIR 703a
NAMPCO, LLC v. Pierre **17CIR 662a**
Neurology Partners, P.A. v. GEICO General Insurance Company CO 712a
New Medical Group Inc. (Amaya) v. United Automobile Insurance Company CO 714a
New Medical Group Inc. (Bowles) v. United Automobile Insurance Company CO 733a
New Medical Group Inc. (Pita) v. State Farm Mutual Automobile Insurance Company CO 731a
New Medical Group Inc. (Ravelo) v. United Automobile Insurance Company CO 730a
New Medical Group Inc. (Salazar) v. United Automobile Insurance Company CO 727a
Nill v. State, Department of Highway Safety and Motor Vehicles **7CIR 647a**
Orlando Therapy Center, Inc. (Mum) v. Progressive American Insurance Company CO 736b
Parker v. State, Department of Highway Safety and Motor Vehicles **7CIR 649a**
Pennington v. State **17CIR 669a**
Perez v. GPI FL-A, LLC **11CIR 654a**
Ponder v. Department of Highway Safety and Motor Vehicles **4CIR 639a**
Portfolio Recovery Associates, LLC v. Durand **17CIR 667a**
Powell v. Bayview Florida Properties, LLC **17CIR 671d**
Ramirez v. Direct General Insurance Company CO 736a
Ramirez v. Florida Department of Highway Safety **11CIR 655b**
Real Healthcare Inc. (Cortez) v. State Farm Mutual Automobile Insurance Company CO 743a
Roybal v. Ariel and Aphrodite LLC CO 737b
Saepoff-Vonhubertz v. Department of Highway Safety and Motor Vehicles **12CIR 661a**
Schibler v. Florida Department of Highway Safety and Motor Vehicles **10CIR 653a**
Silverland Medical Center, LLC (Garcia) v. United Automobile Insurance Company CO 720c
Sinclair v. Florida Department of Highway Safety and Motor Vehicles **11CIR 655a**
Skelton v. Florida Department of Highway Safety and Motor Vehicles **6CIR 641a**
Slovinac v. Florida Department of Highway Safety and Motor Vehicles **6CIR 643b**
Star Casualty Insurance Company v. South Florida Pain and Rehabilitation of Hialeah, LLC (Rodriguez) **17CIR 670a**
State Farm Mutual Automobile Insurance Company v. Gables Insurance Recovery, Inc. (Manyoma) **11CIR 656d**
State Farm Mutual Automobile Insurance Company v. Prime Medical and Rehab Services, Inc. (Perez) **11CIR 658a**
State v. Barr CO 716a
State v. Johnson CO 711b
State v. Mathis 4CIR 679a
Suarez v. City of Opa-Locka 11CIR 681a

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TABLE OF CASES REPORTED (continued)

Taft Rehab Center, LLC (Lopez) v. Allstate Fire and Casualty Insurance Company CO 739b
Thompson, P.A. (Cadau) v. GEICO Indemnity Company CO 737a
United Automobile Insurance Company v. Millennium Radiology, LLC (Lazo) **11CIR 660a**
Venus Medical Center, Corporation (Fabre) v. United Automobile Insurance Company CO 718a
Yambo v. State **11CIR 656a**
Young, In re Guardianship of 2CIR 673a

* * *

TABLE OF STATUTES CONSTRUED

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

FLORIDA STATUTES

34.017(1)(b) Good Health Medical Rehab Inc. v. State Farm Mutual Automobile Insurance Company CO 740a
57.105 (2017) MD Now Medical Centers, Inc. v. Auto-Owners Insurance Company **15CIR 664a**
57.105(7) Portfolio Recovery Associates, LLC v. Durand **17CIR 667a**
83.57(3) Eco Stone Holding, LLC v. Calle CO 720a
83.60(1)(a) Eco Stone Holding, LLC v. Calle CO 720a
90.702 (1978) State Farm Mutual Automobile Insurance Company v. Gables Insurance Recovery, Inc. **11CIR 656d**
92.251(3)-(4) (2019) Luzak v. Light 2CIR 677a
92.251(6) (2019) Luzak v. Light 2CIR 677a
95.031(1) Mikhaylov v. Bilzin Sumberg Baena Price & Axelrod LLP 11CIR 693a
95.11(4)(a) Mikhaylov v. Bilzin Sumberg Baena Price & Axelrod LLP 11CIR 693a
316.193(1) Parker v. State, Department of Highway Safety and Motor Vehicles **7CIR 649a**
316.1932(1)(a)1.a. Nill v. State, Department of Highway Safety and Motor Vehicles **7CIR 647a;** Parker v. State, Department of Highway Safety and Motor Vehicles **7CIR 649a;** State v. Johnson CO 711b
316.1939 State v. Barr CO 716a
322.2616(3) Saepoffvonhubertz v. Department of Highway Safety and Motor Vehicles **12CIR 661a**
322.2616(17) Saepoffvonhubertz v. Department of Highway Safety and Motor Vehicles **12CIR 661a**
501.202(2) (2019) Lando Resorts Corporation v. Cabrera CO 715b
627.409(1) Integon Preferred Insurance Company v. Action Plumbing Services, Inc. 6CIR 704a
627.428(1) Neurology Partners, P.A. v. GEICO General Insurance Company CO 712a
627.736(1)(a)5 Star Casualty Insurance Company v. South Florida Pain and Rehabilitation of Hialeah, LLC **17CIR 670a**
627.736(4)(b) (2009) New Medical Group Inc. v. State Farm Mutual Automobile Insurance Company CO 731a
627.736(4)(i) Orlando Therapy Center, Inc. v. Progressive American Insurance Company CO 736b
627.736(5)(a)(1)(f) (2012) Good Health Medical Rehab Inc. v. State Farm Mutual Automobile Insurance Company CO 740a
627.736(5)(a)5 Real Healthcare Inc. v. State Farm Mutual Automobile Insurance Company CO 743a
627.736(5)(b)1.c. State Farm Mutual Automobile Insurance Company v. Prime Medical & Rehab Services, Inc. **11CIR 658a**
627.736(10) (2016) Dr. Kely J. Huber, Inc. v. Peak Property and Casualty Insurance Corporation CO 713a
627.739(2) Venus Medical Center Corp v. United Automobile Insurance Company CO 718a
671.201 New Medical Group Inc. v. United Automobile Insurance Company CO 730a
671.201(10) New Medical Group Inc. v. United Automobile Insurance Company CO 714a; New Medical Group Inc. v. United Automobile Insurance Company CO 733a; Doctor Rehab Center Inc. v. United Automobile Insurance Company CO 735a
765.205(1)(b) In re Guardianship of Young 2CIR 673a
765.305 In re Guardianship of Young 2CIR 673a
765.306 In re Guardianship of Young 2CIR 673a
765.401 (2019) In re Guardianship of Young 2CIR 673a

TABLE OF STATUTES CONSTRUED (continued)

FLORIDA STATUTES (continued)

768.79 Jain v. Buchanan Ingersoll & Rooney PC 11CIR 700a
921.0026(2)(j) State v. Mathis 4CIR 679a

RULES OF CIVIL PROCEDURE

1.070(j) Capital One Bank (USA), N.A. v. Norman CO 732a
1.280(c) Columna, Inc. v. Allstate Insurance Company CO 734a
1.420(d) Portfolio Recovery Associates, LLC v. Durand **17CIR 667a**
1.510 State Farm Mutual Automobile Insurance Company v. Gables Insurance Recovery, Inc. **11CIR 656d**

RULES OF JUDICIAL ADMINISTRATION

2.514(a) MD Now Medical Centers, Inc. v. Auto-Owners Insurance Company **15CIR 664a**
2.514(b) MD Now Medical Centers, Inc. v. Auto-Owners Insurance Company **15CIR 664a**

RULES OF CRIMINAL PROCEDURE

3.850(f)(2) Mazariegos v. State **15CIR 666a**

RULES OF APPELLATE PROCEDURE

9.030(b)(4) Good Health Medical Rehab Inc. v. State Farm Mutual Automobile Insurance Company CO 740a
9.100(c) Floyd v. State, Department of Highway Safety and Motor Vehicles **6CIR 643a**
9.160 Good Health Medical Rehab Inc. v. State Farm Mutual Automobile Insurance Company CO 740a

* * *

TABLE OF CASES TREATED

Case Treated / In Opinion At

Allstate Fire & Cas. Ins. Co. v. Perez, 111 So.3d 960 (Fla. 2DCA 2013)/CO 740a
Amador v. United Automobile Insurance Company, 748 So.2d 307 (Fla. 3DCA 1999)/CO 736b
Arky, Freed, Stearns, Watson, Greer, Weaver & Harris v. Bowmar Instrument Corp., 537 So.2d 561 (Fla. 1988)/CO 739a
Arky, Freed, Stearns, Watson, Greer, Weaver & Harris v. Bowmar Instrument Corp., 537 So.2d 561 (Fla. 1989)/CO 737c; CO 739b
Bailey v. State, 319 So.2d 22 (Fla. 1975)/**6CIR 641a**
Banks v. State, 732 So.2d 1065 (Fla. 1999)/4CIR 679a
Barry, In re Guardianship of, 445 So.2d 365 (Fla. 2DCA 1984)/2DCA 673a
Beanblossom v. Bay District Schools, 265 So.3d 657 (Fla. 1DCA 2019)/CO 737c
Bratcher v. State, 727 So.2d 114 (Fla. 5DCA 1999)/CO 711b
Brown v. State, 719 So.2d 882 (Fla. 1998)/**17CIR 669a**
Browning, In re Guardianship of, 568 So.2d 4 (Fla. 1990)/2CIR 673a
Bushnell v. Portfolio Recovery Associates, LLC, 255 So.3d 473 (Fla. 2DCA 2018)/**17CIR 667a**
Bystrom v. Mut. of Omaha Ins., 566 So.2d 351 (Fla. 3DCA 1990)/11CIR 700a
Chiropractic One, Inc. v. State Farm Mutual Automobile, 92 So.3d 871 (Fla. 5DCA 2012)/**11CIR 658a**
City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954)/11CIR 693a
Clay v. City of Margate, 546 So.2d 434 (Fla. 4DCA 1989)/**17CIR 666b**
Current Builders of Florida, Inc. v. First Sealord Sur., Inc., 984 So.2d 526 (Fla. 4DCA 2008)/11CIR 700a
Department of Highway Safety and Motor Vehicles v. Hernandez, 74 So.3d 1070 (Fla. 2011)/CO 711b
Department of Highway Safety and Motor Vehicles v. Whitley, 846 So.2d 1163 (Fla. 5DCA 2003)/**7CIR 647a**
Florida Patient's Comp. Fund v. Rowe, 472 So.2d 1145 (Fla. 1985)/11CIR 700a
Fremont Indem. Co. v. Carey, Dwyer, Eckhart, Mason & Spring, P.A., 796 So.2d 504 (Fla. 2001)/11CIR 693a
GEICO Indemnity Company v. Accident & Injury Clinic, Inc., 290 So.3d 980 (Fla. 5DCA 2019)/CO 743a
Gentile v. Bauder, 718 So.2d 781 (Fla. 1998)/CO 731a
Glucksman v. Persol N. Am., Inc., 813 So.2d 122 (Fla. 4DCA 2002)/11CIR 693a

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TABLE OF CASES TREATED (continued)

Gonzalez v. Associates Life Ins., Co., 641 So.2d 895 (Fla. 3DCA 1994)/CO 714a; CO 730a; CO 733a; CO 735a
Ham v. Dunmire, 891 So.2d 492 (Fla. 2004)/**17CIR 666b**
Isaias v. H.T. Hackney Co., 159 So.3d 1002 (Fla. 3DCA 2015)/11CIR 700a
Ivey v. Allstate Ins. Co., 774 So.2d 679 (Fla. 2000)/CO 736b
John F. Kennedy Memorial Hospital, Inc v. Bludworth, 452 So.2d 921 (Fla. 1984)/2CIR 673a
Kennedy Memorial Hospital, Inc v. Bludworth, 452 So.2d 921 (Fla. 1984)/2CIR 673a
Kitchen v. Kitchen, 404 So.2d 201 (Fla. 2DCA 1981)/CO 724a; CO 727a
Kozel v. Ostendorf, 629 So.2d 817 (Fla. 1993)/**17CIR 666b**
Kurecka v. State, 67 So.3d 1052 (Fla. 4DCA 2010)/**7CIR 649a**
Miami, City of v. Brooks, 70 So.2d 306 (Fla. 1954)/11CIR 693a
Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976)/11CIR 693a
Palm Beach Polo Holdings, Inc. v. Stewart Title Guar. Co., 134 So.3d 1073 (Fla. 4DCA 2014)/**15CIR 664a**
Pearce v. Sandler, 219 So.3d 961 (Fla. 3DCA 2017)/CO 724a; CO 727a; CO 731a
Peat, Marwick, Mitchell & Co. v. Lane, 565 So.2d 1323 (Fla. 1990)/11CIR 693a
Perez-Abreu, Zamora & De La Fe, P.A. v. Taracido, 790 So.2d 1051 (Fla. 2001)/11CIR 693a
Progressive Express Ins. Co. v. McGrath, 913 So.2d 1281 (Fla. 2DCA 2005)/CO 713a
Progressive Select Ins. Co. v. Florida Hospital Medical Center, 260 So.3d 219 (Fla. 2018)/CO 718a
Satz v. Perlmutter, 362 So.2d 160 (Fla. 4DCA 1978)/2CIR 673a
Schiavo, In re Guardianship of, 916 So.2d 814 (Fla. 2DCA 2005)/2CIR 673a

TABLE OF CASES TREATED (continued)

Seaboard Coast Line Railroad Co. v. Cox, 338 So.2d 190 (Fla. 1976)/CO 724a; CO 727a
Southeastern Fidelity Ins. Co. v. Rice, 515 So.2d 240 (Fla. 4DCA 1987)/CO 724a; CO 727a
Spera v. State, 971 So.2d 754 (Fla. 2007)/**15CIR 666a**
State v. Breed, 917 So.2d 206 (Fla. 5DCA 2005)/**14CIR 663b**
State v. Castaneda, 79 So.3d 41 (Fla. 4DCA 2011)/**14CIR 663b**
State v. Chubbuck, 141 So.3d 1163 (Fla. 2014)/4CIR 679a
State v. Harbaugh, 754 So.2d 691 (Fla. 2000)/**17CIR 669a**
State v. Kliphouse, 771 So.2d 16 (Fla. 4DCA 2000)/CO 711b
State v. Randall, 746 So.2d 550 (Fla. 5DCA 1999)/4CIR 679a
State v. Taylor, 648 So.2d 701 (Fla. 1995)/CO 711b
State Farm Mutual Automobile Insurance Company v. CC Chiropractic LLC, 245 So.3d 755 (Fla. 4DCA 2018)/CO 740a
State St. Bank & Trust Co. v. Badra, 765 So.2d 251 (Fla. 4DCA 2000)/CO 731a
Velcofski v. State, 96 So.3d 1069 (Fla. 4DCA 2012)/**17CIR 669a**
Vitale v. State, 946 So.2d 1220 (Fla. 4DCA 2007)/**6CIR 641a**
Wallace v. State, 197 So.3d 1204 (Fla. 1DCA 2016)/4CIR 679a
Wibbens v. Department of Highway Safety and Motor Vehicles, 956 So.2d 503 (Fla. 1DCA 2007)/**6CIR 643a**

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DISPOSITION ON APPELLATE REVIEW

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

Howarth v. Lombardi. Circuit Court, Sixth Judicial Circuit (Appellate), Pasco County, Case No. 18-AP-56. Circuit Court Order at 28 Fla. L. Weekly Supp. 182b (July 31, 2020). Quashed at 45 Fla. L. Weekly D2781a

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Volume 28, Number 8
December 31, 2020
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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Driving under influence—Appeals—Petition for writ of certiorari is denied

MICHAEL G. PONDER, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Clay County. Case No. 2019-CA-1256, Division A. August 27, 2020. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, for Respondent.

ORDER ON PETITION FOR WRIT OF CERTIORARI

(MICHAEL SHARRIT, J.) This matter is before the Court on Petitioner's Writ of Certiorari following an administrative driver's license suspension. Having reviewed the record and briefs submitted on behalf of the parties and having been further advised in oral argument, the Court finds:

1. This Court has jurisdiction pursuant to Rule 9.030(c)(2) of the Florida Rules of Appellate Procedure. .

2. Crash reports including driver statements contained therein are admissible in administrative hearings conducted pursuant to Fla. Stat. Sec. 322.615.

3. In light of the totality of circumstances, there was established reasonable suspicion supporting Petitioner's detention, DUI investigation and resulting lawful arrest.

4. At the administrative hearing the Department had the burden of proving their case by a preponderance of the evidence.

5. A *prima facie* case for "substantial compliance" with the "20 minute rule" was established.

6. The administrative hearing accorded procedural due process; and the essential requirements of the law have been observed. The administrative findings and judgment are supported by competent and substantial evidence.

Therefore, it is **ORDERED and ADJUDGED**:

The Petition for Writ of Certiorari is **DENIED** and the hearing officer's order is **AFFIRMED**.

* * *

Licensing—Driver's license—Suspension—Driving under influence—Lawfulness of stop—Where officers activated patrol vehicle's lights to alert other drivers that licensee's vehicle and another vehicle were stopped in roadway at green light and thereafter followed two vehicles into parking lot to determine if there had been an accident that required their assistance, stop was lawful—Lawfulness of detention—Officer had reasonable suspicion for investigatory detention after observing that licensee had glassy bloodshot eyes and odor of alcohol, had to use door to get himself out of vehicle, and had urinated on himself—Petition for writ of certiorari is denied

FRANK CARL KUNNEN, III, Petitioner, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 19-000003AP-88A. UCN Case No. 522019AP000003XXXXCI. August 21, 2020. Petition for Writ of Certiorari from Decision of Hearing Officer from Bureau of Administrative Reviews Department of Highway Safety and Motor Vehicles. Counsel: Kevin Hayslett, for Petitioner. Christie Utt, General Counsel, and Mark L. Mason, Asst. General Counsel, for Respondent.

(**PER CURIAM**.) Mr. Kunnen, III ("Petitioner") 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 of Safety and Motor Vehicles ("DHMSV") entered December 17, 2018. Petitioner contends that the DHSMV's final order finding that the stop was lawful was not supported by competent substantial evidence. For the reasons set for below, the Petition for Writ of Certiorari is denied.

Facts and Procedural History

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

> On September 28, 2018 Officers Gonzalez and Medlin observed two vehicles stopped at a traffic light and the driver of one of the vehicles was out of their vehicle and next to the driver's window of the other. The driver that was out of the vehicle, later identified as Ashley Eggleston, then got back in her vehicle and the two vehicles went into the parking lot of the Best Buy store. Thanking that there may have been an accident the officers pulled into the parking lot to assist. Officer Gonzales made contact with Ashley Eggleston and Officer Medlin made contact with the other driver identified as Frank Carl Kunnen III, the Petitioner. Officer Medlin observed the Petitioner exhibiting indicators of impairment and the officers called for a traffic unit.
>
> Officer Reed made contact with the Petitioner and found him to have an odor of al *(sic)* alcoholic beverage on his breath, bloodshot, glassy eyes and poor balance. The Petitioner performed filed sobriety tests poorly and was arrested for DUI. The Petitioner submitted breath samples of .210g/210L and .213g/210L.
>
> Based on the foregoing, I find that the Petitioner was placed under lawful arrest for DUI.

Petitioner requested a formal administrative review of his drivers license suspension pursuant to Fla. Stat. 322.2615, Fla. Stat. (2019). The Formal Review Hearing was held on November 2, 2018 and continued to December 12, 2019 for additional testimony. After the Formal Review Hearing, the license suspension was upheld. Petitioner then filed the instant Petition for Writ of Certiorari.

Standard of Review

"(U)pon the first-tier certiorari review of an administrative decision, the circuit court is limited to determining (1) whether due process was accorded, (2) whether the essential requirements of the law were observed and (3) whether the administrative findings and judgment were supported by competent, substantial evidence." *Moore v. Department of Highway Safety and Motor Vehicles,* 169 So. 3d 216, 219 (Fla. 2nd DCA 2015) [40 Fla. L. Weekly D1520a]. "It is axiomatic that where substantial competent evidence supports the findings and conclusions of the administrative agency and the record discloses neither an abuse of discretion nor a violation of law by the agency, [a] court should not overturn the agency's determination." *Cohen v. School Board of Dade County, Florida,* 450 So. 2d 1238, 1241 (Fla. 3d DCA 1984). "[I]t is neither the function nor the prerogative of a circuit judge to reweigh the evidence and make findings [of fact] when [undertaking] a review of a decision of an administrative forum." *Department of Highway Safety and Motor Vehicles v. Allen,* 539 So. 2d 20, 21 (Fla. 5th DCA 1989).

Discussion

"As an initial matter, the [c]ourt notes the limited scope of its review. It must only determine whether competent substantial evidence existed in support of the hearing officer's findings and final decision." *Garcia v. Department of Highway Safety and Motor Vehicles,* 27 Fla. Law Supp. 670b citing *Dusseau v. Metro Dade Cty. of Cty. Comm'rs,* 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a] (holding that once the reviewing court determines there is competent substantial evidence to support the hearing officer's decision, the court's inquiry must end, because the issue is not whether the hearing officer made the best, right, or wise decision, but whether the hearing officer made a lawful decision).

Petitioner asserts that competent substantial evidence does not support the hearing officer's finding that the stop was lawful because the officers failed to initiate a legal stop of Petitioner, the subsequent

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arrest was unlawful. "The constitutional validity of a traffic stop depends on purely objective criteria." *Hurd v. State,* 958 So. 2d 600, 602 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1594a]. The correct test to be applied is whether the particular officer who initiated the traffic stop had an objectively reasonable basis for making the stop." *Dobrin v. Department of Highway Safety and Motor Vehicles,* 874 So.2d 1171, 1174 (Fla. 2004) [29 Fla. L. Weekly S80a]. Whether an officer's suspicion is reasonable is determined by the totality of the circumstances that existed at the time of the investigatory detention." *Gaffney v. State,* 974 So. 2d 425, 426 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2520c]. A reasonable suspicion "has some factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge." *McMaster v. State,* 780 So. 2d 1026 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D881b].

An officer may conduct an initial stop based upon a reasonable suspicion if the officer has "a legitimate safety concern for the safety of the motoring public". *Department of Highway Safety and Motor Vehicles v. DeShong,* 603 So.2d 1349 (Fla. 2d DCA 1992). Such concern can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious that that required for other types of criminal behavior. The driving behavior need not reach the level of a traffic violation in order to justify a DUI stop. *State v. Carrillo,* 506 So.2d 495 (Fla. 5th DCA 1987).

Petitioner posits that once Recruit Gonzales turned on the safety lights on the patrol vehicle, the stop of Petitioner became an investigatory stop rather than a consensual encounter. The Complaint Affidavit and the testimony of the Deputy Medlin and Recruit Gonzales indicates that they were patrolling the area on Drew Street when they observed a white Cadillac stopped in the right curb lane on a green light. Another vehicle was in the center lane. They both observed a female exit the vehicle in the center lane and approach Petitioner's vehicle, knock on the window, and speak with Petitioner. At this time, both cars were still in the roadway. The female then walked back to her vehicle and pulled into a parking area. The white Cadillac pulled behind the second vehicle and also stopped in the parking lot. The testimony was that the scene appeared to be a possible traffic crash and the law enforcement stopped to assist. At the Formal Review Hearing, Deputy Medlin testified that "At that point I was thinking it was a rear end, little rear end crash, so we pulled in behind them." In response to counsel's question the deputy testified that he and the recruit were 50 to 75 feet from the vehicles. Recruit Gonzales was driving and upon witnessing two vehicles stopped in the roadway activated the safety lights. Gonzales testified that the lights were used as a safety measure. At the Formal Review Hearing Gonzales testified:

> "As we came up and saw that they were at the light. The light was green, nobody's moving, I put the flashers on so anybody that's coming up would know, have caution up here. . . to swerve or, you know to pull off in the street."
>
> "[w]e would have had our flashers on regardless because what are they doing in the middle of the street with the light being green? Nobody's moving."

Gonzales also testified that he was only checking on the two drivers to see if they needed assistance and "If not, we're going, hey, we're out of here." There was no traffic stop because Petitioner's vehicle was already parked. When a vehicle is not legally parked, or is parked in an emergency lane, highway, or some other place that would give an objective indication that a driver may need assistance, "a reasonable person in such circumstances would not necessarily perceive the officer's use of emergency lights as a show of authority." *Smith v. State,* 87 So.3d 84, 88 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D970a]. "The activation of police lights is one important factor to be considered in a totality-based analysis as to whether a seizure has occurred. Lieutenant Cunningham's decision to activate his blue emergency lights when he parked behind Petitioner is not dispositive of the assertion that law enforcement had illegally detained Petitioner. Not only were there traffic safety concerns, but Petitioner had activated her emergency flashers, giving the indication that she may need aid, and increasing the likelihood that law enforcement would stop and attempt to render assistance." *Salazar v. Dep't of Highway Safety and Motor Vehicles,* 24 Fla. L. Weekly Supp. 216b (Fla. 12th Cir. Ct. June 24, 2016). "This type of limited contact has been deemed a reasonable and prudent exercise of an officer's duty to protect the safety of citizens." *Lightbourne v. State,* 438 So.2d 380, 388 (Fla. 1983). The testimony established that law enforcement was acting in a community care function to determine whether someone needed assistance or if a traffic accident had occurred. The use of the patrol vehicle's safety lights were to alert other drivers of the two stopped cars in the roadway.

Petitioner argues that the testimony of Recruit Gonzales indicates that the stop was based upon a "hunch". In response to counsel's question "So the sole basis of turning the lights on, making contact with the individuals, is your wanted to find out if it was an accident; is that correct?" Recruit Gonzales answer "That's right." The constitutional validity of a traffic stop depends on purely objective criteria. *Whren v. United States,* 517 U.S. 806, 813 (1996). This objective tests "asks only whether any probable cause for the stop existed" making the subjective knowledge, motivation, or intention of the individual officer involved wholly irrelevant." *Holland v. State,* 696 So.2d 757, 759 (Fla. 1997) [22 Fla. L. Weekly S387a]. If therefore, "the facts contained in the arrest report provide any objective basis to justify the stop, even if it is not the same basis stated by the officer, the stop is constitutional." *Department of Highway Safety and Motor Vehicles v. Utley,* 930 So.2d 698 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D1135a]. Deputy Medlin testified to the objective basis for the stop which was that they pulled in behind to two vehicles in the parking lot to investigate if there had been a traffic accident. Recruit Gonzales testimony is relevant only as to his personal observations, his subjective beliefs are not relevant. "[A] police officer's subjective belief regarding the existence or non-existence of probably cause for a warrantless arrest is neither dispositive of, nor generally relevant to, this issue." *Hawxhurst v. State,* 159 So.3d 1012 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D756a].

"To request that a driver submit to field sobriety tests, a police officer must have reasonable suspicion that the individual is driving under the influence." *State v. Ameqrane,* 39 So. 3d 339, 341 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1148b]. "Reasonable suspicion is something less than probable cause, but 'an officer needs more than a mere hunch before he can detain a suspect past the time reasonably required to write a citation.' " *Maldonado v. State,* 992 So. 2d 839, 843 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2303a] (internal citations omitted). "Whether an officer's suspicion is reasonable is determined by the totality of the circumstances that existed at the time of the investigatory detention." *Gaffney v. State,* 974 So. 2d 425, 426 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2520c]. "Reasonable suspicion is based on the totality of the circumstances, and the facts as a whole can justify a detention even if the facts standing alone would not give rise to reasonable suspicion. *Sims v. State,* 622 So.2d 180, 018 (Fla. 4th DCA 1993). Here, Deputy Medlin testified that upon making contact with Petitioner he observed that Petitioner's eyes were bloodshot and glassy. He could smell an odor of alcohol on Petitioner's breath. When Petitioner was asked to step out of the vehicle, he had to use the door to get himself out of the car and the deputy observed Petitioner had urinated on himself. Deputy Medlin had a reasonable suspicion that Petitioner was driving under the influence.

This Court must determine if the Hearing Officer's decision

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upholding the suspension is supported by competent substantial evidence. In determining if competent substantial evidence exists this Court may only decide "whether the record contains the necessary quantum of evidence." *Lee County v. Sunbelt Equities, LL Ltd Partnership*, 619 So. 2d 996, 1003 (Fla. 2d DCA 1993). It is the hearing officer's duty to determine whether the objective facts established in the documentary evidence and testimony constituted a lawful stop. Pursuant to Fla. Stat. §322.2615(7), the preponderance of evidence standard applies to the DHSMV's decision to suspend a drivers license. *Department of Highway Safety and Motor Vehicles v. Cherry,* 91 So. 3d 849 (Fla. 5th DCA 2011) [37 Fla. L. Weekly D1562a]. The preponderance of the evidence standard [is] evidence which as a whole shows that the facts sought to be proved is more probable than not. Substantial evidence has been defined as evidence "which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but may be somewhat less that a preponderance." *State v. Edwards,* 536 So.2d 288, 292 (Fla. 1st DCA 1988). The hearing officer's findings that the initial stop was lawful and the arrest was legal was supported by competent substantial evidence.

Conclusion

In reviewing all the evidence of record as detailed above, the Court concludes that reliable, competent, substantial evidence supports the Hearing Officer's finding that the stop of Petitioner's vehicle was lawful and that Petitioner was placed under lawful arrest for DUI decision to sustain the suspension of Petitioner's driving privileges. Procedural due process has been accorded, the essential requirements of law have been observed and the Hearing Officer's Findings of Fact, Conclusions of Law and Decision are supported by competent substantial evidence. The Petition for Writ of Certiorari is denied.

Accordingly it is,

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is DENIED. (JACK R. ST. ARNOLD, KEITH MEYER, and SHERWOOD COLEMAN, JJ.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop—Where deputy observed vehicle matching vehicle description in BOLO for possibly impaired driver cross over right lane marker, deputy had objective basis for stop—Petition for writ of certiorari is denied

DANIEL JOSHUA SKELTON, Petitioner, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No.19-000057AP-88A. UCN Case No. 522019AP000057XXXXCI. August 13, 2020. Petition for Writ of Certiorari from Decision of Hearing Officer Bureau of Administrative Reviews Department of Highway Safety and Motor Vehicles. Counsel: Paul A. Gionis, Gionis and Lilly, PLLC, Clearwater, for Petitioner. Christie S. Utt, General Counsel, and Mark L. Mason, Asst. General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER AND OPINION

(**PER CURIAM**.) Petitioner challenges a final order of the Department of Highway Safety and Motor Vehicles ("DHSMV") that sustained his driver license suspension for refusal to submit to a breath test pursuant to § 322.2615, Florida Statutes. On appeal, Petitioner contends that DHSMV's order was not supported by competent substantial evidence and did not observe the essential requirements of law because the initial stop was unlawful. For the reasons set forth below, the Petition for Writ of Certiorari is denied.

Facts and Procedural History:

On July 5, 2019, Deputy J. Mullins with PCSO received an anonymous tip through a Tarpon Springs Police Department to be on the lookout for (BOLO) a possibly impaired driver in a black Chevrolet Silverado with a light bar on the roof heading in the direction of Tarpon Avenue. The BOLO indicated a possible drunk driver had just departed Silver King Brewery and was heading in the direction of Tarpon Ave. Deputy Mullins immediately responded to that area and observed the vehicle matching the description. The deputy conducted a registration check on the vehicle showing it was registered to Daniel Skelton. Deputy Mullins pulled in behind the vehicle and immediately saw the vehicle cross over the lane marker. The deputy performed a traffic stop. Upon making contact with Petitioner, observed a strong and distinct odor of an alcoholic beverage. Petitioner fumbled when asked to produce his driver license, registration and proof of insurance. Petitioner could only produce a copy of the vehicle's title. Petitioner performed poorly on field sobriety tests and was arrested for suspicion of driving under the influence. Petitioner refused to submit to a breath test after being read the implied consent warning resulting in a suspension of his driving privileges. Petitioner requested an administrative review hearing, held August 5, 2019, to challenge the lawfulness of his driver license suspension.

Petitioner did not appear at the administrative review hearing but was represented by counsel. The only witness was the arresting officer, Deputy John Mullins. Deputy Mullins testified that he was advised by a Tarpon Springs officer that "a BOLO was coming to Silver King headed towards Pasco County." "He described the vehicle to me, and I got back in my patrol vehicle." (T. 8:7-9). The deputy stated that "Petitioner had failed to maintain a single lane." (T. 5:24-25) and the deputy initiated a traffic stop.

Counsel for Petitioner moved to have the administrative suspension denied based on the lack of reasonable suspicion to stop Petitioner's vehicle. The hearing officer reserved ruling at the hearing and issued his Findings of Fact, Conclusions of Law and Decision August 12, 2019. The hearing officer found:

> "I find that the following facts are supported by a preponderance of the evidence: On July 5, 2019, Deputy J. Mullins received over the dispatch radio a Be On The Look Out (BOLO). The BOLO indicated a possibly impaired driver driving toward Tarpon Avenue in a Black Chevrolet Silverado Truck with a light bar on the roof. Deputy J. Mullins respondent to the intersection of Tarpon Avenue and Huey Avenue. Once there, Deputy Mullins observed a black Chevrolet Silverado truck with a light bar on the roof driving eastbound on Tarpon Avenue. Deputy J. Mullins pulled in behind the vehicle and immediately observed the vehicle cross over the right lane marker. Based on the totality of the circumstances, Deputy J. Mullins initiated a traffic stop."
>
> "After consideration of the foregoing, I conclude, as a matter of law, that the law enforcement officer had probably cause to believe that Petition was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances; Petitioner refused to submit to any such test after being requested to do so by a law enforcement officer or correctional office, subsequent to a lawful arrest; and the Petition was told that if her refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.
>
> I find that all elements necessary to sustain the suspension for refusal to submit to a breath, blood, or urine test under section 322.2615 of the Florida Statutes are supported by a preponderance of the evidence."

The hearing officer affirmed the suspension of Petitioner's driver license and this petition for certiorari was timely filed.

Standard of Review

This Court's standard of review for first-tier review of an administrative decision is limited to: (1) Whether due process was accorded; (2) Whether the essential requirements of law were observed; (3)

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Whether the administrative findings and judgment were supported by competent, substantial evidence. The Court is not entitled to reweigh the evidence or substitute its judgment for the findings of Department's hearing officer. See *Dep't of Highway Safety & Motor Vehicles v. Allen,* 539 So. 2d 20 (Fla. 5th DCA 1989)

Discussion

Appellant raises two issue in the Petition, the first that the hearing officer failed to comply with the essential requirements of the law and secondly that the hearing officer's decision to affirm the suspension of the Petitioner's drivers license was not supported by competent substantial evidence.

"The constitutional validity of a traffic stop depends on purely objective criteria." *Hurd v. State,* 958 So. 2d 600, 602 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1594a]. "The subjective knowledge, motivation or intention of the individual officers involved is irrelevant. Under any other standard, application of the Fourth Amendment would vary from citizen to citizen, depending upon the officer's knowledge or experience. Consequently, the subjective knowledge or intent of an individual officer can never invalidate otherwise objectively justifiable police conduct under the Fourth Amendment," *Whren v. United States*, 517 U.S. 806, 812 (1996). "The correct test to be applied is whether the particular officer who initiated the traffic stop had an objectively reasonable basis for making the stop." *Dobrin v. Dept. of Highway Safety & Motor Vehicles,* 874 So.2d 1171, 1174 (Fla. 2004) [29 Fla. L. Weekly S275a]. The objective test "asks only whether any probable cause for the stop existed." *Holland v. State,* 696 So.2d 757, 759 (Fla. 1997) [22 Fla. L. Weekly S387a]. See also *State v. Perez-Garcia,* 917 So.2d 894 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2397b].

"Whether an officer's suspicion is reasonable is determined by the totality of the circumstances that existed at the time of the investigatory detention." *Gaffney v. State,* 974 So. 2d 425, 426 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2520c] (internal quotations omitted). Considering the totality of the circumstances "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *State v. Marrero,* 890 So. 2d 1278, 1282 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D252a] (citations omitted). A detention "is reasonable if it is based on specific articulable facts." *Castella v. State,* 959 So. 2d 1285, 1292 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1784a]. The arresting officer testified that he received a BOLO from the Tarpon Springs Police Department describing Plaintiff's vehicle which was a black Chevrolet Silverado with a light bar on the roof. The deputy conducted a registration check on the vehicle. The deputy testified that upon pulling in behind Petitioner the deputy immediately saw the vehicle cross over the right lane marker. An officer may conduct an initial stop based upon a reasonable suspicion if the officer has "a legitimate safety concern for the safety of the motoring public". *Department of Highway Safety and Motor Vehicles v. DeShong,* 603 So.2d 1349 (Fla. 2nd DCA 1992). "The courts of this state have recognized that a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired or driving under the influence in situations less suspicious that that required for other types of criminal behavior. *Deshong* at 1352. In *Bailey v. State,* 319 So.2d 22 (Fla. 1975), the Florida Supreme Court upheld the traffic stop of a driver who was observed driving her vehicle at a slow rate of speed and weaving in her lane of traffic. The court expressly stated that there were no circumstances which would reasonably have led the officer to believe criminal activity was taking place, however the court validated the traffic stop, stating the "[b]ecause of the dangers inherent in to our vehicular mode of life, there may be justification of the stopping of a vehicle by a patrolman to determine the reason for its unusual operation." *Bailey v. State,* 319 So.2d 22 (Fla. 1975). A stop is permitted even without a traffic violation, so long as the stop is supported by a reasonable suspicion of impairment, unfitness or vehicle defects. *Hurd v. State,* 948 So.2d 600 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1594a]. The community caretaking doctrine addresses those law enforcement functions that are "totally divorced from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski,* 413 U.S 433, 441 (1973). It is also a proper use of the community caretaking doctrine to determine of the driver requires assistance or aid. *Gentles v. State,* 50 So.3d 1192, 1198-1199 (Fla. 4th DCA 2011) [35 Fla. L. Weekly D2900a]. The doctrine encompasses the seizure of individuals "in order to ensure the safety of the public and/or the individual, regardless of any suspected criminal activity." *Castella v. State,* 959 So.2d 1285, 1292.

An anonymous tip may provide the requisite reasonable suspicion necessary for an officer to lawfully conduct an initial stop if "its reliability [is] established by independent police corroboration." *Vitale v. State,* 946 So. 2d 1220, 1221 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D164a]. In *Genninger v. State,* 26 Fla. L. Weekly Supp. 931a (Fla. 6th Cir. Ct. December 18, 2018) the officer made contact with a driver based on a DUI BOLO that the driver was falling asleep behind the wheel and was swerving. Prior to stopping the driver, the officer received tips from two separate drivers. The officer made contact with the driver after observing the driver park the vehicle taking up two parking spots, after striking the parking stop twice and readjusting back and forth two times. The anonymous tips were corroborated by the officer's observations of the driving.

Deputy Mullins testified that he received information that a possible drunk driver had departed the Silver King brewery and was driving a black Chevrolet Silverado with light bars on the roof. The officer observed the vehicle in the immediate vicinity. He confirmed that the register owner of the vehicle matched the register owner listed in the BOLO. Immediately after pulling in behind the vehicle, the deputy observed the driver to cross over the right lane marker. Petitioner's driving provided corroboration for the anonymous tip.

For an arrest to be lawful, the initial stop that led to that arrest must also be lawful. See *Dep't of Highway Safety & Motor Vehicles v. Pipkin,* 927 So. 2d 901, 903 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2558a]. Petitioner argues the arrest was unlawful because the initial stop was unlawful. The deputy received information that a possibly drunk driver had departed from a brewery and immediately upon contact with the driver observed the vehicle cross over the lane marker. "If the facts contained in the arrest report provide any objective basis to justify the stop, even if it is not the same basis stated by the officer, the stop is constitutional." *Utley v. Department of Highway Safety and Motor Vehicles,* 930 So.2d 698 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D1135a]. The BOLO and the observation of Plaintiff's driving provided the officer with an objective basis for the stop. Based on the totality of circumstances, the deputy had an objective basis to suspect that something was wrong with the driver or the vehicle.

Conclusion

The Court must determine only whether the administrative findings and judgment are supported by competent substantial evidence, and we find that they are. The Hearing Officer found there that the initial stop, based on the totality of the circumstances, was lawful. Petitioner was placed under lawful arrest based upon competent substantial evidence. Procedural due process was accorded, the essential requirements of law have been observed, and the Hearing Officer's findings of fact and decision are supported by competent

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substantial evidence.

Accordingly, it is

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

* * *

Licensing—Driver's license— Suspension— Appeals— Certiorari—Timeliness—Petition seeking review of order upholding license suspension that was filed 31 days after rendition of order is untimely

KENNETH FLOYD, 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. 2020-CA-1278. UCN Case No. 512020CA001278CAAXES. August 6, 2020. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DISMISSING PETITION FOR WRIT OF CERTIORARI

(DISKEY, CRANE, and WESTINE, JJ.) THIS MATTER came on to be heard on Respondent's Motion to Dismiss filed on June 16, 2020. Respondent argues that the petition was untimely filed. A petition for writ of certiorari seeking circuit court appellate review of a Hearing Officer's order upholding a driver license suspension must be filed within 30-days of the rendition date of the order. Fla. R. App. P. 9.100(c). The date of rendition is the day of mailing of the order stated on the petitioner's driver license record. *Wibbens v. Dep't of Highway Safety and Motor Vehicles,* 956 So. 2d 503 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1027c]. Petitioner's driver license record shows a mailing date of May 4, 2020. Petitioner filed his petition on June 4, 2020, 31-days after the rendition date of the order. This Court is without jurisdiction to consider the petition. Accordingly, Respondent's Motion to Dismiss must be granted.

It is therefore **ORDERED** that case number 20-CA-1278 is hereby **DISMISSED**.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop—Deputy who observed licensee fail to yield when exiting from alley, cross lane of traffic without signaling, turn without signaling, and almost strike curb had reasonable suspicion for investigatory stop irrespective of whether licensee was ultimately charged with any traffic infractions—Deputy had reasonable suspicion to detain licensee after stop when he observed indicia of impairment and licensee admitted that she had been drinking—Request to submit to breath test was incident to lawful arrest—Petition for writ of certiorari is denied

BETHANY LYNN SLOVINAC, Petitioner, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 19-000053AP. UCN Case No. 522019AP000053XXXXCI. August 19, 2020. Petition for Writ of Certiorari from Decision of Hearing Officer Bureau of Administrative Reviews Department of Highway Safety and Motor Vehicles. Counsel: J. Kevin Hayslett, Law Offices of Carlson Meissner Hart & Hayslett, Clearwater, for Petitioner. Christine Utt, General Counsel, and Mark L. Mason, Asst. General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER AND OPINION

(**PER CURIAM.**)Petitioner challenges a final order from the Department of Highway Safety and Motor Vehicles ("DHSMV") sustaining the suspension of her driving privilege for refusing to submit to a breath test pursuant to § 322.2615, Florida Statues. Petitioner contends that the DHSMV's final order was not supported by competent, substantial evidence demonstrating that Petitioner was lawfully stopped. Upon consideration of the Petition, Response and Reply, the Petition for Writ of Certiorari is denied.

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].

Where the driver's license was suspended for refusing to submit to a breath, blood, or urine test, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

> 1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
>
> 2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
>
> 3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

See, § 322.2615, Fla. Stat.

The Court, on first tier certiorari, cannot reweigh the evidence or substitute its own judgment for that of the hearing officer. *Department of Highway Safety and Motor Vehicles v. Wiggins,* 151 So. 3d 457, 463 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1894a]. Pursuant to Fla. Stat. §322.2615(7), the preponderance of evidence standard applies to the DHSMV's decision to suspend a drivers license. *Department of Highway Safety and Motor Vehicles v. Cherry,* 91 So. 3d 849 (Fla. 5th DCA 2011) [37 Fla. L. Weekly D1562a]. "The preponderance of the evidence standard [is] evidence which as a whole shows that the facts sought to be proved is more probable than not . . . Substantial evidence has been defined as evidence "which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but may be somewhat less that a preponderance." *State v. Edwards,* 536 So.2d 288, 292 (Fla. 1st DCA 1988)

Statement of Facts

The formal review hearing was conducted in this matter on August 1, 2019. Petitioner did not attend the hearing but was represented by counsel. In the DHMV's final order, the Hearing Officer found the following facts to be supported by a preponderance of the evidence:

> "On June 16, 2019, Deputy L. Blake observed a vehicle pulling out from an alley onto a roadway without stopping, turning wide crossing both lanes rather than turning to the first land (sic) and nearly striking the curb. Based on the testimony, Deputy L. Blake concluded that "putting everything together, it warranted looking into it further" since he felt the driving pattern "may be indicative of an impaired driver, it may be indicative so somebody having an medical emergency" or other event. Based on those observations, Deputy L. Blake conducted a traffic stop. Petitioner pulled over without incident.
>
> Upon first contact with the Petitioner, Deputy L. Blake saw Petitioner use her hand to move a towel over an open cup in the center console of pink liquid with a lime inside. Petitioner exhibited bloodshot, watery eye, dilated pupils and slightly slurred speech. Deputy L. Blake is a trained Drug Recognition Expert (DRE) and based on his observations he asked Petitioner to step out of the car to conduct some Standardized Field Sobriety Exams (SFSE). She complied with no issues. Deputy L. Blake moved Petitioner to well-lit

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area to perform SFSE's. Initially she was uncertain if she would, then decided to consent to the exercises. Deputy L. Blake conducted the Horizonal (sic) Gaze Nystagmus test. Afterward, Petitioner insisted she wanted to go home and did not continue with any additional tasks. Deputy L. Blake read Petitioner the Miranda Rights and Implied Consent. Petitioner indicated she understood and elected not to continue. Based on his training, observations, facts and circumstances at the scene, Deputy L. Blake placed Petitioner under arrest for DUI.

Petitioner was transported to the jail facility where she was observed for twenty minutes and then asked to provide a breath sample to determine her breath alcohol level. She seemed uncertain. Implied Consent was read to her and she was asked again. Petitioner stated she understood but was not willing to take a breath sample."

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

Discussion

Petitioner asserts that the Hearing Officer's final order was not supported by competent substantial evidence. Specifically, Petitioner maintains the evidence at the hearing failed to establish that the officer had a reasonable suspicion to initiate a traffic stop; hence the suspension of her license for refusal to submit to an alcohol breath test was not incident to a lawful arrest.

Petitioner contends that the basis for the stop was unlawful as Petitioner did not violate §316.151, Florida Statutes (2019). Petitioner's argument that she did not violate §316.151 nor charged with a violation of §316.151 is without merit. This matter does not involve an appeal of a traffic violation. The fact that a driver was not ultimately charged for the underlying traffic infraction leading to an arrest on suspicion of DUI is irrelevant. *State v. Potter,* 438 So. 2d 1085 (Fla. 2d DCA 1983). The legality of an arrest does not depend upon the conviction or the acquittal of the accused. *Canney v. State,* 298 So. 2d 495 (Fla. 2d DCA 1973).

The constitutional validity of a traffic stop depends on purely objective criteria. *Hurd v. State,* 958 So.2d 600, 602 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1594a]. The correct test to be applied is whether the particular officer who initiated the traffic stop had an objectively reasonable basis for making the stop. *Dobrin v. Department of Highway Safety and Motor Vehicles,* 874 So.2d 1171, 1174 (Fla. 2004) [29 Fla. L. Weekly S275a]. Whether an officer's suspicion is reasonable is determined by the totality of the circumstances that existed at the time of the investigatory detention." *Gaffney v. State,* 974 So.2d 425, 426 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2520c]. Considering the totality of the circumstances "allows an officer to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude and untrained person." *State v. Marrero,* 890 So.2d 1278, 1282 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D252a]. Factors to consider include, "(t)he time; the day of the week; the location; . . . the appearance and manner of operation of any vehicle involved; [and] anything incongruous or unusual in the situation as interpreted in the light of the officer's knowledge." *Hernandez,* 784 So.2d at 1126. Deputy Blake testified that Petitioner pulled into the road from the alley and she was completing her turn, she almost struck the middle median. In response to counsel's question that almost striking a median is not a violation, Deputy Blake responded "Correct, but it could be indicative of an impaired drive or it might be indicative of somebody having a medical emergency." T-Pg.16 L. 8-10. The arrest report, which was submitted into evidence without objection as DDB#8, states:

"REASON FOR STOP: FAILING TO YIELD FROM ALLEY, CROSSING OVER A LANE OF TRAFFIC WITHOUT SIGNAL, FAILING TO SIGNAL DURING TURN, ALMOST STRIKING CURB."

Deputy Blake's observation of Petitioner's driving provided the objectively reasonable criteria to perform an investigatory stop. *Dobrin* at 1174.

In order to justify continued detention during a traffic stop and "request that a driver submit to field sobriety tests, a police officer must have a reasonable suspicion that the individual is driving under the influence. *State v. Ameqrane,* 39 So.3d 339, 341 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1148b]. For an arrest to be lawful, the initial stop that led to that arrest must also be lawful. *State, Department of Safety & Motor Vehicles v. Pipkin,* 927 So.2d 901, 903 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2558a]. Petitioner argues that her arrest was unlawful because the initial stop was unlawful. However, as discussed above, the initial stop was lawful based on the objectively reasonable criteria of Petitioner's driving. Deputy Blake stopped Petitioner based on the above described driving of Petitioner. Upon making contact with Petitioner, Deputy Blake noticed Petitioner's eyes were bloodshot and watery and her pupils dilated. Petitioner's breath emitted an odor of an alcoholic beverage and she was having trouble locating her documents. Petitioner admitted she had been drinking. Accordingly, reasonable suspicion existed to detain Petitioner for a DUI investigation, and Petitioner's due process rights were not violated.

The hearing officer, tasked only with determining whether there was a reasonable suspicion to warrant the initial stop, is required to limit the review to the objective facts, rather than the subjective beliefs of the arresting officer. The hearing officer found

"The courts have recognized that a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious that than required for other types of criminal behavior. *State Dep't of Highway Safety and Motor Vehicles v. DeShong,* 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992). As revealed by testimony, the deputy's observations of Petitioner's driving provided him with the founded suspicion necessary to conduct a stop."

"Under the community caretaking doctrine, an officer may stop a vehicle without reasonable suspicion of criminal activity if the stop is necessary for public safety and welfare" *Majors v. State,* 70 So. 3d 655, 661-662 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D1355a]. "In keeping with such community caretaking responsibilities, [an officer] could properly check the [driver's] status and condition to determine whether he needed any assistance or aid. This type of limited contact has been deemed a reasonable and prudent exercise of an officer's duty to protect the safety of citizens." *State, Department of Highway Safety & Motor Vehicles v. DeShong,* 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992). "If a police officer observes a motor vehicle operated in an unusual manner, there may be justification for a stop even when there is no violation of vehicular regulations and no citation is issued." *State v. Gentry,* 57 So.3d 245, 247-248 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D534a]. In *State, Department of Highway Safety and Motor Vehicles v. Maggert,* 941 So.2d 431 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D2530a] the court held that the "absence of a statement in the arrest report, indicating Officer Fucci initiated the stop for suspicion of impairment, does not operate to negate the objective existence of probable cause." The fact that Deputy Blake did not state in the arrest affidavit that the basis for the stop was to determine if the driver had a medical emergency is not relevant.

As the initial stop of Petitioner was lawful, so to was her arrest for driving while under the influence. As such, the request to submit to a breath test was incident to a lawful arrest and the Hearing Officer's sustaining the suspension of Petitioner's driver license was supported by competent substantial evidence.

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Conclusion

In reviewing all the evidence of record as detailed above, the Court concludes that the Hearing Officer's final order was supported by competent substantial evidence that the initial stop, arrest, and request for breath test were lawful, did not violate Petitioner's due process rights, observed the essential requirements of law and was not fundamentally erroneous, it is

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is **DENIED**. (JACK R. ST. ARNOLD, KEITH MEYER, and SHERWOOD COLEMAN.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop—Driving need not endanger any person other than driver of vehicle to constitute careless driving—Stop for careless driving was lawful despite absence of other traffic where licensee's driving into bike lane on two occasions endangered licensee's own life, limb, and property—No merit to argument that stop was not lawful because officer made mistake of law in citing licensee for violation of general careless driving statute rather than for violation of more specific statutes regarding failure to maintain single lane or driving upon bike path—Legality of stop or arrest does not depend on conviction of accused, and officer had objective basis for stop—Petition for writ of certiorari is denied

GEORGE DENNIS KOSTILNIK, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 18-000047AP-88A. UCN Case No. 522018AP000047XXXCI. August 31, 2020. Petition for Writ of Certiorari from Decision of Hearing Officer Bureau of Administrative Reviews Department of Highway Safety and Motor Vehicles. Counsel: Kevin Hayslett, Law Offices of Carlson Meissner Hart & Hayslett, Clearwater, for Petitioner. Christine Utt, General Counsel and Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER AND OPINION

Petitioner challenges a final order from the Department of Highway Safety & Motor Vehicles ("DHSMV") upholding the suspension of his driving privilege for refusing to submit to a breath test pursuant to § 322.2615, Florida Statutes. Petitioner contends that DHSMV's final order finding that the stop was lawful was not supported by competent substantial evidence. For the reasons set forth below, the Petition for Writ of Certiorari is denied.

Facts and Procedural History

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

> "On February 3, 29, 2018, Deputy Skalko with the Pinellas County Sheriff's observed the petitioner's vehicle drifting into the bike lane on at least two separate occasions. The vehicle stayed in the bike lane for an extended amount of time. Concerned that the petitioner might be impaired, have a medical issue or just be distracted, the deputy conducted a traffic stop and made contact with the petitioner.
>
> Upon contact with the petitioner the deputy noticed an odor of alcoholic beverage, bloodshot, water, glassy, red eyes and slurred speech. The petitioner admitted to consuming alcoholic beverages.
>
> The petitioner was asked to perform field sobriety exercises to which he refused. Based on the totality of the circumstances the petitioner was arrested for DUI.
>
> The petitioner was asked to submit to a lawful breath test to which he refused. The petitioner was read implied consent and still refused."

Based upon Petitioner's refusal to provide a breath sample, his license was suspended. After a Formal Review Hearing, the license suspension was upheld. Petitioner then filed the instant Petition for Wirt of Certiorari.

Standard of Review:

[U]pon first-tier certiorari review of an administrative decision, the circuit court is limited to determining whether due process was accorded, whether the essential requirements of law were observed and whether the administrative findings and judgment were supported by competent, substantial evidence. *Wiggins v. Department of Highway Safety and Motor Vehicles,* 209 So.3d 1164, 1174 (Fla. 2017) [42 Fla. L. Weekly S85a].

Pursuant to Fla. Stat. §322.2615(7), the preponderance of evidence standard applies to the DHSMV's decision to suspend a drivers license. *Department of Highway Safety and Motor Vehicles v. Cherry,* 91 So. 3d 849 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1562a]. The preponderance of the evidence standard is evidence which as a whole shows that the facts sought to be proved is more probable than not. Substantial evidence has been defined as evidence "which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but may be somewhat less that a preponderance." *State v. Edwards,* 536 So.2d 288, 292 (Fla. 1st DCA 1988)

Discussion

Petitioner argues that the stop was not lawful as the officer did not have probable cause for a traffic violation or reasonable suspicion of impairment. Petitioner states that there are three sub-issues within the issue of the stop: (1) the stop was not lawful as the officer stopped Petitioner for Careless Driving, but there was no interference with traffic or imperiling of others. (2) The stop was not lawful as the officer charged Petitioner with the general Careless Driving statute rather than the specific statute for a Bicycle Lane violation and (3) the stop was unlawful as it was made under a mistake of law due to the officer's lack of knowledge for a violation of the Careless Driving statute therefore there was not competent substantial evidence to support the Hearing Officer's finding that the stop was lawful.

"The constitutional validity of a traffic stop depends on purely objective criteria." *Hurd v. State,* 958 So. 2d 600, 602 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1594a]. The correct test to be applied is whether the particular officer who initiated the traffic stop had an objectively reasonable basis for making the stop." *Dobrin v. Department of Highway Safety and Motor Vehicles,* 874 So.2d 1171, 1174 (Fla. 2004) [29 Fla. L. Weekly S275a]. Probable cause for an arrest exists if the "facts and circumstances allow a reasonable officer to conclude that an offense has been committed." *Mathis v. Coats,* 24 So.3d 1284, 1288 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D142b]; *State v. Riehl,* 504 So.2d 798,800 (Fla. 2d DCA 1987). The existence of probable cause requires an examination of the totality of the circumstances. *Williamson,* 938 So.2d 985, 989 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2005a]. The facts are to be analyzed from the "officer's knowledge, practical experience, special training and other trustworthy information." *City of Jacksonville v. Alexander,* 487 So. 2d 1144, 1146 (Fla. 4th DCA 1986). "Whether an officer's suspicion is reasonable is determined by the totality of the circumstances that existed at the time of the investigatory detention." *Gaffney v. State,* 974 So.2d, 425, 426 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2520c].

In this case, at the Formal Review Hearing the officer testified

> A. Okay, I was traveling Northbound on Golf Boulevard and noticed that he was having a difficult time maintaining his lane. As we were going northbound, I'm not sure of his actual—first time I saw his car, I believe I was maybe in the median lane and he was in the curb lane and he was going northbound and there's a bike lane, a bike pass, on the right side of the curb lane, and I noticed that he was drifting into the bike lane for a few seconds and then he would turn back into his lane.
>
> . . .
>
> Q. And that was the basis for the traffic stop?
>
> A. Two separate times, yeah. The second time was when I saw him travel into the bicycle lane for several seconds, where —so, that about half of his car remained in the bicycle lane and then came back into the lane of travel.

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In response to counsel's questions, "You wouldn't pull him over because he was on his cell phone, would you?" the officer testified:

> "No, he seemed distracted or possibly, you know, a medical issue, or whatever, I'm not really sure. He had a driving pattern similar to an impaired driver."

An officer may conduct an initial stop based upon a reasonable suspicion if the officer has "a legitimate safety concern for the safety of the motoring public". *Department of Highway Safety and Motor Vehicles v. DeShong,* 603 So.2d 1349 (Fla. 2d DCA 1992). Such concern can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious than that required for other types of criminal behavior. The driving behavior need not reach the level of a traffic violation in order to justify a DUI stop. *State v. Carrillo,* 506 So.2d 495 (Fla. 5th DCA 1987).

Petitioner first argues that in order for the officer to issue a citation for Careless Driving, the driver must endanger the life, limb or property of another and without this imperilment, the statute cannot be the basis for the stop. "If the language of a statue is clear and unambiguous, courts are to enforce the law according to its terms." *Florida Department of Revenue v. Florida Mun. Power Agency,* 789 So. 2d 320, 323 (Fla. 2001) [26 Fla. L. Weekly S422a]. "The terms of the statue indicate that if the life, limb or property of *any* person is affected by the driver's operation of the vehicle, then the driver's actions constitute careless driving. *Any* person can include pedestrians, other traffic, or the driver. " "[T]he legislature is presumed to know the meaning of words and the rules of grammar and the court will give the generally accepted construction to both the phraseology of the act and the manner in which it is punctuated." *Roldan v. Dep't of Highway Safety & Motor Vehicles,* 22 Fla. L. Weekly Supp. 175a (Fla. 4th Cir. Ct. July 29, 2015) citing *Ward v. State,* 936 So. 2d 1143 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2160a]. The court in *Roldan* found that based upon the plain meaning of the word *any,* the Legislature did not intend the word *any* person to mean someone other than the driver. There is no requirement that others be imperiled or placed in danger. "Despite the fact that no other traffic was present, the Petitioner' operation of the vehicle was not in a careful and prudent manner The Petitioner's actions endangered his own life, limb and property and therefore fell within the parameters of the careless driving statute". *Roldan* at 175a. "The courts of this state have recognized that a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious than that required for other types of criminal behavior." *DeShong* at 135. Independent of the violation of the careless driving statute, the facts as stated in the arrest report and Deputy Skalko's testimony that he was not sure if the driver was distracted or had a medical issue was sufficient to warrant an investigatory stop and provided an objective basis for the initial stop of Petitioner.

Petitioner's second argument is that because the officer cited Petitioner with Careless Driving rather than Failure to Maintain a Single Lane or Driving upon a Sidewalk or Bicycle Path, the stop was not lawful. Petitioner posits that because there is a specific statute prohibiting the actions of Petitioner, driving in the bicycle lane, the use of the general statute, Careless Driving, was illegal. The fact that a driver was not ultimately charged for the underlying traffic infraction leading to an arrest on suspicion of DUI is irrelevant. *State v. Potter,* 438 So. 2d 1085 (Fla. 2d DCA 1983). The legality of an arrest does not depend upon the conviction or the acquittal of the accused. *Canney v. State,* 298 So. 2d 495 (Fla. 2d DCA 1973). "The objective tests asks only whether any probable cause for the stop existed making the subjective knowledge, motivation, or intention of the individual officer involved wholly irrelevant. If, therefore, "the facts contained in the arrest report provide any objective basis to justify the stop, even if it is not the same basis stated by the officer, the stop is constitutional." *Department of Highway Safety and Motor Vehicles v. Utley,* 930 So.2d 698 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D1135a].

Petitioner cites to *Pearson v. State,* 19 Fla. L. Weekly Supp. 962a (Fla. 17th Cir. Ct. App for Broward County, July 16, 2002) for the proposition that a vehicle crossing into a bicycle lane, alone, does not give an officer the necessary founded suspicion required to perform a traffic stop. *Pearson* is distinguishable from the facts of this case. In *Pearson*, the officer testified he only stopped the driver for crossing into the bicycle lane, not because the officer believed the driver was intoxicated or otherwise impaired. Additionally, the case involved a Motion to Suppress. It is well settled that a reviewing court must give great deference to the trial court's findings of fact, and that the trial court's ruling comes with a presumption of correctness. *Connor v. State,* 803 So. 2d 598, 606 (Fla. 2001) [26 Fla. L. Weekly S579a]. The standard of review is whether there was competent, substantial evidence to support the Hearing Officer's findings that the officer had probable cause to stop the Petitioner. Here, the officer testified the Petitioner "seemed distracted or possibly, you know, a medical issue, or whatever, I'm not really sure. He had a driving pattern similar to an impaired driver".

The Petitioner's third argument is that there was no legal stop for Careless Driving, as it was made under a mistake of law. "An officer may make a mistake, including a mistake of law, yet still act reasonably under the circumstances. . . [W]hen an officer acts reasonably under the circumstances, he is not violating the Fourth Amendment." *Heien v. North Carolina,* 135 S.Ct. 530, 535 (2014) [25 Fla. L. Weekly Fed. S20a]. "The Florida Supreme Court has recognized that an officer is justified in stopping a vehicle to determine the reason for the vehicle's unusual operation". *Bailey v. State,* 319 So.2d 22, 26 (Fla. 1975). Similarly, our Court has explained:

> "If a police officer observes a motor vehicle operating in an unusual manner, there may be justification for a stop even where there is no violation of vehicular regulations and no citation is issued 'The courts of this state have recognized that a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a drive is ill, tired, or driving under the influence in situations less suspicious that than required for other types of criminal behavior.' [*State, Dep't Highway Safety & Motor Vehicles v.] DeShong,* 603 So.2d [1349] at 1352 [(Fla. 2d DCA 1992]. In determining whether such an investigatory stop was justified, courts must look to the totality of the circumstances. *Ndow v. State,* 864 So.2d 1248, 1250 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D321a]." *State v. Gentry,* 57 So.3d 245 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D534a]."

It is well established law in this state that a law enforcement officer does not have to observe any traffic violations where the officer observes a driving pattern that is sufficient to form a founded suspicion that the operator of the vehicle is impaired, *State v. Carillo,* 506 So.2d 495 (Fla. 5th DCA 1987); *Ndow v. State,* 864 So.2d 1248 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D321a]. Here, although the officer issued a ticket for careless driving which was a mistake of law, the officer testified to an objective basis for the stop.

As the stop was lawful, the subsequent evidence derived from it is admissible. Upon contact with the Petitioner, the officer testified that he observed Petitioner to have the "odor of alcohol coming from his breath, when he spoke, you know, and red bloodshot watery eyes, and a little bit of a slurred speech was slurred a little bit. He seemed to be confused." Petitioner also admitted to the deputy that he had consumer alcoholic beverages. These observations and Petitioner's driving provided sufficient objective basis for the deputy to conduct a DUI investigation. Competent substantial evidence supports the

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Hearing Officer's finding that Petitioner was lawfully stopped based upon the deputy's testimony and report that he observed Petitioner driving into the bike lane as well as the concern that Petitioner might have a medical issue.

Conclusion

This Court must determine if the Hearing Officer's decision upholding the suspension is supported by competent, substantial evidence. In determining if competent, substantial evidence exists, this Court may only decide "whether the record contains the necessary quantum of evidence." *Lee County v. Sunbelt Equities, II, Limited Partnership,* 619 So.2d 996, 1003 (Fla. 2d DCA 1993). The Court cannot reweigh the evidence or substitute its own judgment for that of the hearing officer. *Department of Highway Safety and Motor Vehicles v. Wiggins,* 151 So. 3d 457, 463 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1894a]. Pursuant to Fla. Stat. §322.2615(7), the preponderance of evidence standard applies to the DHSMV's decision to suspend a drivers license. *Department of Highway Safety and Motor Vehicles v. Cherry,* 91 So. 3d 849 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1562a]. "The preponderance of the evidence standard [is] evidence which as a whole shows that the facts sought to be proved is more probable than not. Substantial evidence has been defined as evidence "which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." *State v. Edwards,* 536 So.2d 288, 292 (Fla. 1st DCA 1988)

In reviewing all the evidence of record as detailed above, the Court concludes that reliable, competent, substantial evidence supports the Hearing Officer's decision to sustain the suspension of Petitioner's driving privileges. Procedural due process has been accorded, the essential requirements of law have been observed and the Hearing Officer's Findings of Fact, Conclusions of Law and Decision are supported by competent substantial evidence. Accordingly, it is

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is DENIED. (JACK R. ST. ARNOLD, KEITH MEYER, and SHERWOOD COLEMAN, JJ.)

*   *   *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—No merit to argument that licensee was not lawfully required to submit to breath test because he was arrested on drug possession charges where licensee was charged with DUI in addition to possession of drugs, and implied consent law provides that driver in Florida can be required to submit to blood or breath alcohol test if lawfully arrested for any offense if arresting officer has probable cause to believe driver is also under influence of alcohol—Petition for writ of certiorari is denied

SIDNEY REED NILL, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for Volusia County. Case No. 2018 30401 CICI, Division 32. September 14, 2020. Counsel: Flem Whited, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(MICHAEL S. ORFINGER, J.) THIS CAUSE came before the Court on Petitioner, SIDNEY REED NILL's, Petition for Writ of Certiorari [Doc. 2]. The Court, having reviewed the Petition and exhibits attached thereto, the Response [Doc. 9], and being fully advised in the premises, finds as follows:

Statement of the Facts

On January 18, 2018, Petitioner SIDNEY REED NILL was arrested following a traffic stop. He was charged with driving under the influence (DUI), possession of cannabis under 20 grams, and possession of cocaine. Petitioner refused to perform field sobriety tests, and ultimately refused to submit to a breath alcohol test. As a result, his driver's license was administratively suspended for one year by Respondent STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES ("Department"). Thereafter, Petitioner requested a formal review hearing of his license suspension pursuant to Fla. Stat. § 322.2615. The hearing was held on February 13, 2018, before Department Field Hearing Officer Ann Marie Totten.

The following documents were presented and reviewed at the hearing: (1) DDL-1: DUI Uniform Traffic Citation A108T1P (Notice of Suspension); (2) DDL-2: Photocopy of Petitioner's Florida Driver's License; (3) DDL-3: Florida Uniform Traffic Citation A2BN7VP (Unlawful Speed 44/30); (4) DDL-4: Florida Uniform Traffic Citation A2BN7WP (Open Container); (5) DDL-5: Probable Cause Charging Affidavit - Volusia; (6) DDL-6 Narrative Supplement—Officer Edward Landon; (7) DDL-7: Implied Consent Warnings; (8) DDL-8: Affidavit of Refusal; (9) DDL-9: Incident Report; and (10) DDL-10: Vehicle Tow Report. *See* Petition, Ex. C [Doc. 9].

The only issues to be determined at Petitioner's hearing, as in all administrative hearings reviewing license suspensions occasioned by a refusal to submit to a blood, urine, or breath test for alcohol or controlled substances, were (1) whether law enforcement officers had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcohol or drugs, (2) whether the Petitioner refused to submit to submit to one of the foregoing tests after being requested to do so by a law enforcement officer, and (3) whether Petitioner was told that if he refused to submit to such test his privilege to operate a motor vehicle would be suspended for a period of one year or, in the case of a second or subsequent refusal, for a period of 18 months. Fla. Stat. § 322.2615(7)(b).

On February 14, 2018, the Hearing Officer entered a written order upholding the suspension of Petitioner's driver's license. The Hearing Officer found that the following facts had been established by a preponderance of the evidence:

> On January 18, 2018, Officer Landon Edwards of the Daytona Beach Police Department was stopped for traffic, facing westbound at the stop sign at the intersection of Riverview Boulevard and North Halifax Avenue when he observed a Chevrolet Silverado, Florida tag 153RZF traveling northbound in the 700 block of Halifax Avenue. The vehicle was visually estimated traveling 45 mph in a 30 mph posted speed zone. Officer Edwards activated his Stalker II Radar and received a clear doppler tone with a reading of 45 mph. Officer Edwards conducted a traffic stop.
>
> Officer Edwards approached the passenger side of the vehicle and made contact with the driver. The officer immediately smelled a strong odor of marijuana coming from inside the vehicle. The driver was slow to respond to questions and appeared to be confused. He had difficulty locating his driver's license fumbling through his backpack and the center console. The driver was later identified as Sidney Reed Nill by his Florida Driver's License. Officer Edwards observed the following signs of impairment: an odor of an alcoholic beverage was coming from his breath as he spoke, his eyes were bloodshot, watery and glassy and his speech was slurred. Officer Edwards advised Mr. Nill, that he smelled an odor of marijuana coming from inside the vehicle. Mr. Nill responded by stating, there was marijuana in the vehicle and handed the officer a small black tubular container. Inside the container was a green leafy substance that Officer Edwards identified as marijuana from his training and experience.

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> Officer Cruz Alvarez assisted Officer Edwards and requested Mr. Nill exit his vehicle. The leafy green substance was tested and identified as marijuana. Mr. Nill was placed under arrest for possession of marijuana. Officer Alvarez conducted an inventory of Mr. Nill's vehicle and located a black tubular container in the crevice of the driver seat containing a white powdery substance that was later identified and tested at the precinct as cocaine. Two open containers of an alcoholic beverage were found in the rear cab of the vehicle.
>
> Officer Edwards requested Mr. Nill participate in the Field Sobriety Exercises and he refused. Mr. Nill was informed by officer [sic] Edwards, that refusing to participate in the exercises could be used against him in court and he maintained his refusal. Mr. Nill was transported to the Daytona Beach Police Department and was asked to submit to a breath alcohol test. Mr. Nill refused and he was advised of the consequences of a refusal. The Implied Consent Warning was read and Mr. Nill maintained his refusal stating, "Jesus Christ said no[.]"
>
> Mr. Nill's driving privilege was suspended for one year for refusing to submit to a breach alcohol test. Mr. Nill was issued Citation A108T1P for DUI, Citation A2BN7VP issued for unlawful speed, and Citation A2BN7WP for an open alcoholic beverage.

Petition, Ex. A.

Based on the foregoing facts, the Hearing Officer concluded as a matter of law that the officers had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcohol or chemical or controlled substances, that he refused to submit to the breath alcohol test after being requested to do so by a law enforcement officer subsequent to a lawful arrest, and that Petitioner was properly advised of the consequences of refusing to submit to the test. The suspension of Petitioner's driver's license was therefore affirmed. *Id.*

This Petition for Writ of Certiorari timely followed. Respondent filed a Response pursuant to this Court's Order to Show Cause. Petitioner asks this Court to grant his Petition and quash the Final Order of License Suspension entered by the Hearing Officer.

Standard of Review

The Court has jurisdiction to consider this Petition pursuant to Fla. Stat. § 322.31 and Fla. R. App. P. 9.030(c)(3).

In reviewing an administrative agency decision by certiorari, this Court's role is strictly limited to consideration of: (i) whether procedural due process was accorded to the parties; (ii) whether the essential requirements of law were observed; and (iii) whether the administrative findings are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (citing *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982)).

The first factor, procedural due process, "requires both fair notice and a real opportunity to be heard at a meaningful time and in a meaningful manner." *Massey v. Charlotte County,* 842 So. 2d 142, 146 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D407b] (internal citations omitted). The second factor, "whether the essential requirements of law were observed," requires an analysis of whether the lower tribunal applied the correct law. *Heggs,* 658 So. 2d at 530; *Dusseau v. Metropolitan Dade County Board of County Commissioners,* 794 So. 2d 1270 (Fla. 2001) [26 Fla. L. Weekly S329a].

The third factor requires the Court to determine whether there is "evidence in the record that supports a reasonable foundation for the conclusion reached" by the Hearing Officer, and that the administrative findings and judgment are supported by competent substantial evidence. *Dep't of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]; *De Groot v. Sheffield,* 95 So.2d 912, 916 (Fla. 1957) (defining "competent substantial evidence"). The Court in its review is not entitled to reweigh the evidence or substitute its judgment for the findings of the DHSMV Hearing Officer. *See Education Development Ctr., Inc. v. City of West Palm Beach Zoning Bd. of Appeals,* 541 So. 2d 106, 108 (Fla. 1989); *Dep't of Highway Safety & Motor Vehicles v. Allen,* 539 So. 2d 20, 21 (Fla. 5th DCA 1989). *See also Dep't of Highway Safety & Motor Vehicles v. Smith,* 687 So. 2d 30, 32-33 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D161a] ("[t]he circuit court was not empowered to conduct an independent fact finding mission on the question of whether [petitioner's] driver's license should have been suspended").

Because Petitioner does not challenge the first and third factors, *i.e.* whether he was afforded due process and whether the Hearing Officer's findings were supported by competent substantial evidence, the only issue before this Court is whether the Hearing Officer applied the correct law. Petitioner urges this Court to answer this question in the negative. Specifically, Petitioner contends that the Hearing Officer erroneously found that "he was arrested for an offense allegedly committed while he was driving and under the influence of alcoholic beverages where the arrest was for possession of a controlled [substance]." Petition at 2-3.[1]

As noted above, it does not appear that Petitioner is challenging whether the Hearing Officer's findings are supported by competent substantial evidence. However, to the extent Petitioner suggests that he was not arrested for driving under the influence, that suggestion is belied by the evidence presented at the hearing. Exhibit DDL-5 states that Petitioner was charged with DUI at the time of his arrest. The officer's narrative in that exhibit includes a description of the facts giving the officer probable cause to believe that Petitioner was driving while under the influence of alcohol, *e.g.,* bloodshot watery eyes and the smell of alcohol on Petitioner's breath. The fact that the narrative says only that Petitioner was arrested for possession of marijuana is of no moment because the charges against Petitioner are clearly set forth on the first page of the exhibit. There is competent substantial evidence to support the Hearing Officer's finding that Petitioner was arrested for DUI, and this Court cannot reweigh that evidence.

Further, and perhaps more importantly, nothing in Florida's "implied consent" law requires that someone in Petitioner's position be arrested for DUI as a prerequisite to submitting to a breath test. Fla. Stat. § 316.1932(1)(a)l.a. provides in pertinent part:

> Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath ***if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages.*** The chemical or physical breath test ***must be incidental to a lawful arrest*** and administered at the request of a law enforcement officer who has reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle within this state while under the influence of alcoholic beverages. (Emphasis added)

A plain reading of the test of section 316.1932(1)(a)1.a. leads to the conclusion that a person driving in Florida impliedly consents to a blood or breath alcohol test if the person is "lawfully arrested for any offense" if that offense is allegedly committed while the person is driving or controlling a motor vehicle while under the influence of alcohol. The particular offense for which the person is arrested is irrelevant, so long as the arrest is lawful. The statute then reiterates that the test must be "incidental to a lawful arrest," but again makes no mention of the nature of the offense for which the person is arrested. Stated differently, a person driving a motor vehicle can be required to

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submit to a blood or breath alcohol test if lawfully arrested for any offense if the arresting officer has probable cause to believe that the person is also under the influence of alcohol.

Petitioner relies on *Dep't of Highway Safety & Motor Vehicles v. Whitley,* 846 So. 2d 1163 (Fla. 5th DCA) [28 Fla. L. Weekly D1090a], *rev. denied* 858 So. 2d 333 (Fla. 2003). In *Whitley,* the petitioner was arrested for fleeing and eluding a law enforcement officer. At the time of the arrest, the officer noticed a strong odor of alcohol on the petitioner's breath. The officer did not tell the petitioner, however, that he was under arrest for DUI. At the police station, the petitioner refused to take field sobriety tests, but consented to a breath test, which showed his blood alcohol to be in excess of the legal limit He was then formally charged with DUI. *Id.* at 1164-1165. The administrative hearing officer upheld the petitioner's driver's license suspension, but on certiorari review, the circuit court reversed, holding that the alcohol test had to be administered incident to an arrest for DUI, and petitioner's test did not meet that standard because he was only arrested for fleeing and eluding. *Id.* at 1165. The circuit court also held that absent the breath test, the officer had no probable cause to arrest the petitioner for DUI. *Id.*

On second tier certiorari review, the Fifth District Court of Appeal quashed the circuit court's decision and upheld the petitioner's license suspension. First, the court concluded that the arresting officer had probable cause to arrest the petitioner for DUI even before the breath test. The *Whitley* court then considered the circuit court's holding "that the administration of the breath test must be incidental to a lawful arrest for DUI and that a person's license may not be suspended unless the person is first arrested for DUI and, thereafter, administered the breath test." *Id.* at 1166. The court agreed that based on its prior precedent, the petitioner must be arrested before the breath test could be administered. However, the *Whitley* court observed that "the statute does not specifically say that the arrest must be for DUI; rather, it only provides that the person be 'lawfully arrested for any offense allegedly committed while the person was driving . . . while under the influence of alcoholic beverages. . . .' " *Id.* The Fifth District agreed with the Department that the arrest for fleeing and eluding satisfied the requirements of the implied consent statute, and concluded that the respondent's license had been properly suspended. *Id.* at 1167-1168.

Petitioner argues, based on *Whitley,* that "[i]t is clear the legislature meant for the driver to be arrested for a driving offense; such as fleeing and attempting to elude, driving on a suspended license, driving with a current license, etc. all of which driving is an essential element of the offense and not for non-driving offenses such as possession of controlled substance, carrying a concealed firearm or weapon or any other such offense." Petition at 5. But neither *Whitley* nor section 316.1932(1)(a)l.a. support this argument. Section 316.1932(1)(a)1.a. speaks unequivocally of an arrest for "any offense." The meaning of "any offense" is unambiguous and unequivocal. *Whitley* requires that the arrest precede the breath test, but it rejects the notion that the arrest must be for DUI. Moreover, *Whitley* in no way draws a distinction between offenses in which driving is or is not an essential element of the offense. Both *Whitley* and the implied consent statute require only that the offense for which the arrest is lawfully made occur *while* the arrested person is driving or in control of a motor vehicle *while* under the influence of alcohol. Thus, even if Petitioner was arrested at the scene only for possession of marijuana, there is competent substantial evidence showing that he was in possession of marijuana *while* driving a motor vehicle with probable cause to believe that he was doing so *while* under the influence of alcohol. Thus, there is no basis for overturning the Hearing Officer's judgment affirming Petitioner's driver's license suspension.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari shall be, and the same is hereby DENIED.

[1]It is candidly somewhat difficult to discern the precise argument Petitioner is advancing. He states in his Petition that "[t]he issue presented the Hearing Officer was quite simple. If the defendant is arrested for possession of a controlled substance and offense committed while the person was driving under the influence of alcoholic beverages?" The question as phrased is a *non sequitir.*

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of detention and arrest—Where deputies responding to 911 call from liquor store employee reporting that licensee parked at store had consumed bottle of alcohol observed that licensee was slumped over driver's seat of vehicle and drooling, vehicle keys were in possession of licensee, motor was running, and mostly-empty vodka bottle was on console of vehicle, deputies were justified in detaining licensee and arresting him when he resisted lawful order to exit vehicle—Deputies were initially acting in community caretaking role and had articulable, well-founded suspicion that licensee was DUI before encounter became investigatory stop—Confusion doctrine does not excuse licensee's refusal to submit to breath test where licensee was not read *Miranda* rights until after his refusal, and any confusion he may have had about right to counsel before responding to request to submit to test was not created by law enforcement—No merit to argument that deputy improperly deemed licensee's request for counsel as refusal to submit to breath test—Petition for writ of certiorari is denied

CORTLAND T. PARKER, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for Volusia County. Case No. 2020 30515 CICI, Division 32. September 29, 2020. Counsel: Harry D. Rutherford, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(MICHAEL S. ORFINGER, J.) THIS CAUSE came before the Court on Petitioner, CORTLAND T. PARKER's, Petition for Writ of Certiorari [Doc. 1]. The Court, having reviewed the Petition and Appendices [Docs. 2-3], the Response [Doc. 8], and being fully advised in the premises, finds as follows:

Statement of the Facts

On February 13, 2020, the Volusia County Sheriff's Office responded to a 911 call regarding an "older white male 'downing a bottle of alcohol' while sitting in the driver's seat of a blue vehicle parked in an ABC Liquor store parking lot." *See* Petition at 1. Two deputies arrived on scene separately; Deputy Wilson arrived first, and Deputy Rittenour arrived later [A. 7].[1] Deputy Wilson observed Petitioner in the driver's seat; he was slumped over with drool coming from his mouth. *Id.* The deputy could tell that the Petitioner was breathing. The car keys were visibly hanging out of Petitioner's pocket, but the car's engine was running because the car had a push-button starter. *Id.* Deputy Wilson also saw a mostly empty bottle of vodka sitting in the center console of the car [T. 12:14-18].

When Deputy Rittenour arrived on scene, Petitioner's car was parked within a parking space at the ABC store, although it was crooked, and although he did not remember for sure, he believed that the driver's door was ajar [T. 24:21-13; 25:6-11]. He attempted to wake Petitioner, who began rambling about the government and politics [A. 7]. He gave an incoherent response when asked why he was sitting there. *Id.* Deputy Rittenour removed the keys from inside the vehicle. He also observed the mostly consumed vodka bottle in the center console. Deputy Rittenour asked Petitioner if he had anything to drink, and he responded in the negative. When asked to surrender the vodka bottle, however, Petitioner refused and placed it on the passenger's seat instead [A. 4, 7]. At that point, Deputy Rittenour

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ordered Petitioner out of the car. He repeated this order several times because Petitioner refused to comply and grabbed onto the steering wheel [A. 4]. Eventually Deputy Rittenour was able to pull Petitioner from the vehicle. Petitioner was handcuffed and arrested for resisting an officer without violence. *Id.*

Deputy Rittenour's charging affidavit states that Petitioner was "extremely sweaty, spoke with slurred/incoherent speech, smelled of an odor consistent with an alcoholic beverage that also emanated from his breath, and had watery eyes" [A. 4]. Deputy Rittenour asked Petitioner at the scene if he was willing to perform field sobriety exercises, "but he provided unrelated responses to the question." *Id.* Deputy Rittenour then transported Petitioner to the Sheriff's Office for additional processing. *Id.*

At the Sheriff's Office, Deputy Rittenour again asked Petitioner if he was willing to submit to field sobriety exercises, and Petitioner declined. At that point, Petitioner was arrested for driving under the influence (DUI) and asked to submit to a breath test. *Id.* Petitioner refused to submit to the test and was read the implied consent warning. Deputy Rittenour asked Petitioner again if he would submit to a breath test, but Petitioner responded by stating that he wanted an attorney present. The charging affidavit states that "Deputy Rittenour determined Parker's request for an attorney present was a refusal to the breath test. ***Also, due to Parker's request to have an attorney present, he was not read the Miranda Warning***." *Id.* (Emphasis added.) Because Petitioner had a prior refusal to submit to a breath test in his history, he was then also charged with refusal to submit to a breath test with a prior refusal. *Id.*

As a result of the foregoing events, Petitioner's driver's license was administratively suspended by Respondent STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES ("Department"). Thereafter, Petitioner requested a formal review hearing of his license suspension pursuant to Fla. Stat. § 322.2615. The hearing was held on March 17, 2020, before Department Field Hearing Officer Morkos Ikladious [T. 3].

The following documents were presented and reviewed at the hearing: (1) DDL-1: the "DUI Packet" consisting of (a) Florida Uniform Traffic Citation AD2BGFE; (b) Florida Uniform Traffic Citation A4M4YSE; (c) Charging Affidavit—Volusia; (d) Volusia County Sheriff's Office DUI Report; and (e) Affidavit of Refusal to Submit to Breath and/or Urine Test [T. 4:16-25]. Petitioner presented the live testimony of both Deputies Wilson and Rittenour.

The only issues to be determined at Petitioner's hearing, as in all administrative hearings reviewing license suspensions occasioned by a refusal to submit to a blood, urine, or breath test for alcohol or controlled substances, were (1) whether law enforcement officers had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcohol or drugs, (2) whether the Petitioner refused to submit to submit to one of the foregoing tests after being requested to do so by a law enforcement officer, and (3) whether Petitioner was told that if he refused to submit to such test his privilege to operate a motor vehicle would be suspended for a period of one year or, in the case of a second or subsequent refusal, for a period of 18 months. Fla. Stat. § 322.2615(7)(b).

On March 17, 2020, the Hearing Officer entered a written order upholding the suspension of Petitioner's driver's license [A/ 10]. The Hearing Officer found that the following facts had been established by a preponderance of the evidence:

> On February 13, 2020, Deputy Rittenour of the Volusia County Sheriff's Office responded to a report by an employee, of an intoxicated driver that was parking behind his business. Deputy Willson [sic] arrived first and observed the driver slumped over forward with drool coming from his mouth. Deputy Willson [sic] became concerned about the Petitioner's wellbeing. Deputy Willson [sic] also noted the keys hanging out of the driver's pocket and the vehicle was running.
>
> Deputy Rittenour arrived at the scene and made a contact with the Petitioner. The petitioner was incoherent. Deputy Rittenour noted a mostly consumed bottle of Vodka, in the center console. The petitioner was uncooperative and was placed under arrest for resistance [sic] an officer without violence.
>
> After the Petitioner's exiting the vehicle, Deputy Rittenour noted a smell of an alcoholic beverage coming from the Petitioner's breath. Deputy Rittenour also the [sic] Petitioner's eyes were watery, and his speech was slurred.
>
> Later, the Petitioner was offered to complete the field sobriety exercises and was subsequently arrested for DUI.
>
> The Petitioner was read the Implied Consent Warning form and a breath test was requested. The Petitioner refused to submit to the breath test.
>
> Based on the foregoing, I find the Petitioner was placed under lawful arrest for DUI.

[A.11-12].

Based on the foregoing facts, the Hearing Officer concluded as a matter of law that the officers had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcohol or chemical or controlled substances, that he refused to submit to the breath alcohol test after being requested to do so by a law enforcement officer subsequent to a lawful arrest, and that Petitioner was told that if he refused to submit to such test his privilege to operate a motor vehicle would be suspended for a period of one year or, in the case of a second or subsequent refusal, for a period of 18 months. The suspension of Petitioner's driver's license was therefore affirmed [A.13].

This Petition for Writ of Certiorari timely followed [Doc. 8]. Respondent filed a Response pursuant to this Court's Order to Show Cause [Doc. 6]. Petitioner asks this Court to grant his Petition and quash the Final Order of License Suspension entered by the Hearing Officer.

Standard of Review

The Court has jurisdiction to consider this Petition pursuant to Fla. Stat. § 322.31 and Fla. R. App. P. 9.030(c)(3).

In reviewing an administrative agency decision by certiorari, this Court's role is strictly limited to consideration of: (i) whether procedural due process was accorded to the parties; (ii) whether the essential requirements of law were observed; and (iii) whether the administrative findings are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (citing *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982)).

The first factor, procedural due process, "requires both fair notice and a real opportunity to be heard at a meaningful time and in a meaningful manner." *Massey v. Charlotte County,* 842 So. 2d 142, 146 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D407b] (internal citations omitted). The second factor, "whether the essential requirements of law were observed," requires an analysis of whether the lower tribunal applied the correct law. *Heggs,* 658 So. 2d at 530; *Dusseau v. Metropolitan Dade County Board of County Commissioners,* 794 So. 2d 1270 (Fla. 2001) [26 Fla. L. Weekly S329a].

The third factor requires the Court to determine whether there is "evidence in the record that supports a reasonable foundation for the conclusion reached" by the Hearing Officer, and that the administrative findings and judgment are supported by competent substantial evidence. *Dept of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]. Perhaps the most common definition of "competent substantial evidence" appears in *De Groot v. Sheffield,* 95 So.2d 912, 916 (Fla.

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1957). There the Supreme Court of Florida defined the term as follows:

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

Id. at 916 (internal citations omitted). (Emphasis added.) "Evidence contrary to the agency's decision is outside the scope of the inquiry [during first tier certiorari review], for the reviewing court above all cannot reweigh the 'pros and cons' of conflicting evidence." *Dusseau,* 794 So. 2d at 1275. In other words, the Court must take care not to reweigh the evidence or substitute its judgment for the findings of the Department Hearing Officer. *See Education Development Ctr., Inc. v. City of West Palm Beach Zoning Bd. of Appeals,* 541 So. 2d 106, 108 (Fla. 1989); *Dep't of Highway Safety & Motor Vehicles v. Allen,* 539 So. 2d 20, 21 (Fla. 5th DCA 1989). *See also Dep't of Highway Safety & Motor Vehicles v. Smith,* 687 So. 2d 30, 32-33 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D161a] ("[t]he circuit court was not empowered to conduct an independent fact finding mission on the question of whether [petitioner's] driver's license should have been suspended").

Petitioner does not challenge the first and second factors, *i.e.* whether he was afforded due process and whether the Hearing Officer applied the correct law. Therefore the only issue before this Court is whether the Hearing Officer's findings are supported by CSE. Petitioner urges this Court to answer this question in the negative. Specifically, Petitioner contends that there was no CSE to support the Hearing Officer's finding that Petitioner refused to submit to a breath test. He also contends that the Hearing Officer's finding that Petitioner was unlawfully detained is unsupported by CSE. The Court addresses these issues in inverse order.

Propriety of the stop.

The Court finds that CSE exists to support Petitioner's detention and ultimate arrest for two reasons. First, Fla. Stat. § 316.193(1), which criminalizes driving under the influence, provides as follows:

> A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) **if the person is driving or in actual physical control of a vehicle** within this state **and:**
>
> (a) **The person is under the influence of alcoholic beverages,** any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected **to the extent that the person's normal faculties are impaired;**
>
> (b) The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; **or**
>
> (c) The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.

In the instant case, the Sheriff's Office responded to a 911 call from an employee of the ABC Liquor Store where Petitioner's car was parked [A. 7]. The caller reported that the occupant of the vehicle had consumed a bottle of alcohol. *Id.* When Deputy Wilson arrived on the scene, Petitioner was in a crookedly parked car, slumped over in the driver's seat and drooling [T. 24:21—25:1; A. 7]. The car engine was running and Petitioner was in physical possession of the keys [A. 7]. Both Deputy Wilson and Deputy Rittenour saw a mostly empty 750 ml vodka bottle sitting in the center console of Petitioner's car [T. 12:14-24—30:8-16; A. 7]. The Court finds that these facts, without more, constituted probable cause to believe that Petitioner had committed the offense of DUI. The deputies were thus justified in asking Petitioner to get out of the car. They were further justified in arresting Petitioner for resisting an officer without violence when he repeatedly refused to get out of the car and grabbed the steering wheel to prevent Deputy Rittenour from removing him from the car [A. 7; T. 30:8-21].

Second, the Court concludes that there is CSE to support Petitioner's initial detention because Deputies Wilson and Rittenour were acting in a community caretaking role. A community caretaking encounter between a police officer and a citizen is considered to be consensual and does not implicate the Fourth Amendment.[2] Having been informed that there was a man sitting in the parking lot downing a bottle of alcohol, and coming upon Petitioner in his crookedly parked car, slumped over, drooling, with the engine running and the keys in his possession, it was clearly reasonable for the deputies to conduct a check on Petitioner's well-being.

It is true that a community caretaking stop, which is considered consensual, can turn into an investigatory stop. In the instant case, the deputies parked behind Petitioner's vehicle so as to block his exit. There are circumstances under which this action would make the encounter an investigatory stop, thus requiring the deputies to have a "well-founded, articulable suspicion of criminal activity." *Popple,* 626 So. 2d at 186. But in the instant case, after Deputy Wilson parked his vehicle, he came upon Petitioner slumped over and drooling in his still-running vehicle. Deputy Rittenour had to wake him [A.7]. Thus, even if the deputies had parked behind Petitioner's car, that would not have converted the encounter into an investigatory stop because the sleeping Petitioner could not have been aware of the police presence. *Dermio v. State,* 112 So. 3d 551, 556 (Fla. 2nd DCA 2013) [38 Fla. L. Weekly D776a]; *rev. denied* 137 So. 3d 1019 (Fla. 2014); *Arthur v. Dep't of Highway Safety & Motor Vehicles,* 23 Fla. L. Weekly Supp. 300a (Fla. 6th Cir. Ct. 2015).

Florida law also recognizes that where a law enforcement officer orders the occupant of a car to exit the vehicle or even roll down the window, an investigatory stop occurs. *E.g., Dermio,* 112 So. 3d at 556. The same is true if it is the officer who opens the car door. As noted above, an investigatory stop requires a "well-founded, articulable suspicion of criminal activity." *Topple,* 626 So. 2d at 186. Here, by the time Deputy Rittenour told Petitioner to get out of his car and ultimately removed him from the car, he and Deputy Wilson had already observed a mostly consumed bottle of vodka in the center console of a running vehicle. They had also observed that Petitioner's car keys were dangling out his pocket. This constitutes CSE of an articulable, well-founded suspicion (and as this Court noted above, sufficient probable cause to believe) that Petitioner had committed the offense of DUI as the elements of that crime are set forth in Fla. Stat. § 316.193.

Refusal to submit to the breath test.

Florida's "implied consent" law, Fla. Stat. § 316.1932(1)(a)1.a. provides in pertinent part as follows:

> Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages. The chemical or

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physical breath test must be incidental to a lawful arrest and administered at the request of a law enforcement officer who has reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle within this state while under the influence of alcoholic beverages. . . . ***The person shall be told that his or her failure to submit to any lawful test of his or her breath will result in the suspension of the person's privilege to operate a motor vehicle for a period of 1 year for a first refusal, or for a period of 18 months if the driving privilege of such person has been previously suspended as a result of a refusal to submit to such a test or tests, and shall also be told that if he or she refuses to submit to a lawful test of his or her breath and his or her driving privilege has been previously suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood, he or she commits a misdemeanor in addition to any other penalties.*** The refusal to submit to a chemical or physical breath test upon the request of a law enforcement officer as provided in this section is admissible into evidence in any criminal proceeding. (Emphasis added.)

Petitioner claims that he never actually refused a lawful request to submit to a breath test. He claims that he only asked to speak to a lawyer. Deputy Rittenour interpreted this statement as a refusal to submit to the test [A. 4; T. 33:19—34:2]. Petitioner argues that "[l]aw enforcement did not explain or clarify that he had to make a choice at that moment, that he could speak to a lawyer later, or otherwise do anything to dispel the confusion created by the *Miranda* rights." Petition at 5. Petitioner characterizes his argument as a "hybrid" incorporating the absence of an actual refusal with the "confusion doctrine." *See* Petitioner's Reply to Response at 1 [Doc. 9]. He contends that Deputy Rittenour should have clarified the state of the law to Petitioner to correct his erroneous belief that the *Miranda* rights applied to the situation before him, even though Deputy Rittenour had not read the *Miranda* warnings to him. This Court does not agree.

This issue is governed by the Fourth District Court of Appeal's decision in *Kurecka v. State,* 67 So. 3d 1052 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2162b]. *Kurecka* was a consolidated appeal of two cases, both of which presented the question of whether the defendants' refusal to submit to a breath test following their arrest for DUI should have been suppressed in their criminal trials. In the first of the two cases, defendant Kurecka was arrested for DUI, taken to the police station, and asked to submit to breath testing. The parties stipulated to the following facts:

> Upon hearing the request, Defendant requested to speak with an attorney. Prior to requesting Defendant to submit to breath testing, law enforcement had not advised Defendant of his *Miranda* rights. As such, Defendant's desire for counsel was not premised upon law enforcement advice, but his own belief that he needed to speak with an attorney. Law enforcement did not inform Defendant that he did not have a right to speak with counsel prior to deciding to take or refuse breath testing. Because he wanted to speak with counsel first, Defendant refused to submit to breath testing.

Id. at 1053-1054. Kurecka sought to exclude the refusal from evidence because it did not show consciousness of guilt, but only confusion on his part. The county court denied the motion to suppress, but certified the following question to the Fourth District as one of great public importance:

> If the confusion doctrine exists in Florida, does it apply when law enforcement fails to eliminate a defendant's confusion about the right to counsel before submitting to a breath test even though law enforcement did not cause the confusion?

Id. The Fourth District answered this question in the negative, and affirmed the order denying the motion to suppress. *Id.* at 1054.

In the second of the consolidated cases in *Kurecka,* defendant Power was arrested for DUI and taken to the breath testing center for questioning and testing. He responded to every question, including routine booking questions, by stating that he wanted a lawyer. When the police sergeant asked him to submit to a breath test, Power (himself a former police officer) replied, "Lawyer." *Id.* at 1055. Then the following colloquy occurred:

> Q. Lawyer? That means no, right?
> A. Get a lawyer.
> Q. Okay. I'm gonna assume that by not saying yes you're saying no, you want a lawyer.
> A. A lawyer.
> Q. Am I correct in what I'm assuming?
> A. A lawyer, yes.

Id. At that point, the sergeant read Power the implied consent law and advised him of the consequences of refusing the test. However, the sergeant did not repeat his request for Power to take the breath test; rather, he interpreted Power's actions as a refusal to submit to testing. The sergeant then read Power his *Miranda* rights and asked him if he wanted to answer questions. Power shook his head and said he wanted a lawyer. *Id.* Power sought to suppress evidence of the question-and-answer session and his refusal to take the test.

The county court granted the motion to suppress, holding that because Power made clear that he thought he was entitled to counsel before submitting to a breath test, law enforcement had an obligation to correct that mistaken belief, even though law enforcement did nothing to create that belief. The county court certified the following question as one of great public importance:

> Does a defendant's mistaken belief in the right to counsel prior to breath testing, not created by law enforcement, but made known to law enforcement, require the suppression of the refusal to submit to breath testing if law enforcement does not correct the defendant's mistaken belief?

Id. at 1056. The *Kurecka* court answered this question in the negative, and reversed the order of suppression.

The *Kurecka* court began its analysis by noting that under Florida law, "a person arrested for DUI does not have the right to consult with counsel before deciding whether to submit to a breath test." *Id. Accord State v. Burns,* 661 So. 2d 842 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D1942a]. However, the court recognized that Florida courts have in some circumstances applied a judicially created exclusionary rule known as the "confusion doctrine," under which " 'a licensee's refusal to submit to [a] breath test will be excused if, due to a prior administration of the Miranda warnings, the licensee believes that he or she had the right to consult with counsel prior to taking a breath test.' " 67 So. 3d at 1056 (quoting *Ringel v. State,* 9 Fla. Law Weekly Supp. 678a (Fla. 18th Cir. Ct. 2002). The *Kurecka* court observed that Florida courts had not uniformly applied the confusion doctrine, with some rejecting it and some accepting it.

In attempting to harmonize these decisions, the Fourth District distinguished between cases in which law enforcement had possibly created the defendant's mistaken belief that he could consult with counsel prior to taking a breath test and those cases in which law enforcement had not created that mistaken belief but merely failed to correct it. The former category of cases were those in which law enforcement read the defendant his or her *Miranda* rights prior to asking the defendant to submit to a breath test, while the latter category consisted of cases in which the defendant was first asked to submit to a breath test and given the *Miranda* rights later. *See generally id.* at 1056-1058. *Accord State v. Wymer,* 4 Fla. L. Weekly Supp. 113a (Hillsborough Cty. Ct. Nov. 30, 1995).

The defendants in *Kurecka* were not read their *Miranda* rights until after they were asked to submit to breath testing and declined. 67 So. 3d at 1053, 1055. It was undisputed on the record that law enforce-

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ment did nothing to create Kurecka or Powers' confusion about the applicability of their *Miranda* rights. *Id.* at 1061. The *Kurecka* court also noted that nothing in the implied consent statute required law enforcement to advise people arrested for DUI that their right to counsel did not attach to their decision to submit to breath testing. *Id.* While the court observed that explaining this to suspects who request counsel would be a minimal burden on law enforcement, the court also recognized that the imposition of any such obligation must come from the legislature rather than from the judiciary. Accordingly, the Fourth District affirmed the order denying Kurecka's motion to suppress, and reversed the order granting Powers' motion to suppress. *Id*

Petitioner in the instant case makes the following argument in support of certiorari relief:

> Unequivocally, [Petitioner] did not refuse to submit to a breath test—-he may have intended to, who knows, but he never got a chance to. [Petitioner] believed, in good faith, he had the fundamental right to speak with an attorney. Rightly or wrongly, the vast majority of citizens believe the in the [sic] almost supernatural and talismanic value of the *Miranda* warnings and the right to have counsel before speaking with the police or, as here, before deciding whether to voluntarily participate further in the investigation . . . . Consistent with a lay person's understanding of the right to remain silent and the right to any attorney, law enforcement has a corresponding obligation to explain when *Miranda* is not applicable or at least explain a lawyer is not going to be provided at that point in the process. Even if the officer is not required to offer an explanation, an officer is not free to unilaterally translate the request for a lawyer into a refusal to submit to a breath test.

Petition at 6-7. Petitioner's argument, while eloquent, misses the mark. Regardless of what the vast majority of the citizenry believes about *Miranda* warnings, there is no CSE about what Petitioner actually believed about them, because he did not testify at the hearing. Clearly there is CSE that he responded to the request to submit to breath testing by asking to speak with an attorney, but the record is equally clear that Petitioner was not administered *Miranda* warnings until after he was asked to submit to breath testing and he requested a lawyer. Thus, law enforcement did not create whatever confusion Petitioner may have had about his rights; that confusion was either self-created or caused by some source not attributable to this law enforcement encounter. Under those circumstances, the "confusion doctrine" does not apply, and Deputy Rittenour was not obligated to explain to Petitioner that he did not have the right to counsel when asked to submit to breath testing. *Kurecka,* 67 So. 3d at 1056-1057.

The Court also rejects Petitioner's argument that Deputy Rittenour improperly deemed Petitioner's request to speak to a lawyer as a refusal to take the breath test. In *Kurecka,* after defendant Power responded to the request for a breath test by saying he wanted a lawyer, the sergeant interviewing Power read the implied consent law to him and advised him of the consequences of refusing to submit to the test. But as the *Kurecka* court noted, "Sergeant Gray did not repeat his request for Power to take the breath test; however, he interpreted Power's actions as a refusal to submit to breath testing." *Id.* at 1055. This was sufficient to constitute a refusal in *Kurecka.* Petitioner's actions in the instant case are essentially the same as Powers' actions in *Kurecka,* and the same result must obtain here. There is CSE in the instant case to support the Hearing Officer's finding that Petitioner refused to submit to a breath test, and that his driver's license was properly suspended.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari shall be, and the same is hereby DENIED.

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[1]References to the Appendix to the Petition are designated by "[A.__]," followed by the appropriate page number(s) thereof. References to the transcript of the hearing before the Hearing Officer are designated by "[T.__]," followed by the appropriate page and line numbers.

[2]Petitioner correctly notes that Florida recognizes three levels of encounters between citizens and the police. *See* Petition at 8. "The first level is considered a consensual encounter and involves only minimal police contact. . . . The second level of police-citizen encounters involves an investigatory stop as enunciated in *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). . . . [T]he third level of police-citizen encounters involves an arrest which must be supported by probable cause that a crime has been or is being committed." *Popple v. State,* 626 So. 2d 185, 186 (Fla. 1993).

* * *

Licensing—Driver's license—Suspension—DUI manslaughter—Order upholding suspension of license of driver in ATV rollover accident was supported by competent substantial evidence despite below-limit results of breath test administered four hours after accident where hearing officer was not persuaded that breath test results negated arresting deputy's observations that licensee had odor of alcohol, poor balance, glassy bloodshot eyes, and poor performance on field sobriety exercises

SARA SCHIBLER, Petitioner, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 10th Judicial Circuit (Appellate) in and for Polk County. Case No. 2020CA-000435, Section 30. July 27, 2020. Counsel: Thomas C. Grajek, Lakeland, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITIONER'S *PETITION FOR WRIT OF CERTIORARI*

(ELLEN S. MASTERS, C.J.) This matter came before the Court on the Petitioner's *Petition for Writ of Certiorari* (hereinafter "Petition"), filed on February 4, 2020. Petitioner seeks review of the *Final Order* issued by a Hearing Officer of The Florida Department of Highway Safety and Motor Vehicles (hereinafter "DHSMV") on January 6, 2020. This Court has jurisdiction. *See* Fla. R. App. P. 9.030(c).

On December 5, 2019, the DHSMV conducted an administrative review hearing of the Petitioner's driver's license suspension. The Petitioner was charged with a violation of section 316.193(3)(c)(3)(a), Florida Statutes, for DUI manslaughter on October 26, 2019. The Petitioner's driving privilege was suspended by the DHSMV on November 19, 2019, pursuant to section 322.27(1), Florida Statutes.

The Petitioner did not attend the hearing, but the Petitioner's attorney was present on behalf of the Petitioner. The Hearing Officer entered Exhibit 1, the Florida DUI Uniform Traffic Citation, and Exhibit 2, a Polk County Sheriff's Office affidavit without objection. No evidence was presented by the Petitioner. The Petitioner argued that the evidence established that the incident was a "rollover" accident on an ATV, but that the evidence was insufficient to establish that the Petitioner was driving the motor vehicle, that the Petitioner was impaired, or that alcohol was a factor in the accident. The Petitioner specifically argued that the breath alcohol test results were under the .05 such that there was a presumption of no impairment.

In the Final Order, the Hearing Officer found that the suspension was proper based upon a review of the citation and probable cause affidavit. The probable cause affidavit identified the Petitioner as the driver based upon the investigation by the Polk County Sheriff's Office. Specifically, the deputy's affidavit asserted that the driver called 911 after the accident and identified herself as the driver. The deputy observed indicators of impairment including an odor of alcohol, lack of physical balance, bloodshot and glassy eyes, and poor performance on field sobriety exercises. The deputy determined the time of the accident to be between 1930 and 2000 hours. The 20-minute observation time before the breath test began at 2351 hours. Thus, the breath test was administered four hours after the accident.

When reviewing an administrative proceeding on a petition for writ of certiorari, this Court must determine whether the hearing

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officer followed the essential requirements of the law, whether Petitioner was afforded due process, and whether the decision below is supported by competent substantial evidence. *See Haines City Community Development v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. "[T]he circuit court is not entitled to reweigh the evidence; it may only review the evidence to determine whether it supported the hearing officer's findings." *Department of Highway Safety and Motor Vehicles v. Stenmark,* 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a].

Based upon the Petitioner's argument, the only issue properly before the Court is whether the decision below is supported by competent substantial evidence. The Petitioner contends that the hearing officer's order is not supported by substantial, competent evidence because the evidence presented did not establish probable cause for her arrest.

"Probable cause exists 'where the facts and circumstances, as analyzed from the officer's knowledge . . and practical experience . . . are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed." *Department of Highway Safety and Motor Vehicles v. Silva,* 806 So. 2d 551, 554 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D139a] (*citing Department of Highway Safety and Motor Vehicles v. Favino,* 667 So. 2d 305, 308 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a]).

Here, the Hearing Officer was presented with the affidavit of the deputy that identified a victim and an operator at the scene. The deputy identified the Petitioner as the operator. The deputy observed various indicators of impairment but that four hours after the accident her breath alcohol test results were less than .05g/210L, the established minimum result that creates a legal presumption of impairment. The Hearing Officer's finding that the Petitioner's suspension was proper indicates that the Hearing Officer was not persuaded that the delayed breath test result negated the deputy's observations of impairment. Therefore, this Court determines that the Hearing Officer's decision is supported by substantial, competent evidence.

Accordingly, based on the record before the Court, the Petitioner's *Petition for Writ of Certiorari* filed on February 04, 2020, is **DENIED**.

*   *   *

Consumer law—Florida Deceptive and Unfair Trade Practices Act—No error in entering directed verdict in favor of defendant on claims for FDUTPA violation and reformation of contract— Judges— Disqualification—No error in denying plaintiff's motion for disqualification filed after issuance of order in favor of defendant

MARCO PEREZ, Appellant, v. GPI FL-A, LLC d/b/a AUDI NORTH MIAMI f/k/a PRESTIGE AUDI, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000199-AP-01. L.T. Case No. 17-000697-SP-24. October 16, 2020. On Appeal from County Court in and for Miami-Dade County, Diana Gonzalez-Whyte, Judge. Counsel: Griffin C. Klema, Klema Law, P.L., for Appellant. Nancy W. Gregoire, Birnbaum, Lippman & Gregoire, PLLC; and Glen R. Goldsmith, Glen R. Goldsmith, P.A., for Appellee.

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

OPINION

(PER CURIAM.) Marco Perez appeals from a final judgment for the Defendant below, GPI FL-A, LLC d/b/a Audi North Miami f/k/a Prestige Audi ("Prestige Audi"). Following a bench trial, the trial court granted a directed verdict in favor of Prestige Audi. We find no error in the trial court's directed verdict. *See Rollins, Inc. v. Heller,* 454 So. 2d 580 (Fla. 3d DCA 1984) (a claim for FDUPTA fails when the claimant does not prove a deceptive act which proximately caused actual damages, defined as "difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties.") (quoting *Raye v. Fred Oakley Motors, Inc.*, 646 S.W.2d 288, 290 (Tex.App.1983)); *Dorestin v. Hollywood Imports, Inc.*, 45 So. 3d 819 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1817a] (consequential damages are not permitted in a claim for FDUPTA; a claim under FDUPTA may not be based upon oral representations in direct conflict with clear and unambiguous contract); *Rodriguez v. Recovery Performance & Marine, LLC*, 38 So. 3d 178, 180 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1122a] (finding that "under FDUTPA, the term 'actual damages' does not include special or consequential damages").

We likewise find no error in the exclusion of parol evidence nor in limiting trial to claims framed by the complaint. *Farrey's Wholesale Hardware Co., Inc. v. Coltin Elec. Services, LLC*, 263 So. 3d 168, 176 (Fla. 2d DCA 2018) [44 Fla. L. Weekly D130a] ("It is well-established that the parol evidence rule prevents the terms of a valid written contract or instrument from being varied 'by a verbal agreement or other extrinsic evidence where such agreement was made before or at the time of the instrument in question.' ") (quoting *J. M. Montgomery Roofing Co. v. Fred Howland, Inc.*, 98 So. 2d 484, 485 (Fla. 1957)); *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So. 2d 561 (Fla. 1988) (trial is properly limited to matters framed by the complaint).

The trial court did not err in directing a verdict on a count for reformation of a contract. *See Romo v. Amedex Ins. Co.*, 930 So. 2d 643, 649 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D571a] ("To state a cause of action for reformation of a contract, the complaint must allege that, as a result of a mutual mistake or a unilateral mistake by one party coupled with the inequitable conduct of the other party, the . . . contract fails to express the agreement of the parties").

We likewise reject Mr. Perez's argument that he was deprived of discovery or that the trial court erred in preventing depositions midway through the trial. *See Carriage Hills Condo., Inc. v. JBH Roofing & Constructors, Inc.*, 109 So. 3d 329 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D643a] (a corporate representative designated and produced by the corporation, "represents the collective knowledge of the corporation, not of the individual deponents. As the corporation's "voice" the witness does 'not simply testify . . . about matters within his or her personal knowledge, but rather is 'speaking for the corporation.' ") (quoting *Rainey v. Amer. Forest & Paper Ass'n*, 26 F.Supp.2d 82, 94 (D.D.C.1998)) (citation omitted).

Finally, the trial court correctly denied Mr. Perez's motion for disqualification, filed nine days after the trial court issued its written order in favor of Prestige Audi. *See Sibley v. Sibley,* 885 So. 2d 980 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D2449a] (" 'The well-settled proposition is that the law 'does not favor the substitution of a Judge or Justice in a cause after decision which essentially carries a benefit to the successful party.' ") (quoting *Lawson v. Longo*, 547 So.2d 1279, 1281 (Fla. 3d DCA 1989) (citation omitted))); *Lukacs v. Ice*, 227 So. 3d 222 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D2088a] ("where a judge's comments are directed to the issue the court is currently handling, a motion to disqualify can be denied").

Accordingly, the final judgment entered below is hereby **AFFIRMED.**

Appellee's Motion for Determination of Entitlement to and Assessment of Attorneys' Fees pursuant to section 501.2105 of the Florida Statutes (2018) is **GRANTED** and **REMANDED** to the trial court to fix a reasonable amount. (WALSH, TRAWICK, and SANTOVENIA JJ., concur.)

*   *   *

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Licensing—Driver's license—Early reinstatement—Denial—In absence of transcript or clear error on face of order denying early reinstatement to licensee who admitted to driving while his license was revoked, affirmance is required

JAMES SINCLAIR, JR., Petitioner, v. FLORIDA DEPT. OF HIGHWAY SAFETY & MOTOR VEHICLES, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-000078-AP-01. October 14, 2020. On Petition for Writ of Certiorari from the Florida Department of Highway Safety and Motor Vehicles Final Order Denying Early Reinstatement. Counsel: James Sinclair, Jr., Pro se, for Petitioner. Christie S. Utt, General Counsel, Kayla Cash Robinson, Assistant General Counsel, and Samuel Eliot Frazer, Assistant General Counsel, Florida Department of Highway Safety & Motor Vehicles, for Respondent.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

OPINION

(PER CURIAM.) Petitioner argues that the hearing officer for the Florida Department of Highway Safety and Motor Vehicles ("Department") erred by denying Petitioner's motion for early reinstatement of his driving privileges.

Our standard of review is limited to "whether or not the board provided procedural due process, observed the essential requirements of the law, and supported its findings by substantial competent evidence." *Broward County v. G.B.V. International, Ltd.,* 787 So. 2d 838 (Fla. 2001) [26 Fla. L. Weekly S389a]; *Haines City Community Development v. Heggs,* 658 So. 2d 523 (Fla. 1995) [20 Fla. L. Weekly S318a]; *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

The record on appeal consists only of the Final Order and an uncertified transcript of Petitioner's driving record. By Order dated March 24, 2020, this court ordered the Petitioner to file a complete written transcript of the administrative hearing below. Petitioner failed to do so.

Generally, where an appellant fails to provide the appellate court with a trial transcript, the order below must be affirmed. *Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150 (Fla. 1979). Further, there is a presumption of correctness in the order being appealed. *Id.* at 1152.

Petitioner has failed to provide this court with a sufficient record to demonstrate reversible error below, and our appellate review is accordingly limited due to the absence of a hearing transcript. Notwithstanding the absence of a transcript, however, an appellate court may review a lower court judgment for error apparent on its face. *See Bisnauth v. Leelum,* 233 So. 3d 1275 (Fla. 3d DCA 2017) [43 Fla. L. Weekly D2c] *citing Hill v. Calderin,* 47 So. 3d 852 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2278b]; *Howle v. Howle,* 967 So.2d 435 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2589a]; *Kanter v. Kanter,* 850 So.2d 682 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1844a].

Here, the Petitioner fails to include any argument or facts which would support the contention that the Department's Final Order was incorrectly entered. In fact, Petitioner admits in the Petition that he was driving with a suspended license. The Petition focuses instead on Petitioner's need to drive, the reasons for requesting a hardship license, and the request that this court review the matter in the hope that it will reach a different conclusion than the Department hearing officer.

Limiting our analysis, as we must, to whether there is clear error on the face of the Final Order, we find none. The Department's Final Order on its face clearly indicates that the hearing officer addressed the limited scope of her review at the formal hearing to a review of the Petitioner's driving record and his testimony, qualifications, fitness and need to drive. Based on the evidence, the hearing officer made a finding of fact that the Petitioner continued to drive while his license was revoked. The hearing officer's determination that the Petitioner was ineligible for a hardship license was supported by competent and substantial evidence.

Finding no error, we conclude that the order below was correctly entered, and the Petition for Writ of Certiorari is therefore denied. (TRAWICK AND WALSH, JJ., concur.)

* * *

Licensing—Driver's license—Cancellation—Petition for writ of certiorari challenging cancellation of driver's license of non-immigrant foreign citizen who applied for driver's license renewal with documents that did not prove that she was lawfully in the United States is denied—Licensee has failed to present any documents or argument that support claim of error, licensee was accorded due process, and documents presented for license renewal showed that licensee's immigration status had expired

ANDREA DANIEL NIETO RAMIREZ, Petitioner, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-000076-AP-01. October 8, 2020. On Petition for Writ of Certiorari from The Florida Department of Highway Safety and Motor Vehicles Notice of Cancellation of Driver's License. Counsel: Andrea Daniel Nieto Ramirez, Petitioner. Christine Utt, General Counsel and Samuel Frazer, Assistant General Counsel, for Respondent.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

OPINION

(PER CURIAM.) On February 3, 2020, Andrea Daniela Nieto Ramirez, a non-immigrant citizen of Venezuela, went to a driver's license office to apply for a driver's license renewal. She presented several documents to the Department of Highway Safety and Motor Vehicles ("the Department") in support of her request to renew her driver's license. These documents from the Department of Homeland Security did not prove that she was lawfully in the United States and therefore, the Department ordered her license cancelled, effective March 9, 2020. She challenges the cancellation in this Petition for Writ of Certiorari.

We review the order below to determine "whether or not the board provided procedural due process, observed the essential requirements of the law, and supported its findings by substantial competent evidence." *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982).

First, the Petitioner has failed to provide this Court a sufficient record to support her claim. This Court ordered the Petitioner to file an appendix and transcript of any record of administrative proceedings. She has failed to comply with this order. As there were no proceedings below—petitioner merely presented documents to the driver's license office official and was rejected—and no documents support her claim of error, there is a presumption of correctness in the order. *Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150, 1152 (Fla. 1979). Here, the Petitioner fails to include any argument or facts which would support her contention that the order was wrong.

Second, the Petitioner has failed to demonstrate a deprivation of due process. She applied to the Department, which reviewed her documents and cancelled her license with more than 30 days' notice. Thus, she received due process.

Turning to the merits and application of law, the Petitioner's claim also fails. The documents the Petitioner presented to the Department would not entitle her to the renewal of her license. The Florida Department of Highway Safety and Motor Vehicles "Acceptable Document Table" included in the Respondent's appendix requires that the applicant, a non-citizen and non-immigrant, present documents to prove her legal presence in the United States. The Petitioner failed to do that. On February 3, 2020, the Petitioner presented the Department her B-2 (Temporary Visa) issued by Customs and Border Protection. According to this document, her authority for entry into the United States expired on January 1, 2019, 11 months earlier.

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She was required to file for an extension of her visa before its expiration. To justify her late-filed extension, the Petitioner was required to present extraordinary circumstances to Customs and Border Protection justifying the untimely request for extension. (Respondent's Appendix at p. 4) The Petitioner failed to provide any such justification for her late-filed extension. Because her immigration status had expired, the order below cancelling the Petitioner's driver's license was correctly entered, and the Petition for Writ of Certiorari is therefore denied. (TRAWICK AND SANTOVENIA, JJ., concur.)

* * *

Criminal law—Sentencing—Judgment—Correction—Offense of conviction—Judgment to be corrected to conform to outcome at trial

CANDANCE C. YAMBO, Appellant, v. THE STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-5-AC-01. L.T. Case No. ABYU2SE. September 24, 2020. An Appeal from the County Court for Miami-Dade County, Judge Robin Faber. Counsel: Carlos J. Martinez, Public Defender, and James Odell, Assistant Public Defender, for Appellant. Katherine Fernandez-Rundle, State Attorney, and Jason Scott Duey, Assistant State Attorney, for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

ON CONFESSION OF ERROR

(**PER CURIAM**.) On the State's commendable confession of error, we reverse the trial court's order entering a judgement and sentence for the offense of Driving While License Suspended, in violation of §322.34(2)(b), Florida Statutes. At trial, the Defendant was convicted for the offense of No Valid Driver License, in violation of §322.03(1), Florida Statutes. Due to the failure of the order of Judgment and Sentence to conform to the outcome at trial, we remand for the trial court to enter a judgment and sentencing order which conforms to the offense of conviction. (**TRAWICK, WALSH and SANTOVENIA, JJ., concur.**)

* * *

Criminal law—Appeals—*Anders* appeal

ADRIAN CARILLO-ENRIQUEZ, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-059-AC-01. L.T. Case No. A3HPPYP. October 1, 2020.

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

* * *

KARL H. ALLEN, Appellant, v. CAPITAL ONE (USA) (NA), Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-000065-AP-01. L.T. Case No. 2012-016799-SP-23. September 21, 2020. An Appeal from the County Court for Miami-Dade County, Judge Myriam Lehr. Counsel: Karl H. Allen, Pro Se, for Appellant. Arthur D. Rubin, We Protect Consumers, P.A., Tampa, and Maureen B. Murphy, for Appellee.

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

(PER CURIAM.) Affirmed. *See Garvin v. S.C. Ins. Co.,* 528 So. 2d 929 (Fla. 2d DCA 1988) (defendant not entitled to have default final judgment vacated where he waited six months after becoming aware of judgment before seeking relief); *Allstate Floridian Ins. Co. v. Ronco Inventions, LLC*, 890 So. 2d 300 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D2717c] (seven-week delay in seeking relief from default final judgment was unreasonable); *Seay Outdoor Advert., Inc. v. Locklin,* 965 So. 2d 325 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2270b] (absent any reason for 10-week delay in seeking relief from judgment, no due diligence shown to set aside default final judgment). (TRAWICK, WALSH, and SANTOVENIA, JJ., concur.)

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Summary judgment—Factual issues—Error to enter summary judgment in favor of medical provider where opposing affidavit of insurer's expert was sufficient to raise genuine issues of material fact

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant, v. GABLES INSURANCE RECOVERY, INC., a/a/o Maria Manyoma, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2017-009-AP-01. L.T. Case No. 2011-2705-SP-26. October 8, 2020. An appeal from the County Court in and for Miami-Dade County, Lawrence D. King, Judge. Counsel: Nancy W. Gregoire, Birnbaum, Lippman & Gregoire, PLLC; and Michael A. Alfonso and Joshua G. Blasberg, Roig Lawyers, for Appellant. G. Bart Billbrough, Billbrough & Marks, P.A., and Aimee A. Gunnells, Gables Insurance Recovery, for Appellee.

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

(PER CURIAM.) Maria Manyoma ("Manyoma"), an insured of State Farm, was allegedly injured in an automobile collision and received treatment from All X-Ray Diagnostic Services Corp. ("All X-Ray"). Manyoma assigned her benefits under her State Farm Policy (the "Policy") to All X-Ray, which subsequently assigned the benefits to Gables. Gables filed suit alleging that State Farm failed to pay personal injury protection ("PIP") benefits claimed due under the Policy for three x-rays (cervical, thoracic and lumbar). State Farm denied that the x-rays were medically necessary, related or that the charges were reasonable.

The trial court granted an Amended Motion for Summary Judgment filed by Gables on the issues of medical necessity, relatedness and reasonableness. After a motion for rehearing by State Farm was denied, the trial court entered a Final Judgment, awarding damages to Gables in the amount of $2,055.48, plus post judgment interest at the rate of 4.75% in addition to attorneys' fees and costs. This appeal followed.

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

The resolution of this case depends mainly on the sufficiency of the parties' opposing Affidavits. Florida Rule of Civil Procedure 1.510(e) requires that 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.

Id.; see also State Farm Mut. Auto. Ins. Co. v. Pembroke Pines MRI, Inc., 171 So. 3d 814, 816-17 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1879a] (citations omitted).

In support of its Motion for Summary Judgment, Gables relied upon the Affidavit of Jose A. Pelayo, D.C. ("Dr. Pelayo"), regarding

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medical necessity and relatedness. In opposition, State Farm filed the Affidavit of Bradley Simon, D.C. ("Dr. Simon"). We find that both Dr. Pelayo's Affidavit and Dr. Simon's Affidavit are based upon their personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that they are competent to testify to the matters relating to medical necessity and relatedness.

NECESSITY AND RELATEDNESS

> "Medically necessary" refers to a medical service or supply that a prudent physician would provide for the purpose of preventing, diagnosing, or treating an illness, injury, disease, or symptom in a manner that is:
>
> (a) In accordance with generally accepted standards of medical practice;
>
> (b) Clinically appropriate in terms of type, frequency, extent, site, and duration; and
>
> (c) Not primarily for the convenience of the patient, physician, or other health care provider.

Section 627.732(2), Florida Statutes (2007)

Dr. Pelayo attests that he has been a chiropractic physician for more than 26 years, that he has treated patients injured in automobile accidents, and that he has reviewed and evaluated medical records including diagnostic radiological studies, magnetic resonance imaging and chiropractic treatment. Dr. Pelayo indicated that he reviewed the medical file for Manyoma, and that based upon the information reviewed, his skill and experience, he believed that the diagnostic studies ordered by the treating physician and performed on Manyoma were medically necessary and related to the injuries caused by the subject automobile accident.

We find that Dr. Pelayo's affidavit presented a *prima facie* case as to medical necessity and relatedness. Once competent evidence is tendered, the opposing party must come forward with sufficient counterevidence to reveal a genuine issue of material fact. *See Landers v. Milto*n, 370 So. 2d 368, 370 (Fla. 1979).

State Farm countered Dr. Pelayo's affidavit with the affidavit of Dr. Bradley Simon. Dr. Simon averred that he was a Doctor of Chiropractic with fourteen years of experience in the South Florida community, including Miami-Dade County. His practice consists of chiropractic care and therapy to patients, and he provides Independent Medical Examinations and peer reviews to medical vendors. He further indicates that he provides opinions on reasonableness, relatedness and medical necessity of chiropractic treatment for cases in litigation. Dr. Simon stated that based upon his review of Manyoma's clinical records, as well as his background, education, and clinical experience, the x-rays in question were neither medically necessary nor related. He premised his opinion on several facts. First, the onset of pain from a dislocation or fracture is immediate, but Manyoma did not seek treatment for five days. Second, there was no indication or record of any suspicions of dislocation or fracture. Third, x-rays are used to diagnose a dislocation or fracture. Finally, Manyoma received therapy before the x-rays were taken. In Dr. Simon's opinion, each of these facts runs counter to a conclusion that the x-rays were medically necessary or related.

We find that Dr. Simon's affidavit is sufficient to raise genuine issues of material fact which preclude the entry of summary judgment regarding the issues of medical necessity and relatedness.

REASONABLENESS

Reasonableness "is a fact-dependent inquiry determined by consideration of various factors." *Geico General Insurance Company v. Virtual Imaging Services, Inc.* 141 So. 3d 147, 155-56 (Fla. 2013) [38 Fla. L. Weekly S517a]. Section 627.736(5)(a), Florida Statutes (2016) provided, in part, that:

> In determining whether a charge for a particular service, treatment, or otherwise is reasonable, consideration may be given to evidence of usual and customary charges and payments accepted by the provider involved in the dispute, reimbursement levels in the community and various federal and state medical fee schedules applicable to motor vehicle and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.

Despite State Farm's not electing to use the Medicare Part B Fee Schedule in its policy and limiting its reimbursements under section 627.736(5)(a)(2), it is not precluded from having an opportunity to litigate the reasonableness of Gables' bill under section 627.736(5)(a)(1). *See Geico Gen. Ins. Co. v. Virtual Imaging*, 141 So. 3d 147,155-56 (Fla. 2013) [38 Fla. L. Weekly S517a]; s*ee also Progressive Select Ins. Co. v. Emergency Physicians of Central Florida, LLP*, 202 So. 3d 437, 438 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D2145a]. Under section 627.736(5)(a)(1), the Medicare B Fee Schedule may be utilized as a "factor" in determining reasonableness of the fees submitted for payment.

Gables had the burden of establishing that the charges for the services rendered were reasonable. *See State Farm Mut. Auto. Ins. Co. v. Sestile*, 821 So. 2d 1244, 1246 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1757a]; *see also Derius v. Allstate Indem. Co.*, 723 So. 2d 271, 272 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a]. Gables relied upon the Affidavits of Sabino Ferro ("Ferro"), the Senior Corporate Officer at All X-Ray.[1] Ferro executed two affidavits, one regarding the reasonableness of All X-Rays' charges, and the other which attached a copy of All X-Rays' CMS 1500 Form along with a copy of the bill for the services rendered to Manyoma.

Ferro stated that he is familiar with the range and rate of charges for radiological services provided in the area. He maintained that All X-Ray's charges have been the same for years; they are based upon the prevailing amounts charged in the community by similarly credentialed providers; and they are usual and customary, taking into account all regulatory licensing and commercial concerns recognized and permitted by the American Medical Association and recognized in the industry. Additionally, Ferro stated that prior to 2008 the charges were never characterized as "unreasonable" or "excessive." He continued by saying that the amount received was significantly lower than the charges generated by All X-Ray. Ferro concluded that the amounts received as per the Medicare Part B schedule were not reasonable and not reflective of the usual and customary charges by providers for such services in the Miami-Dade County area.

State Farm relied on Dr. Simon's affidavit regarding reasonableness. Dr. Simon attested that in formulating his opinion on reasonableness he relied on his 14 years of experience providing chiropractic care; the usual and customary charges and rates accepted by his practice; the usual and customary charges in the market; and reimbursement rates for Miami-Dade County. Dr. Simon stated that he reviewed thousands of insurance claims forms, including x-ray services in Miami-Dade, making him familiar with what other providers charged. He also reviewed explanations of review issued by major insurance carriers and was familiar with what insurance companies reimbursed for the same or similar services. Dr. Simon said that his practice has accepted reimbursements from PIP insurers, Medicare, Medicaid, Workers Compensation, HMO insurers, PPO Insurers, and out of pocket cash payments made by patients. He listed numerous insurance companies that since 2008 pay 200% of the amounts listed in the Medicare Part B schedule. Dr. Simon concluded that fees billed in this case were excessive and unreasonable regarding price.

Both Ferro's and Dr. Simon's affidavits satisfy the requirements of Florida Rule of Civil Procedure 1.510. Both affidavits are premised on personal knowledge; provide the basis for their knowledge; set forth facts admissible in evidence; present statutory factors; reference

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various fee schedules; and are based upon their experience and training. Neither affidavit is conclusory or legally insufficient. Since both affidavits provide the necessary predicate for their opinions, the affidavits are not framed solely in terms of legal conclusions. Additionally, given these predicates, neither affidavit can be disqualified based on section 90.702, Florida Statutes (1978).[2] Finally, "Rule 702 does not distinguish between "scientific" knowledge and "technical" or "other specialized" knowledge, but makes clear that any such knowledge might become the subject of expert testimony." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 138 (1999).[3] Dr. Simon's Affidavit sufficiently raised questions of fact regarding reasonableness and precluded the granting of summary judgment.

State Farm also argues that the reasonableness of a charge can *never* be decided at summary judgment. While we do agree that reasonableness "is generally a factual issue ripe for determination by a jury", *United Automobile Insurance Company v. Skylake Medical Center, Inc., a/a/o Giancarlo Avila,* 27 Fla. L. Weekly Supp. 856a (Fla. 11th Cir. App. 2019) (Trawick, J., concurring), quoting *State Farm Mut. Auto. Ins. Co. v. Florida Wellness & Rehab. Ctr., Inc.,* 25 Fla. L. Weekly Supp. 5a (Fla. 11th Cir. Ct. 2017), quoting *State Farm Mut. Auto. Ins. Co. v. Sunset Chiropractic & Wellness,* 24 Fla. L. Weekly Supp. 787a (Fla. 11th Cir. Ct. 2017), State Farm has cited no case to support a conclusion that reasonableness can never be decided at summary judgment. Indeed, Florida Rule of Civil Procedure 1.510(a) permits a party seeking to recover on a claim to move for summary judgment on all or any part thereof. " 'All or any' inherently includes reasonableness, and thus, it cannot be said that reasonableness can only be resolved by a jury." *State Farm Mutual Automobile Insurance Company v. Gables Insurance Recovery, Inc.,* 25 Fla. L. Weekly Supp. 857a (Fla. 11th Cir. Ct. Sept. 28, 2017), cert. dismissed, Case No. 3D17-2311 (Fla. 3d DCA Dec. 2017); *State Farm Mutual Insurance Company v. Roberto River-Morales, M.D. a/a/o Joseph*, 26 Fla. L. Weekly Supp. 454a (Fla. 11th Cir. Ct. July 17, 2018) ("Nevertheless, the fact-specific nature of a reasonableness determination generally makes it a jury question.").

When a record raises even the slightest doubt that an issue might exist, that doubt must be resolved against the moving party, and summary judgment must be denied. *See Dellatorre v. Buca*, 211 So. 3d 272, 273 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D289c]; *Rakusin Law Firm v. Estate of Dennis*, 27 So. 3d 166, 167 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D296a]. While Gables presented a *prima facie* case on the issues of medical necessity, relatedness and reasonableness, State Farm raised genuine issues of fact precluding the entry of summary judgment.

Accordingly, the Final Judgment is hereby REVERSED and REMANDED for further proceedings consistent with this opinion. "Appellee's Motion for Appellate Attorneys [sic] Fees," is hereby DENIED and "Appellant's Motion for Appellate Attorney's Fees" is conditionally GRANTED upon the trial court's determination at the conclusion of the case that Appellant is entitled to attorneys' fees pursuant to section 768.79, Florida Statutes (1997). (WALSH and SANTOVENIA, JJ. concur.)

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[1]When a representative of a corporation makes an affidavit on its behalf, the representative is not required to state the source of their knowledge. *Beverage Canners, Inc. v. E.D. Green Corp.*, 291 So. 2d 193, 194 (Fla. 1974).

[2]Furthermore, the trial court ruled that it would not apply an analysis for either expert under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). Neither party has challenged that decision, and so any issue relating to the qualifications of expert witnesses under *Daubert* has been waived.

[3]An expert may testify to an opinion that is not based upon "firsthand knowledge or observation" as long the expert has a reliable basis in the "knowledge and experience of his discipline" and that an expert "might draw a conclusion from a set of observations based on extensive and specialized experience." *Kuhmo*, 526 U.S. at 148, 156.

* * *

Insurance—Personal injury protection—Affirmative defenses—Trial court erred in granting medical provider's motion for judgment on pleadings on insurer's affirmative defense alleging that insurer was relieved by section 627.736(5)(b)1.c. of obligation to pay claims for which provider knowingly overcharged—Undisputed fact that bills for x-rays were submitted by provider before demand letter was sent and were never withdrawn, coupled with insurer's allegations that some of those x-rays were not performed, established issue of fact precluding judgment on pleadings—No merit to argument that affirmative defense failed as matter of law because x-ray overcharges were not included among claims at issue in litigation because provider forfeits its right to receive compensation for entire claim, not merely individual offensive charges, when it knowingly makes false or misleading charge relating to claim—Trial court erred in considering deposition testimony in ruling on motion—Error in granting motion for judgment on pleadings regarding defense was compounded by trial court's rejecting insurer's peer review reports that raised issues of fact regarding reasonableness, medical necessity, and relatedness of treatment and entering summary judgment in favor of provider

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant, v. PRIME MEDICAL & REHAB SERVICES, INC., a/a/o Orlando E. Perez, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-000357-AP-01. L.T. Case No. 2013-2208-CC-26. September 25, 2020. On Appeal from the County Court in and for Miami-Dade County; Hon. Lawrence D. King, County Court Judge. Counsel: Nancy W. Gregoire, Birnbaum Lippman & Gregoire, PLLC; and Jonathan S. Brooks, Jonathan S. Brooks, P.A., for Appellant. Rima C. Bardawil, Rima C. Bardawil, P.A., for Appellee.

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

OPINION

(PER CURIAM.) State Farm Mutual Automobile Insurance Company ("State Farm") appeals the trial court's order entering a final judgment on behalf of the provider, Prime Medical & Rehab Services, Inc. ("Prime" or "Provider").

The November 6, 2018 final judgment was also premised on the trial court's May 14, 2018 amended order granting the Provider's motion for judgment on the pleadings on State Farm's affirmative defense pursuant to Section 627.736(5)(b)1.c., Fla. Stat., which argued that the Provider submitted false and misleading bills for payment.

The Motion for Judgment on the Pleadings

Appellant argues that it was error for the trial court to grant the Provider's motion for judgment on the pleadings on State Farm's 627.736(5)(b)1.c. affirmative defense.

The standard of review of an order granting judgment on the pleadings as well as the interpretation of a statute is de novo. *See GTC, Inc. v. Edgar,* 967 So. 2d 781 (Fla. 2007) [32 Fla. L. Weekly S546a]. "[A] motion for judgment on the pleadings. . .has limited application. It is appropriate where the complaint fails to state a cause of action against the defendant or where the answer fails to state a defense or tender any issue of fact. It is similar to a motion to dismiss and raises only questions of law arising out of the pleadings." *Venditti-Siravo, Inc. v. City of Hollywood,* 418 So. 2d 1251 (Fla. 4th DCA 1982). It is settled that "[a] motion for judgment on the pleadings must be decided wholly on the pleadings without aid of outside matters." *Jaramillo v. Dubow,* 588 So. 2d 677 (Fla. 3d DCA 1991) (*citing J & J Util. Co.,* 485 So.2d at 36 (citations omitted); *accord Hanft v. Phelan,* 488 So. 2d 531, 531 n. (Fla. 1986) ("Extrinsic evidence cannot be considered . . . on a motion for judgment on the pleadings.").

In considering a motion for judgment on the pleadings, "all material allegations of the opposing party's pleading are taken as true, and all of the movant's allegations which have been denied are taken as false." *Jaramillo, supra.,* 588 So. 2d at 677 (*citing Butts v. State*

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Farm Mut. Auto. Ins. Co., 207 So. 2d 73, 75 (Fla. 3d DCA 1968) (citations omitted))

Section 627.736(5)(b)1.c., Fla. Stat., on which State Farm's second affirmative defense is premised, provides that:

> An insurer or insured is not required to pay a claim or charges:
> c. To any person who knowingly submits a false or misleading statement relating to the claim or charges;

State Farm argued as to its second affirmative defense that the Provider knowingly overbilled certain listed CPT codes for x-rays, thereby relieving State Farm of its obligation to pay. The affirmative defense states that the radiologist interpreting the x-rays noted that two views were taken of each body part, but the CPT codes included in the bills to State Farm were for three to four views for the various x-rays. The Provider filed a Reply to State Farm's affirmative defense, stating that the allegation that Prime knowingly submitted a false or misleading statement to State Farm relating to the claim and charges at issue is incorrect since the specific charges that are the subject of State Farm's defense are not "at issue" in this case because Provider neither demanded payment of the x-rays performed on the insured, Orlando Perez nor included the bills in its notice of filing of the bills at issue in the litigation. In the same Reply, the Provider acknowledged that State Farm originally received the x-ray bills pre-suit from the Provider along with the x-ray reports indicating the number of views for each x-ray.

The Provider's motion for judgment on the pleadings would have been appropriately granted only "where the answer fail[ed] to state a defense or tender any issue of fact." *See Venditti-Siravo, Inc., supra.,* 418 So. 2d at 1253. Here, it was undisputed that the x-ray bills were submitted for payment by the Provider to State Farm before suit was filed and before the pre-suit demand letter was sent. State Farm notes that the x-ray bills which were submitted to the insurer for payment by the Provider were never withdrawn. The facts alleged in the affirmative defense that only two x-ray views were taken of each body part while the Provider submitted bills for more than two views, which must be taken as true on the Provider's motion for judgment on the pleadings, coupled with the Provider's acknowledgment that the x-ray bills were submitted to State Farm pre-suit, do establish an issue of fact as to State Farm's second affirmative defense precluding the judgment on the pleadings in favor of the Provider.

Given the issues of fact, the Provider's judgment on the pleadings then could only have been premised on State Farm's failure to state a defense as a matter of law. *Id.* The Provider argued below that the specific charges that are the subject of State Farm's defense were not "at issue" in the case because Provider neither demanded payment of the x-rays performed on Perez nor included the bills in its notice of filing of the bills at issue in the litigation.

The "at issue" verbiage comes from the wording of State Farm's affirmative defense[1]. Notably, the statute does not refer to the claim or charges "at issue" or "sued for" in the litigation. The application of Section 627.736(5)(b)1.c. does not turn on when the false or misleading statement is made as to unpaid bills. Indeed, even where an insured or a provider does not file a lawsuit, nothing in the statute precludes the insurer from relying on Section 627.736(5)(b)1.c. as the basis for rejecting a pre-suit claim.

No legal authority supporting the restrictive interpretation urged by the Provider has been provided to this court, nor does the court adopt such a restrictive reading of the statute. The "false or misleading statement relating to the claim or charges" clearly encompasses bills submitted for payment before suit is filed or the pre-suit demand letter is sent. To find otherwise would allow an insured or provider who knowingly submits false and misleading bills for payment as part of its pre-suit claim to circumvent the statute by not including those bills in the pre-suit demand letter or the litigation.

Similarly, the Provider's argument that the statute only applies to charges included in the litigation would render meaningless the reference to "claim" in Section 627.736(5)(b)1.c. Further, the Provider's argument has already been rejected by the court in *Chiropractic One, Inc. v. State Farm Mutual Automobile,* 92 So. 3d 871, 874 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1565a], which interpreted Section 627.736(5)(b)1.c. ("Although "claim" and "charges" are not defined by the PIP statutes. . ., it is logical to conclude that the Legislature established that dichotomy to be certain that not only the specific individual offensive "charges" were invalidated, but also that the entire "claim," i.e., the collective of all charges, was invalidated, as well"). The pertinent arguments and holding addressed in *Chiropractic One* are summarized as follows:

> The appellees, both of which are State Farm entities, take the position that if a medical provider "knowingly" submits a false claim or false charges, both the insurer and the insured are relieved of the obligation to pay both the entire claim or charges currently before the insurer. . . The appellant, Chiropractic One, Inc., asserts that if it knowingly submits a false charge, then the insurer is relieved of paying for that charge, but not for any other charges. The trial court ruled in favor of State Farm and **held essentially that the provider forfeits its right to receive compensation on a claim by knowingly making a false or misleading charge relating to the claim** . . .Given the legislative history of this statute and the language chosen by the Legislature, we conclude that the trial court was correct and affirm.

Id. at 872 (emphasis added).

Here, the trial court explained the reasons for its ruling on the motion for judgment on the pleadings at the hearing on State Farm's motion to amend its second affirmative defense premised on Section 627.736(5)(b)1.c. . The trial court explained that it considered the deposition testimony of Monica Crespo, the Provider's principal, in finding that Crespo did not submit false bills intentionally or with reckless disregard, but rather had mistakenly done so or committed a scrivener's error. It was error for the trial court to consider and resolve matters extrinsic to the pleadings. *See Jaramillo, supra.,* 588 So. 2d at 677.

The Summary Judgment

The standard of review of a trial court's entry of final summary judgment is de novo. *See Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.,* 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a]; *Sierra v. Shevin,* 767 So. 2d 524, 525 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1605a]. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *State Farm Mut. Auto. Ins. Co. v. Gonzalez,* 178 So. 3d 448, 450 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2352a], *citing State Farm Mut. Auto. Ins. Co. v. Pressley,* 28 So. 3d 105, 107 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D150b]. "On a motion for summary judgment, it is well settled that a trial court is not permitted to weigh material conflicting evidence or pass on the credibility of the witnesses." *Sierra v. Shevin,* 767 So. 2d 524, 525 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1605a]; *Pita v. State Street Bank and Trust Co.,* 666 So. 2d 268 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D185a].

The parties below filed cross summary judgment motions. Prime filed the affidavit of its expert, Kevin Wood, D.C., and the peer review reports of Peter J. Millheiser, M.D. and Michael Weinreb, D.C. in support of its summary judgment motion and the Provider's position that the charges for the x-rays were medically necessary, related and reasonable. In granting Prime's motion for summary judgment, the trial court necessarily found that Prime introduced competent evidence supporting its prima facie claim that its bills were medically necessary, related and reasonable.

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In support of its summary judgment motion and in opposition to the Provider's motion for summary judgment, State Farm filed the deposition testimony of Monica Crespo, the Provider's principal, supporting, *inter alia,* that Crespo had submitted bills to State Farm for payment for more x-rays than were taken by Provider. State Farm also relied on the peer review reports of Drs. Millheiser and Weinreb, which were submitted in support of the *Provider's* summary judgment motion. State Farm argued that submission of the x-ray bills was done either in reckless disregard or with actual knowledge of the falsity of the Provider's claim. The Provider filed the affidavit of Crespo for the proposition that she did not knowingly submit false or misleading bills to State Farm for payment. Even assuming *arguendo* that the Crespo affidavit were sufficient to contradict her deposition testimony (which State Farm contested below), at a minimum there are evident disputed issues of material fact as to the 627.736(5)(b)1.c. defense[2].

Chiropractic One acknowledges that "[a]ny knowingly misleading or false charge, by definition, is unreasonable, not medically necessary, and in excess of permitted amounts." 2 So. 3d at 874. The Provider's summary judgment motion was heard after the judgment on the pleadings was granted in Provider's favor on State Farm's 627.736(5)(b)1.c. defense. Had State Farm's 627.736(5)(b)1.c. defense not been precluded by the judgment on the pleadings in favor of Provider, the 627.736(5)(b)1.c. affirmative defense would have been pertinent to refute the relatedness, reasonableness and medical necessity of Prime's bills on its summary judgment motion. And, had the judgment on the pleadings not been entered erroneously, the Provider would have been required on its summary judgment motion to show that State Farm could not prevail on its 627.736(5)(b)1.c. affirmative defense. *See Leal v. Deutsche Bank National Trust Co.,* 21 So.3d 907, 909 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2304c] ("[t]he party moving for summary judgment must factually refute or disprove the affirmative defenses raised, or establish that the defenses are insufficient as a matter of law."). On that basis alone, the summary judgment in favor of Prime must be reversed.

The Wood affidavit attached all of the insured's medical records, including the x-rays which the Provider claims are not "at issue". Crespo's deposition testimony supports the conclusion that some of the x-rays that Dr. Wood found medically necessary and related were not even performed. Both peer reviews disputed that a portion of the bills was medically necessary and related.

Accordingly, it was error to accept the Provider's affidavit of Dr. Wood while rejecting that the peer review reports of Drs. Millheiser and Weinreb raised disputed issues of material fact precluding summary judgment as to the reasonableness, medical necessity and relatedness of some of the treatments provided by Prime. It was thus error to grant summary judgment. *See State Farm Mutual Ins. Co. v. Gables Insurance Recovery a/a/o Yuderis Rego,* 27 Fla. L. Weekly Supp. 860a (Fla. 11th Cir. Ct. Nov. 20. 2019); *United Automobile Insurance Co. v. Open MRI of Miami Dade, Ltd. a/a/o Rosa Castillo,* Case No. 2017-326-AP-01 (Fla. 11th Cir. Ct. Nov. 6, 2019) [27 Fla. L. Weekly Supp. 791b]; *United Automobile Insurance Co., v. Miami Dade County MRI, Corp. a/a/o Marta Figueredo,* 27 Fla. L. Weekly Supp. 506b (Fla. 11th Cir. App. July 30, 2019); *United Automobile Insurance Co., v. Miami Dade County MRI, Corp. a/a/o Javier Rodriguez,* 27 Fla. L. Weekly Supp. 225c (Fla. 11th Cir. Ct. July 25, 2019); *United Automobile Insurance Co. v. Miami Dade County MRI, Corp. a/a/o Rene Dechard,* 27 Fla. L. Weekly Supp. 226a (Fla. 11Oth 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).

Because the trial court erred when it granted the Provider's motion for judgment on the pleadings on State Farm's 627.736(5)(b)1.c. affirmative defense, the final judgment on the pleadings was erroneously entered below and must be reversed. Further, that error was compounded when the summary judgment was entered in favor of Provider.

Accordingly, the order granting Provider's motion for judgment on the pleadings, and the summary judgment and final judgment entered below are hereby REVERSED, and this cause is REMANDED to the trial court. Appellant's Motion for Attorney's Fees is conditionally GRANTED (conditioned upon Appellant ultimately prevailing and the enforceability of the proposal for settlement) and REMANDED to the trial court to fix the amount.

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[1]State Farm also argues on appeal that the trial court erred in denying State Farm's motion to amend its 627.736(5)(b)1.c. affirmative defense to delete the words "at issue". That hearing and ruling occurred after the Provider's motion for judgment on the pleadings was granted. Given this court's ruling, *infra.,* regarding the judgment on the pleadings, it is not necessary to reach this argument.

[2]The parties have brought to the court's attention a related appeal involving a different claimant in the same accident under the same State Farm policy insuring Orlando Perez in this case: *Prime Medical & Rehab. Services, Inc. a/a/o Maylin Ferradas v. State Farm Mutual Automobile Ins. Co.,* Eleventh Judicial Circuit Court Appellate Division Case No. 2016-492-AP-01. There, the trial court granted State Farm's summary judgment motion premised on its 627.736(5)(b)1.c. defense on a very similar factual record. A different appellate panel of this court reversed the summary judgment, finding that "[a] question of fact exists as to whether there were systemic improper billing practices, or merely an unknowing mistake. . .A question of fact exists regarding whether Ms. Crespo "knowingly" provided false and misleading information. There is also a question of fact as to whether Ms. Crespo acted with deliberate indifference, and, reckless disregard in submitting the wrong [CPT] Codes. Thus, summary judgment for both parties is precluded."

* * *

Insurance—Personal injury protection—Summary judgment—Error to reject affidavits of insurer's experts on reasonableness of charges

UNITED AUTOMOBILE INSURANCE COMPANY, Appellant, v. MILLENNIUM RADIOLOGY, LLC, a/a/o Nicole Lazo, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-157-AP-01. L.T. Case No. 2013-005271-SP-23. October 16, 2020. An Appeal from the County Court for Miami-Dade County, Hon. Myriam Lehr, County Court Judge. Counsel: Michael J. Neimand, House Counsel for United Automobile Insurance Company, for Appellant. David B. Pakula, David B. Pakula, P.A.; and Gary Howard Marks, Marks and Fleischer, for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

OPINION

(PER CURIAM.) United Automobile Insurance Company ("UAIC") appeals the trial court's order entering a final judgment on behalf of the provider, Millennium Radiology, LLC ("Millennium" or "Provider"). UAIC stipulated below to the medical necessity and relatedness of the MRI at issue, leaving only the issue of the reasonableness of the Provider's $2,150 bill for a cervical MRI.

The Provider moved for summary judgment on the reasonableness issue. Initially, the trial court denied Plaintiff's summary judgment motion by Order dated September 30, 2015, but on motion for reconsideration, granted it. Millennium filed in support of its summary judgment motion the December 31, 2014 affidavit of its owner and corporate representative, Roberta Kahana, which opined that the Provider's charge for the MRI was reasonable. In granting summary judgment below, the trial court first found that Millennium introduced competent evidence supporting its prima facie claim that its bill was reasonable. The trial court then rejected UAIC's July 23, 2015 affidavit of Peter J. Millheiser, M.D. filed in opposition to Provider's summary judgment motion, finding that Dr. Millheiser was not qualified to render an opinion on MRI pricing.

While not mentioned in the summary judgment order, the record below reflects that UAIC also filed the July 23, 2015 affidavit of Lizbeth Vazquez, UAIC's adjuster and records custodian, in opposition to the Provider's summary judgment motion on reasonableness. In rejecting UAIC's evidence, the trial court rendered the Provider's evidence uncontroverted, and thereafter entered summary judgment.

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The standard of review of a trial court's entry of final summary judgment is de novo. *See Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a]; *Sierra v. Shevin*, 767 So. 2d 524, 525 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1605a]. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *State Farm Mut. Auto. Ins. Co. v. Gonzalez*, 178 So. 3d 448, 450 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2352a], *citing State Farm Mut. Auto. Ins. Co. v. Pressley*, 28 So. 3d 105, 107 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D150b]. The standard of review of an order admitting or excluding expert testimony is abuse of discretion. *See State Farm Mutual Automobile Insurance Company v. CEDA Health of Hialeah, LLC*, 2020 WL 1036485 at * 2 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D505a] ("In its opinion, the circuit court identified the correct law: 'The standard of review of an order granting summary judgment is de novo, while the standard of review regarding a trial court's admission or exclusion of expert testimony is for abuse of discretion.' "). *See also Lesnik v. Duval Ford, LLC*, 185 So. 3d 577, 579 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D281a] (trial court order striking witness affidavit is reviewed for abuse of discretion).

The Millheiser affidavit opines that the MRI charge was not reasonable and sets forth his background, experience and the basis of his knowledge regarding MRI's and other diagnostic studies in connection with his clinical practice and peer reviews he has performed in Miami-Dade and Broward counties since 1972. Also attached to the Millheiser affidavit are charges submitted to and paid by PIP insurers for MRI's from 2008 until 2012 in Miami-Dade and Broward counties which he reviewed, together with the fee schedule reimbursement rates for Medicare and Florida workmen's compensation for the same MRI code at issue here which he also reviewed in reaching his opinion. The Millheiser affidavit was sufficient to raise a disputed issue of material fact regarding the reasonableness of the MRI bill[1].

Similarly, the Vazquez affidavit, standing alone, was sufficient to raise disputed issues of material fact as to reasonableness, thus precluding summary judgment in Provider's favor. The Vazquez affidavit sets forth her background, training, and experience. She has adjusted hundreds of insurance claims and because of her extensive experience, she has gained knowledge of reasonable reimbursement levels in the PIP community of providers in Miami-Dade and Broward counties. She testified in her affidavit that the bill was not reasonable, basing her opinion on her "background, training, experience and education in the field of insurance as an adjuster." She testified that the amount charged for the MRI at issue was above a reasonable rate and greater than the amounts that Provider has accepted for other Medicare patients, workman's compensation patients and private insurance patients for the same services. This opinion was tethered to her personal background, training and experience receiving, analyzing, adjusting and determining reimbursement dollar amounts for PIP claims in South Florida, coupled with her personal knowledge of reimbursement levels in the community and her personal knowledge of Medicare reimbursement fee schedules, workman's compensation reimbursement fee schedules and other fee schedules. In her capacity as an insurance adjuster, Vasquez was specifically permitted to consider these fee schedules as part of her job. Section 627.736(5)(a) specifically permits an insurer to take all the above information into account when determining whether a medical charge is reasonable. In fact, the Kahana and Vazquez affidavits are similar although they reach different conclusions. Accordingly, it was an abuse of discretion to accept the Provider's affidavit while rejecting UAIC's affidavit.

While a trial court has discretion regarding the admission and exclusion of evidence, "[t]he trial court's discretion, however, is constrained by the evidence code and applicable case law." *Ortuno v. State*, 54 So. 3d 1086, 1088 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D471a].

Notwithstanding that we agree that Provider established a prima facie case for the reasonableness of its bill, we find the trial court erred in rejecting Appellant's expert's affidavit (and the Vazquez affidavit) and granting summary judgment on the issue of reasonableness. Taking UAIC's affidavits into account, it was error to grant summary judgment. *See State Farm Mutual Ins. Co. v. Gables Insurance Recovery a/a/o Yuderis Rego*, 27 Fla. L. Weekly Supp. 860a (Fla. 11th Cir. Ct. Nov. 20. 2019); *United Automobile Insurance Co. v. Open MRI of Miami Dade, Ltd. a/a/o Rosa Castillo*, Case No. 2017-326-AP-01 (Fla. 11th Cir. Ct. Nov. 6, 2019) [27 Fla. L. Weekly Supp. 791b]; *United Automobile Insurance Co., v. Miami Dade County MRI, Corp. a/a/o Marta Figueredo*, 27 Fla. L. Weekly Supp. 506b (Fla. 11th Cir. App. July 30, 2019); *United Automobile Insurance Co., v. Miami Dade County MRI, Corp. a/a/o Javier Rodriguez*, 27 Fla. L. Weekly Supp. 225c (Fla. 11th Cir. Ct. July 25, 2019); *United Automobile Insurance Co. v. Miami Dade County MRI, Corp. a/a/o Rene Dechard*, 27 Fla. L. Weekly Supp. 226a (Fla. 11th Cir. Ct., August 12, 2019); *United Automobile Insurance Co. v. Millennium Radiology, LLC a/a/o Javier Rodriguez*, 25 Fla. L. Weekly Supp. 911b (Fla. 11th Cir. Ct., July 19, 2019).

Accordingly, the summary judgment and final judgment entered below are hereby REVERSED, and this cause is REMANDED to the trial court. Appellant's Motion for Attorney's Fees is conditionally GRANTED (conditioned upon Appellant ultimately prevailing and the enforceability of the proposal for settlement) and REMANDED to the trial court to fix the amount. Appellee's Motion for Attorney's Fees is DENIED. (TRAWICK AND WALSH, JJ., concur.)

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[1]In fact, the trial court correctly noted the qualifications of Dr. Millheiser as an expert regarding reasonableness based on the Millheiser affidavit in its June 21, 2016 Order Denying Plaintiff's Motion to Strike Affidavit of Peter Millheiser, M.D.

* * *

Licensing—Driver's license—Suspension—Driving with unlawful alcohol level—Licensee under age 21—Breath test—Substantial compliance with administrative rules—Second breath sample was not necessary where breath test was performed on testing device listed in U.S. Department of Transportation conforming products list under section 316.2616(17)—Petition for writ of certiorari is denied

ADAM JAMES SAEPOFF-VONHUBERTZ, Plaintiff, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Defendant. Circuit Court, 12th Judicial Circuit (Appellate) in and for Sarasota County. Case No. 2020 CA 002786 NC, Division E Circuit. September 1, 2020. Counsel: Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Defendant.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(HUNTER W. CARROLL, J.) THIS CAUSE came before the Court on a Petition for Writ of Certiorari, with supporting Appendix, electronically filed by counsel for Petitioner on June 26, 2020, through which Petitioner has challenged Respondent's May 29, 2020 order sustaining the suspension of Petitioner's driving privileges pursuant to § 322.2616, Florida Statutes. Upon initial review of the Petition and Appendix, the Court directed the Respondent to file a Response. The Respondent electronically filed its Response on July 31, 2020.[1] Having reviewed the Petition and Appendix, the Response thereto, and the applicable law, upon due consideration, the Court finds as follows:

Petitioner's driver's license was suspended as a result of his driving under the influence (DUI) of alcohol while under age 21. Petitioner requested a formal administrative review of his license suspension

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pursuant to § 322.2616, Florida Statutes. An evidentiary hearing was held on May 28, 2020, at which Hearing Officer Bishoff admitted the following items into evidence:

DDL1—Notice of Suspension (listing Petitioner's Date of Birth)
DDL 2—Affidavit of Probable Cause
DDL 3—Breath Test Results Affidavit for Under Age 21 Suspension
DDL 4—US Department of Transportation Conforming Product List

Petitioner has attached each of the above referenced documents in an appendix to his petition, along with the order on review and a transcript from the evidentiary hearing.

According to the Notice of Suspension, supporting affidavits, and final order of license suspension, on May 3, 2020, Sarasota County Sheriff's Deputy Sanders stopped Petitioner "for driving in a reckless manner including: speeding, improper passing and failing to stop at a stop sign." Upon contact with Petitioner, Deputy Sanders noted the odor of an alcoholic beverage coming from his person, and Petitioner admitted consuming alcoholic beverages. Petitioner submitted a single breath test, the result of which was .074g/210L.

Following the formal administrative review hearing, Hearing Officer Bishoff concluded that law enforcement had probable cause to believe that Petitioner was under the age of 21 and was driving or in actual physical control of a motor vehicle with an unlawful alcohol level of .02% or higher. The suspension of Petitioner's driving privilege was therefore sustained. The instant petition followed.

Circuit court review of an administrative agency decision is limited to a determination of: (1) whether procedural due process was 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. *Haines City Community Development v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. The Court is not entitled to reweigh the evidence, to reevaluate the credibility of the evidence, or to substitute its judgment for that of the agency. *Id*. Instead, this Court's function is to review the record to determine whether a decision is supported by competent substantial evidence. *Dusseau v. Metro. Dade County Board of County Commissioners*, 794 So. 2d 1270, 1273-75 (Fla. 2001) [26 Fla. L. Weekly S329a]; *see also Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1093-94 (Fla. 2000) [25 Fla. L. Weekly S461a]. Competent substantial evidence is defined as such relevant evidence as a reasonable person would accept as adequate to support the findings and decision made. *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957).

Petitioner contends the Department failed to comport with the essential requirements of the law in denying his motion to invalidate the suspension of his driver's license. Citing "the plain language of Fla. Stat. § 322.2616(3)" and its reference to "results" in support of his overall claim, Petitioner argues that, unless a person refuses to provide a breath sample, two samples are required under Florida Administrative Code Rule 11D-8.002(12). Thus, Defendant concludes, "[T]he Hearing Officer had insufficient evidence to establish that the Petitioner's blood alcohol content was over a 0.020 g/210L" and moves the Court to set aside the suspension of his driver's license.

As pointed out by the Respondent, however, Petitioner's reliance on the plural use of the word "results" in Fla. Stat. § 322.2616(3) is misplaced speculation. Instead, the Respondent points to § 322.2616(17) and argues that subsection "provides a choice between (a) taking two breath samples pursuant to Section 316.1932 and Rule 11D-8002(12); or (b) taking a breath sample with a Department of Transportation approved device."[2]

The Respondent then aptly notes that Petitioner's single breath sample was taken via an Intoxilyzer 500, which is one of the breath alcohol testing devices approved by the U.S. Department of Transportation. *See* DDL 4; and Fla. Stat. § 322.2616(17). Citing *Elder v. Department of Highway Safety and Motor Vehicles*, 18 Fla. L. Weekly Supp. 510e (Fla. 15th Cir. Ct. 2011), the Respondent concludes that the single breath sample taken by Deputy Sanders, using the Intoxilyzer 500, was acceptable and properly considered by the hearing officer, and a second breath sample was not required in this case.

The Court agrees with the Respondent's conclusion. As noted by the 15th Circuit Court in *Elder*, "The State of Florida has devised a system whereby an under-age person's driving privileges may be suspended when that person operates a motor vehicle with even small amounts of alcohol in their system." Where, as in this case, the applicable Fla. Stat. § 322.2616(17) gives a police officer the option of performing a breath test on an under-age-21 driver *either* pursuant to § 316.1932 "*or* by a breath-alcohol test device listed in the United States Department of Transportation's conforming-product list of evidential breath-measurement devices,"[3] it was not necessary for Deputy Sanders to collect two breath samples from Petitioner because the single breath test given was performed on an Intoxilyzer 500, a breath-taking device which is included on the United States Department of Transportation's conforming-products list. *See* DDL 4. As further provided in § 322.2616(17), "[t]he reading from such a device is presumed accurate and is admissible in evidence in any administrative hearing conducted under this section."

In this case, as in *Elder*, the State offered a breath-test result affidavit into evidence at the administrative hearing. Because the affidavit contained a statement, that the Intoxilyzer 500 machine used "is listed in the Department of Transportation's conforming products list and has been calibrated and checked in accordance with the manufacturer's and/or agency procedures," per the last sentence of § 322.2616(17), "[t]he reading from such a device is presumed accurate and is admissible in evidence in any administrative hearing conducted under this section."[4] Petitioner did not overcome the presumed accuracy of the results of the machine used for his single breath sample. *See Uglietta v. State of Florida, Department of Highway Safety and Motor Vehicles, Division of Driver Licenses*, 11 Fla. L. Weekly Supp. 285a (Fla. 9th Cir. Ct. 2004).

Thus, the Court finds that Hearing Officer Bishoff's findings and judgment were supported by competent substantial evidence and do not constitute a departure from the essential requirements of law. Accordingly, the Court finds that Petitioner's license suspension was properly upheld, and Petitioner has failed to demonstrate an entitlement to relief. It is, therefore,

ORDERED AND ADJUDGED that Petitioner's Petition for Writ of Certiorari, filed June 26, 2020, is **DENIED**.

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[1]If Petitioner opted to file a Reply, it would have been due 30 days after the Response was filed, pursuant to Fla. R. App. P. 9.100(k).

[2]Fla. Stat. § 322.2616(17) provides in pertinent part:

A breath test to determine breath-alcohol level pursuant to this section may be conducted as authorized by s. 316.1932 or by a breath-alcohol test device listed in the United States Department of Transportation's conforming-product list of evidential breath-measurement devices. The reading from such a device is presumed accurate and is admissible in evidence in any administrative hearing conducted under this section.

[3]§ 322.2616(17), Fla. Stat. (2019) (emphasis added).

[4]*Compare* DDL 3 *with* § 322.2616(17), Fla. Stat. (2019).

*   *   *

NAMPCO, LLC, Appellant, v. JOCELYN PIERRE, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-010572 (AP). L.T. Case No. COCE19-002192. September 1, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Betsy Benson, Judge. Counsel: Sean Conway, Sean. Conway Law Firm, P.A., Ft. Lauderdale, for Appellant. Allegra Fung, Korte & Associates, West Palm Beach, for Appellee.

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OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, and the Final Judgment and Order Directing Clerk Disbursing Funds entered on April 11, 2019, is hereby **AFFIRMED**. Further, Appellee's Motion for Appellate Attorney's Fees and Costs is hereby **GRANTED**. (BOWMAN, TOWBIN SINGER, AND RODRIGUEZ, JJ., concur.)

* * *

TAMIKA MOODIE, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-59AC10A. L.T. Case No. 18-14871TC10A. August 28, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Kenneth Gottlieb, Judge. Counsel: Bernadette Guerra, Office of the Public Defender, for Appellant. Nicole Bloom, Office of the State Attorney, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record on appeal, and the applicable law, we find that the trial court did not err in denying Appellant's motion for discharge. (FEIN, MURPHY III, AND SIEGEL, JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Driving with unlawful breath alcohol level—Lawfulness of detention—Once licensee was lawfully stopped for failing to stop before turning at red light and failing to maintain proper lane after turn, officer was authorized to order licensee to dismount his motorcycle—Officer had reasonable suspicion supporting detention for DUI investigation where officer observed that licensee had committed traffic infractions and had odor of alcohol, flushed face, and watery bloodshot eyes—After licensee failed to perform satisfactorily on several field sobriety exercises, officer had probable cause for arrest—Petition for writ of certiorari is denied

JOSEPH GLENN HARRIS, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 14th Judicial Circuit (Appellate) in and for Bay County. Case No. 19-4375-CA. July 28, 2020. Counsel: Kerry Adkison, Chipley, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(MICHAEL C. OVERSTREET, J.) **THIS MATTER** is before the Court on the Petition for Writ of Certiorari, filed on November 27, 2019, appealing the suspension of his driver license by the Department of Highway Safety and Motor Vehicles (Department). Having considered said Petition, the Department's Response, and the court file and records, and being otherwise fully advised, this Court finds as follows:

On August 30, 2019, the Petitioner was issued a citation for driving under the influence and the Panama City Police Department directed the Department to suspend the Petitioner's driver license due to his unlawful breath alcohol level. The Petitioner requested an administrative hearing pursuant to section 322.2615, Florida Statutes, to challenge the suspension of his driver license. A hearing was held on October 22, 2019. At the hearing, the hearing officer heard testimony from Officer Allyn, Officer Hernandez, Officer Johnson, and the Petitioner. The hearing officer also admitted into evidence the following documents: (1) DUI Uniform Traffic Citation #8485XGP and Driver License of Petitioner; (2) DUI Probable Cause Affidavit signed by Officer Allyn; (3) Breath Alcohol Test Affidavit; (4) Implied Consent Warning; (5) Panama City Police Officer Report for Incident; (6) Vehicle Inventory Receipt; (7) DUI Checklist; (8) DUI Coversheet; (9) Notification of Driver License Hearing; and (10) Agency Inspection Report. On October 28, 2019, a final order upholding the driver license suspension was issued. Specifically, the Petitioner's Motion to Invalidate Suspension on the grounds of an improper stop or no probable cause to detain him were denied. The Petitioner timely sought review of the hearing officer's final order by filing the Petition for Writ of Certiorari in this Court on November 27, 2019. *See* §§ 322.2615(13), 322.31, Fla. Stat.

The Petitioner contends that the officer requiring him to dismount the motorcycle in order to separate him from his passenger to determine from whom the odor of alcohol was emitting was improper because the officer did not have a reasonable suspicion that the Petitioner had, was, or was about to commit a crime prior to requesting he dismount the motorcycle. He argues the observations of his driving did not support a reasonable suspicion and/or probable cause to believe he was driving under the influence. The Petitioner argues that "without more than what the officer had observed prior to requiring the dismount, the officer lacked reasonable suspicion to believe the Petitioner was D.U.I. Requiring the dismount without reasonable suspicion was improper because this was a show of authority turning an investigatory stop into a detention." He also argued that the officer's observations of the Petitioner having a flushed face, bloodshot eyes and watery eyes did not establish reasonable suspicion that the Petitioner had committed a crime because the Petitioner had driven the motorcycle in the early morning hours some distance without a helmet or a face protector. The Petitioner concludes his arrest was illegal and the requirement that he submit to a breath test was also improper.

In response, the Department asserts that Officer Allyn's request that the Petitioner step away from the motorcycle did not constitute a de facto arrest but was instead a lawful continuance of the DUI investigation. The Department further asserts that even if Officer Allyn's request was a detainment, it was lawful because the indicators of impairment observed prior to the request constituted both reasonable suspicion and probable cause of driving under the influence of alcohol in violation of section 316.193, Florida Statutes. The Department contends that the Petitioner had committed a traffic violation and there existed reasonable suspicion the Petitioner was DUI prior to Officer Allyn requesting the Petitioner to get off of the motorcycle based on the following: "The Petitioner's vehicle was stopped at approximately 2:55 a.m. on a Friday morning. The Petitioner had failed to stop at a red light and made an improper turn. Following the Stop, Officer Allyn detected an odor of alcohol he strongly believed emanated from the Petitioner. The Petitioner's face was flushed, and his eyes were bloodshot and watery. All of this evidence was gathered by Officer Allyn before he requested that the Petitioner exit his vehicle." The Department argued that Officer Allyn drew the reasonable conclusion that a DUI investigation was warranted based upon these observations and after administration of field sobriety exercises, Officer Allyn developed probable cause for an arrest; the hearing officer reached the same conclusions.

Standard of Review

At the administrative hearing, the hearing officer's scope of review was limited to the following issues: (1) whether the arresting law enforcement officer had probable cause to believe that the person was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or controlled substances; (2) whether the person whose license was suspended had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in section 316.193, Florida Statutes. *See* § 322.2615(7)(a), Fla. Stat. Implicit in this scope of review is consideration of the lawfulness of the arrest. *See Fla. Dep't of Highway Safety & Motor Vehicles v. Hernandez,* 74 So. 3d 1070, 1073 (Fla. 2011) [36 Fla. L. Weekly S654a].

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The circuit court's review of administrative action is governed by a three-part standard of review: (1) whether procedural due process was accorded; (2) whether the essential requirements of law were observed; and (3) whether the findings and judgment are supported by competent substantial evidence. *Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles,* 209 So. 3d 1165, 1170-71 (Fla. 2017) [42 Fla. L. Weekly S85a]. "The competent, substantial evidence standard requires the circuit court to defer to the hearing officer's findings of fact, unless there is no competent evidence of any substance, in light of the record as a whole, that supports the findings." *Dep't of Highway Safety & Motor Vehicles v. Hirtzel,* 163 So. 3d 527, 529 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1107a] (citation omitted). The circuit court is not permitted to conduct an independent fact finding, reweigh the evidence, or substitute its judgment for that of the agency. *See Dep't of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1095 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a].

Findings of Fact

Officer Allyn of the Panama City Police Department performed a traffic stop on a motorcyclist who had been traveling eastbound on Highway 98 and turned southbound on Jenks Avenue. The Petitioner was identified as the driver of the motorcycle. The traffic stop was initiated based on the Petitioner's failure to stop at the intersection before turning southbound on Jenks Avenue when there was a solid red light for eastbound traffic at the intersection and the Petitioner's failure to maintain the proper lane when turning. (Tr. at 11-15.)

The officer noted that the Petitioner's face was flushed. (Tr. at 21.) He also immediately smelled the odor of alcohol. When the Petitioner spoke, the officer observed that the odor of alcohol grew stronger, which gave him a strong suspicion the odor was coming from the Petitioner while he was on the motorcycle. (Tr. at 25-26.) Because the Petitioner's wife was a passenger on the motorcycle, the officer followed normal standard procedure in a DUI investigation to separate anyone from their vehicle to make sure the odor of alcohol was coming from the driver and not from the vehicle or a passenger. (Tr. at 24.) After the Petitioner was separated from the motorcycle, he still smelled the odor of alcohol from the Petitioner's person. (Tr. at 26.) The officer asked the Petitioner to perform field sobriety exercises because the Petitioner exhibited several physical clues of impairment including bloodshot eyes, watery eyes, flushed face, and the odor of alcohol. (Tr. at 25.) After the Petitioner was determined to have performed poorly on some field sobriety exercises, he was arrested for driving under the influence of alcohol or a chemical or controlled substance in violation of section 316.193, Florida Statutes. (Tr. at 11-15.) After his arrest, the Petitioner provided two samples of his breath which indicated a breath alcohol content of .080g/210L. (Tr. at 30.)

Analysis

The Petitioner argues that he was improperly ordered to exit his vehicle prior to the officer having reasonable suspicion that he was committing a crime, which converted the officer's action into an illegal detention. The Court finds Petitioner's contentions to be without merit.

The Petitioner was lawfully stopped for a traffic violation based on the officer observing the Petitioner fail to stop at a solid red light at a traffic intersection and fail to maintain the proper lane after turning. Once the vehicle was lawfully stopped for the traffic violation, the officer was authorized to order the Petitioner to exit the vehicle. *See State v. Breed,* 917 So. 2d 206, 208 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D1457a] (citing *Whren v. United States,* 517 U.S. 806 (1996)) ("[I]t is not a violation of the Fourth Amendment for a law enforcement officer to temporarily detain a motorist for a civil traffic infraction where the officer has probable cause to believe a violation occurred."); *Reid v. State,* 898 So. 2d 248 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D762a].

Additionally, to detain a person for a DUI investigation, the officer must have reasonable suspicion that the detainee committed the offense. *State v. Castaneda,* 79 So. 3d 41, 42 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1347b]. To determine whether an officer conducting an investigatory detention had a well-founded or reasonable suspicion of criminal activity, a court must examine the totality of the circumstances surrounding the detention. Relevant factors include: "the time of day, the appearance and behavior of the suspect; the appearance and manner of operation of any vehicle involved; and anything incongruous or unusual in the situation as interpreted in light of the officer's knowledge." *Huffman v. State,* 937 So. 2d 202, 206 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D2227a]. In this case, the officer noted an odor of alcohol that grew stronger as the Petitioner spoke. The Petitioner also had a flushed face and his eyes were blood shot and watery, and the Petitioner had failed to stop at a solid red light before turning at an intersection of four-lane roadways. Based on the circumstances, the officer had reasonable suspicion that the Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or controlled substances. *See Castaneda,* 79 So. 3d at 42 (determining the officer's observations of the defendant driving 90 miles per hour in a sixty-five mile-per-hour zone, the smell of an alcoholic beverage when he approached the driver's side window, and the defendant having bloodshot and glassy eyes "were enough to give rise to a reasonable suspicion sufficient to justify detaining the defendant for a DUI investigation").

After the Petitioner failed to perform satisfactorily on several field sobriety exercises, the officer had probable cause to believe the Petitioner was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or controlled substances. The Petitioner's driver license was accordingly lawfully suspended.

Conclusion

Based on the foregoing, this Court finds that procedural due process was accorded, the essential requirements of the law were observed, and the hearing officer's denial of the request to invalidate the suspension of his driver license was supported by competent, substantial evidence.

Therefore, it is

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is hereby **DENIED** and the Department's suspension is hereby **AFFIRMED**. The parties have thirty (30) days from the date of this order to appeal this decision.

* * *

Insurance—Automobile—Attorney's fees—Claim or defense not supported by material facts or applicable law—Where insurer provided insured with section 57.105 safe harbor notice by email, rule 2.514(b) extended safe harbor period additional five days—Trial court erred in granting motion for sanctions which was filed prematurely 23 days after email service of safe harbor notice—Trial court further erred by failing to make express findings regarding absence of justiciable issue of law or fact raised by insured's action, awarding fees in amount greater than amount insurer was charged by its counsel, and awarding costs as sanction

MD NOW MEDICAL CENTERS, INC., d/b/a MD NOW, Appellant, v. AUTO-OWNERS INSURANCE COMPANY, Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Civil Division AY. Case No. 502019AP000078CAXXMB. L.T. Case No. 502016SC014569XXXXSB. October 8, 2020. Appeal from the County Court in and for Palm Beach County, Judge Reginald Corlew. Counsel: Chad Christensen, Boca Raton, for Appellant. William J. McFarlane, Matthew T. Jones, and Michael K. Mittelmark, Coral Springs, for Appellee.

(PER CURIAM.) Plaintiff, MD Now Medical Centers, Inc., appeals

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a final judgment awarding Defendant, Auto-Owners Insurance Company, attorney's fees and costs pursuant to section 57.105, Florida Statutes. On appeal, Plaintiff argues that the fee judgment must be reversed because: (1) Defendant's Motion for Sanctions failed to comply with section 57.105's safe harbor provision; (2) the trial court failed to include the requisite findings of fact and law in its order granting Defendant's Motions for Sanctions and in its Final Order on Attorney's Fees and Costs; (3) the trial court awarded Defendant attorney's fees in an amount greater than Defendant incurred; and (4) the trial court awarded costs as a sanction pursuant to section 57.105 although section 57.105 does not permit the recovery of costs. We agree with Plaintiff on all points and reverse.

BACKGROUND

On December 21, 2016, Plaintiff sued Defendant for breach of contract. Although Plaintiff's claim was a workers' compensation claim, Plaintiff's complaint sought the recovery of no-fault benefits. Based on this error, Defendant served Plaintiff with an intent to move forward with sanctions pursuant to section 57.105, Florida Statutes ("safe harbor notice") via email on January 25, 2017. Twenty-three days later, Defendant filed its Motion for Sanctions with the trial court, arguing that it was entitled to attorney's fees because Plaintiff knew or should have known that its claim was without merit at the time it was filed.

Subsequently, Plaintiff filed a notice of voluntary dismissal without prejudice, and thereafter, Defendant filed a Motion for Entitlement to Attorney's Fees and Costs arguing that it was entitled to an award of attorney's fees and costs pursuant to section 57.105. In response, Plaintiff argued that the Motion for Sanctions was prematurely filed because Florida Rule of Judicial Administration 2.514(b) extended section 57.105's twenty-one day safe harbor period by five days. The trial court granted Plaintiff's Motion for Entitlement to Attorney's Fees and Cost without elaboration.

At the ensuing fee hearing, Defendant requested attorney's fees in the amount of $450.00 per hour and further requested costs for an expert witness who appeared on behalf of Defendant at the fee hearing. Plaintiff argued that the trial court could not award $450.00 per hour because Defendant's attorneys only billed $125.00 per hour for the legal services rendered. Plaintiff further argued that costs were not recoverable as a sanction under section 57.105. In its Final Order for Attorney's Fees and Costs, the trial court awarded Defendant $15,300.00 in attorney's fees, $1,571.18 in interest, and $1,815.00 in costs associated with the expert witness. This appeal follows.

ANALYSIS

Ordinarily, we review a trial court's order awarding attorney's fees or costs under an abuse of discretion standard; however, because the instant order involves a question of law, our review is de novo. *City of Boca Raton v. Basso*, 242 So. 3d 1141, 1144 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D702a] ("An appellate court reviews whether a trial court's award of costs is excessive for an abuse of discretion; however, whether a cost requested may be awarded, at all, is a question of law to be reviewed de novo." (quotation omitted)).

We begin by addressing Plaintiff's safe harbor argument. Section 57.105 permits a trial court to award attorney's fees to the prevailing party where the court finds that the losing party knew or should have known that its claim or defense was not supported by material facts or then-existing law. § 57.105(1), Fla. Stat. (2017). However, section 57.105(4) contains a safe harbor provision which states, in pertinent part, that:

> [A] motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

The purpose of this safe harbor provision is to provide the non-moving party with a meaningful opportunity to avoid sanctions by withdrawing or amending meritless allegations or claims. *Bionetics Corp. v. Kenniasty*, 69 So. 3d 943, 948 (Fla. 2011) [36 Fla. L. Weekly S69a].

With respect to the computation of time, Florida Rule of Judicial Administration 2.514 provides as follows:

> (a) Computing Time. The following rules apply in computing time periods specified in any rule of procedure, local rule, court order, or statute that does not specify a method of computing time.
>
> . . .
>
> (b) Additional Time after Service by Mail. When a party may or must act within a specified time after service and service is made by mail or email, 5 days are added after the period that would otherwise expire under subdivision (a).

Fla. R. Jud. Admin. 2.514(a), (b). As this Circuit has previously held, because section 57.105 does not specify a method for computing time, the plain language of rule 2.514 indicates that a 5-day timeline extension is applicable to section 57.105's procedure for serving and filing motions for sanctions. *G&R Plumbing, Inc. v. Avatar Prop. and Cas. Ins. Co.*, 26 Fla. L. Weekly Supp. 945a (Fla. 15th Cir. Ct. Feb 5, 2019). As a result, when a party provides the opposing party with a section 57.105 safe harbor notice via email, rule 2.514(b) has the effect of extending the safe harbor period from twenty-one days to twenty-six days. *Id.*

In the instant case, Defendant served Plaintiff with a section 57.105 safe harbor notice by email on January 25, 2017. Per the plain language of rule 2.514(b), because the safe harbor notice was served via email, Plaintiff should have been given twenty-one days, plus five, to withdraw the challenged claim. *See McCray v. State*, 151 So. 3d 449, 450 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1259a] (explaining the two step process for the calculation of time under rule 2.514). However, Defendant prematurely filed its Motion for Sanctions with the trial court twenty-three days later, thereby violating the safe harbor period for Plaintiff to withdraw or amend its claim. Accordingly, the court erred in granting Defendant's motion. *City of N. Miami Beach v. Berrio*, 64 So. 3d 713, 715-16 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D1166a]. Therefore, we reverse the ensuing fee judgment.

Although our holding on the safe harbor issue is dispositive, we also write to address the trial court's lack of express findings, its decision to award Defendant more legal fees than incurred, and its award of costs as a sanction.

"Section 57.105 requires an explicit finding by the trial court that there was a complete absence of a justiciable issue of law or fact raised by the plaintiff in the action." *Palm Beach Polo Holdings, Inc. v. Stewart Title Guar. Co.*, 134 So. 3d 1073, 1078 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D140a] (quoting *Vasquez v. Provincial S., Inc.*, 795 So. 2d 216, 218 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2329a]). In this case, the trial court's order granting Defendant's motion for fees lacked any such findings. The court's Final Order on Attorney's Fees and Costs also lacked these findings. The trial court's failure to state this express finding in either of its orders is grounds for reversal. *Id.* (holding that because neither the order finding that the party was entitled to section 57.105 fees nor the order awarding the amount of fees contained any express findings of fact, the trial court reversibly erred).

The court's award of attorney's fees in an amount that was greater than what Defendant was charged by its trial counsel for the legal services rendered is also grounds for reversal as a trial court may not award attorney's fees in excess of what was actually charged to the party. *Effective Teleservices, Inc. v. Smith*, 16 So. 3d 256, 256 (Fla. 4th

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DCA 2009) [34 Fla. L. Weekly D1692b]; *Spagnolo v. Nicoletti*, 755 So. 2d 671, 671 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1520b]. Likewise, the court's award of costs as a sanction under section 57.105 was also reversible error as section 57.105 only provides for the award of attorney's fees as sanctions and "makes no mention of costs." *Ferdie v. Isaacson*, 8 So. 3d 1246, 1251 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D898a]; *see* § 57.105, Fla. Stat. (2017). *See also Pronman v. Styles*, 163 So. 3d 535, 538 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D572a] (costs are not awardable under section 57.105).

Accordingly, we **REVERSE** the trial court's award of attorney's fees, interest, and costs in favor of Defendant. (CHEESMAN and COATES, JJ., concur. HAFELE, J., concurs in result only.)

* * *

Criminal law—Post conviction relief—Trial court erred in summarily denying motion for post conviction relief—To extent denial was based on facial insufficiency of motion, trial court should have entered order allowing defendant to amend motion—To extent denial was based on record, trial court erred in not attaching portion of record conclusively showing that defendant was not entitled to relief—State's effort to rectify omission by providing portions of record during appeal is improper

WILDEN ORTIZ MAZARIEGOS, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Criminal Division AC. Case No. 50-2019-AP-000005-AXXX-MB. L.T. Case No. 50-2018-CT-001608-AXXX-NB. October 14, 2020. Appeal from the County Court in and for Palm Beach County; Judge Frank Castor. Counsel: Wilden L. Ortiz-Mazariegos, pro se, Jupiter, for Appellant. Samantha Bowen, Office of the State Attorney, West Palm Beach, for Appellee.

(PER CURIAM.) Appellant, William Ortiz-Mazariegos, appeals the trial court's order summarily denying his motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. Appellant asserts that the trial court reversibly erred when it denied his motion, which did not comply with the oath and certification requirements of Rule 3.850(c) and (n), without explanation and without attaching any record exhibits that conclusively refute Appellant's postconviction claim. We agree.

To the extent the denial of the motion was based upon the facial insufficiency of the motion, the trial court did not follow the procedure outlined in *Spera v. State*, 971 So. 2d 754, 761 (Fla. 2007) [32 Fla. L. Weekly S680a] and Rule 3.850(f)(2)(providing that "[i]f the motion is insufficient on its face, and the motion is timely filed under this rule, the court shall enter a non-final, non-appealable order allowing the defendant 60 days to amend the motion. If the amended motion is still insufficient or if the defendant fails to file an amended motion within the time allowed for such amendment, the court, in its discretion, may permit the defendant an additional opportunity to amend the motion or may enter a final, appealable order summarily denying the motion with prejudice"). To the extent the denial of the motion was based upon the record, the court did not attach to its order any portion of the files or record that conclusively shows appellant was not entitled to relief. *See* Fla. R. Crim. P. 3.850(f)(5). *Wheeler v. State*, 297 So. 3d 604, 605 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D1508a] ("When a trial court summarily denies a motion for postconviction relief, 'it must either explain the rationale for the denial, or attach those portions of the record that conclusively refute the claims.' " (quoting *Morris v. State*, 287 So. 3d 634, 635 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D71a]). Furthermore, this Court notes that the State's attempt to supplement the record on appeal is improper and cannot rectify the trial court's omission. *Dennis v. State*, 16 So. 3d 331, 332 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1889c] (holding that the trial court "must attach portions of the record conclusively refuting the claim; [and] the [S]tate's attempt to provide them for the first time on appeal is improper.").

We therefore **REVERSE** the trial court's order denying Appellant's motion for postconviction relief and **REMAND** with directions that the trial court either: 1) enter an amended order that attaches those portions of the files and record that conclusively establish that Appellant is entitled to no relief; or 2) permit Appellant an opportunity to amend his motion to state facially sufficient claims, and for proceedings thereafter consistent with this opinion. An evidentiary hearing should only be granted if the trial court finds that Appellant's claim cannot be conclusively refuted by the record nor denied as a matter of law. Fla. R. Crim. P. 3.850(f)(5). (SHEPHERD, G. KEYSER, and SCHER, JJ., concur.)

* * *

Insurance—Personal injury protection—Discovery—Failure to comply—Sanctions—Trial court abused its discretion by dismissing complaint due to discovery violations without making requisite findings on *Kozel* factors

BAUM CHIROPRACTIC CLINIC, P.A., a/a/o Deborah Rogers, Appellant, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE18-007978 (AP). L.T. Case No. COCE14-004104. September 11, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; John D. Fry, Judge. Counsel: Todd Landau, Todd Landau, P.A., Hallandale Beach, for Appellant. Jeffrey M. James, Banker, Lopez, & Gassler, P.A., Tampa, for Appellee.

OPINION

(PER CURIAM.) Baum Chiropractic Clinic, P.A., ("Provider"), appeals non-final orders granting Defendant's Motion to Dismiss entered on March 5, 2018 and order denying Plaintiff's Motion for Rehearing and Reconsideration entered on March 12, 2018, and Final Judgment for Plaintiff entered on September 4, 2018. Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the orders are hereby **REVERSED** and **REMANDED** as set forth below.

In the proceedings below, Provider filed suit to recover personal injury protection ("PIP") benefits from State Farm Mutual Automobile Insurance Company ("State Farm") pursuant to an assignment of benefits from Deborah Rogers (the "Insured"). The complaint alleges that from April 2, 2013 through May 9, 2013, Provider administered reasonable, related and medically necessary care for the Insured.

On April 28, 2014, State Farm filed its First Set of Interrogatories, and Request to Produce. On June 3, 2014, State Farm sent a "good faith" letter to Provider regarding Provider's failure to timely respond to discovery requests in attempt to resolve the issues. On July 9, 2014, State Farm filed its Ex-Parte Motion to Compel Discovery Responses. On July 29, 2014, the county court entered an Order granting State Farm's Ex-Parte Motion to Compel Discovery Responses giving Provider 10 days to respond to the discovery requests.

On August 11, 2014, State Farm filed a Motion to Enforce Court Order and Motion for Attorney's Fees and Costs. In the motion State Farm alleges Provider again failed to respond to its discovery requests, and comply with the county court's July 29, 2014 order. On August 19, 2014, the county court entered an Agreed Order on State Farm's Ex-Parte Motion to Enforce Court Order. On August 18, 2014, Provider filed its Unverified Answers to Interrogatories, and Responses to Request for Production. On September 8, 2014, State Farm filed its Motion to Compel Verified Answers to First Set of Interrogatories and Motion to Compel Better Response to First Set of Discovery. On March 17, 2015, the county court entered an Agreed Order on State Farm's Motion to Compel giving Provider 14 days to provide verified responses to interrogatories.

On April 6, 2015, State Farm filed its Ex-Parte Motion to Enforce Court Order on its Motion to Compel Verified Answers to First Set of Interrogatories and Motion to Compel Better Response to First Set of

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Discovery and Motion for Attorney's Fees and Costs. On May 11, 2015, Provider filed its Better Responses to Request for Production, and Verified Answers to Interrogatories. On May 12, 2015, the county court held a hearing on State Farm's Ex-Parte Motion to Enforce Court Order on its Motion to Compel Verified Answers to First Set of Interrogatories and Motion to Compel Better Response to First Set of Discovery and Motion for Attorney's Fees and Costs. On May 18, 2015, the county court entered an order granting State Farm's Ex-Parte Motion to Enforce Court Order, which stayed the action until Provider complied with the discovery requests.

On February 10, 2017, State Farm filed its Renewed Motion for Status Conference and for Sanctions. On February 13, 2018, the county court set a mandatory status conference for February 27, 2018. On February 27, 2018, the county court held a status conference in which it ordered a hearing on State Farm's Motion to Dismiss and to Enforce Court Orders will be heard on March 5, 2018. On February 28, 2018, State Farm filed a Motion to Dismiss. A hearing was held on March 5, 2018 on State Farm's Motion to Dismiss, at which time the county court entered an order granting its motion. Provider filed its Verified Motion for Rehearing and Reconsideration of the county court's March 5, 2018 Order of Dismissal. On March 12, 2018, the county court denied Provider's motion. On September 4, 2018, the county court entered a Final Judgment for State Farm.

On appeal, Provider argues that the county court abused its discretion when it failed to make written findings of fact in its order dismissing its complaint. Provider further argues that this alone is enough to warrant reversal. This Court respectfully agrees.

> The dismissal of an action based on the violation of a discovery order will constitute an abuse of discretion *where the trial court fails to make express written findings of fact supporting the conclusion that the failure to obey the court order demonstrated willful or deliberate disregard.* Express findings are *required* to ensure that the trial judge has consciously determined that the failure was more than a mistake, neglect, or inadvertence, and to assist the reviewing court to the extent the record is susceptible to more than one interpretation. While no 'magic words' are required, the trial court *must* make a 'finding that the conduct upon which the order is based was equivalent to willfulness or deliberate disregard.'

Ham v. Dunmire, 891 So. 2d 492,495-96 (Fla. 2004) [30 Fla. L. Weekly S6a] (quoting *Commonwealth Fed. Savings & Loan Ass'n v. Tubero,* 569 So.2d 1271 (Fla.1990)) (emphasis added). The county court's order dismissing Provider's complaint does not make any specific findings of fact or law. (R. 158; PDF. 168). The county court is required to make specific findings, and further, requires the county court to consider *Kozel* factors in determining whether dismissal is an appropriate sanction. *See Id.* at 500. ("The trial court's failure to consider the *Kozel* factors in determining whether dismissal was appropriate is, by itself, a basis for remand for application of the correct standard."). In *Kozel v. Ostendorf,* 629 So.2d 817 (Fla.1993), the Florida Supreme Court outlined six factors that the court should consider when determining whether dismissal is appropriate. The six factors include:

> 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration.

Kozel, 629 So.2d at 818. "Upon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative." *Ham,* 891 So. 2d at 496. In *Clay v. City of Margate,* 546 So.2d 434 (Fla. 4th DCA 1989), the Fourth District reversed a trial court order dismissing an action due to the plaintiff's untimely filing of a response to a motion for a more definite statement. The court further stated,

> The record [was] devoid of any evidence reflecting willful disregard of an order of court. There was no showing of appellant's failure to respond as ordered was a deliberate and contumacious disregard of the court's authority. Nor was bad faith, gross indifference, or deliberate callous conduct established as the reason for appellant's noncompliance.
>
> * * *
>
> The sanction of dismissal had the effect of punishing the litigant too severely for an act or failure on the part of his counsel. The purpose of the rules of civil procedure is to promote the orderly movement of litigation. A lesser sanction would have accomplished that purpose.

Id. at 435-436. "Moreover, dismissal is far too extreme as a sanction in those cases where discovery violations have absolutely no prejudice to the opposing party." *Ham,* 891 So. 2d at 499. *See Beauchamp v. Collins,* 500 So.2d 294, 295 (Fla. 3d DCA 1986) (The district court reversed an order of dismissal determining that the defendant was not prejudiced by plaintiff's actions. That "the record is devoid of any indication that there was bad faith noncompliance with discovery or court orders which would warrant a finding of willful and flagrant disobedience."). The county court failed to make the requisite findings of fact in its order pursuant to the *Kozel* factors, and therefore abused its discretion when dismissing Provider's complaint.

1. Accordingly, the non-final orders granting Defendant's Motion to Dismiss entered on March 5, 2018 and order denying Plaintiff's Motion for Rehearing and Reconsideration entered on March 12, 2018, and Final Judgment for Plaintiff entered on September 4, 2018 are hereby **REVERSED**, and this case is **REMANDED** to the county court for a new hearing on the motion to dismiss to determine if the Kozel factors apply or whether a lesser sanction is appropriate.

2. The Appellant, Baum Chiropractic Clinic, P.A.'s Motion for Attorneys' Fees and Costs is hereby **CONDITIONALLY GRANTED** as to appellate attorney's fees, with the amount of to be determined by the trial court on remand, **CONTINGENT UPON** the Appellant's ultimately prevailing in the case.

3. The Appellant's Motion for Attorneys' Fees and Costs is **DENIED WITHOUT PREJUDICE** as to costs. *See* Fla. R. App. P. 9.400(a) ("Costs shall be taxed by the lower tribunal on a motion served no later than 45 days after rendition of the court's order."). (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

* * *

Debt collection—Attorney's fees—Prevailing party—Mutuality or reciprocity of obligation—Defendant who prevailed as result of voluntary dismissal of plaintiff's action for account stated seeking monies due on credit card account was entitled to award of attorney's fees under attorney's fees provision of underlying credit card agreement, made reciprocal to apply to defendant pursuant to section 57.105(7)—Although trial court erred in determining that defendant was entitled to attorney's fees under rule 1.420(d), order is affirmed under tipsy coachman rule

PORTFOLIO RECOVERY ASSOCIATES, LLC, Appellant, v. RIGOBERTO DURAND, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE18-015706 (AP). L.T. Case No. CONO12-006166. September 2, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Steven P. DeLuca, Judge. Counsel: Robert E. Sickles, Nelson, Mullins, Broad and Cassel, Tampa, for Appellant. Scott D. Owens, Scott D. Owens, P.A., Hollywood, for Appellee.

OPINION

(PER CURIAM.) Portfolio Recovery Associates, LLC, ("Portfolio")

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appeals a non-final order denying Plaintiff's Motion to Strike Defendant's Motion to Tax Costs and Attorney's Fees entered on October 27, 2014, and a final order on Defendant's Motion for Attorney's Fees and Final Judgment entered on May 24, 2018. Having carefully considered the briefs, the record, and the applicable law, the orders are hereby **AFFIRMED** for the reasons set forth below.

In the proceedings below, Portfolio filed suit for an account stated to recover an unpaid credit card debt held by Rigoberto Durand ("Durand"). The credit card was issued by G.E. Money Bank, F.S.B., Dillards, who then sold, assigned, and transferred Durand's account to Portfolio in 2011. Sometime after filing suit, Portfolio filed its Notice of Voluntary Dismissal Without Prejudice. Shortly thereafter, Durand filed his Motion to Tax Costs and Attorney's Fees pursuant to Florida Rules of Civil Procedure 1.420(d), Florida Statutes 57.105(1), Florida Statutes 57.105(7), under contractual grounds, and equitable and public policy grounds. Durand filed his affidavit in support of his Motion to Tax Costs and Attorney's Fees. Attached to Durand's affidavit is an exhibit of an exemplar credit card agreement from G.E. Capital Retail Bank in which Durand attests contains the same term (as provided in his contract with Portfolio) stating attorney's fees and court costs are recoverable collection costs.

Portfolio filed an Amended Motion to Strike and/or Dismiss under Florida Small Claims Rule 7.110(b) Durand's Motion to Tax Costs and Attorney's Fees. Portfolio then filed an Objection and Motion to Strike Durand's affidavit. Additionally, Portfolio filed a Memorandum of Law in Opposition to Durand's Motion for Entitlement to Attorney's Fees. A hearing was held on Portfolio's motion to strike, and the county court entered an order denying Portfolio's motion and granting Durand's entitlement to attorney's fees as costs under rule 1.420(d). The county court held a subsequent hearing on Durand's Motion for Reasonable Attorney's Fees, and thereafter entered a final order awarding Durand attorney's fees.

On appeal, Portfolio argues that Durand is not entitled to attorney's fees, and therefore the county court erred when denying its motion to strike, granting Durand's entitlement and final judgment. "The standard of review for an award of attorney's fees is abuse of discretion.". *Carlin v. Javorek,* 42 So. 3d 820, 822 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1566a] (citing *Glantz & Glantz, P.A. v. Chinchilla,* 17 So. 3d 711, 713 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1124c]). "However, when the entitlement to attorney's fees is based on the interpretation of contractual provisions, appellate courts undertake a *de novo review.*" *Id.* (citing *Stevens v. Zakrzewski,* 826 So. 2d 520, 521 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D2121b]).

Moreover, "under the tipsy coachman rule, 'if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support judgment in the record.' ". *Bueno v. Workman,* 20 So. 3d 993, 998 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2227a] (quoting *Dade County Sch. Bd. v. Radio Station WQBA,* 731 So. 2d 638, 644 (Fla. 1999) [24 Fla. L. Weekly S71a]). "However, an appellate court cannot employ the tipsy coachman rule where a lower court has not made factual findings on an issue and it would be inappropriate for an appellate court to do so.". *Id.*

Portfolio argues that rule 1.420(d) does not provide for attorney's fees, and in order to receive attorney's fees as costs there must be an underlying contract between the parties that provides for such. This Court agrees that the county court erred in determining Durand is entitled to attorney's fees under rule 1.420(d). The plain language of the contract solely provides recovery for attorney's fees by the collector, *i.e.* Portfolio. Further, rule 1.420(d) does not contain a reciprocal attorney fee provision. Therefore, the county court erred in determining that Durand was entitled to attorney fees on this basis.

Notwithstanding, this Court also finds that the county court erred when denying attorney's fees to Durand pursuant to section 57.105(7), Florida Statutes. Section 57.105(7) states, in pertinent part:

> (7) If a *contract* contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, *the court may also allow reasonable attorney's fees to the other party when that party prevails in any action,* whether as plaintiff or defendant, with respect to the contract.

§ 57.105(7), Fla. Stat. (emphasis added). In support of Durand's Motion to Tax Costs and Attorney's Fees, Durand submitted his affidavit and an exemplar credit card agreement from G.E. Capital Retail Bank in which he attests contains the same terms (as in his agreement with Portfolio) providing attorney's fees and court costs are recoverable collection costs. The language provided in the credit card agreement submitted by Durand states the following:

> Collection Costs: If we ask an attorney who is not our salaried employee to collect your account, we may charge you our collection costs. These include court costs and reasonable attorney's fees.

Accordingly, the county court properly determined that a contract existed between the parties, and the record reflects there is substantial competent evidence to support this finding. *See Berlin v. Pecora,* 968 So. 2d 47, 50 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2268b] ("[I]t is within the trial judge province, when acting as trier of both fact and law, to determine the weight of the evidence, evaluate conflicting evidence, and determine the credibility of the witnesses, and such determinations may not be disturbed on appeal unless shown to be unsupported by competent and substantial evidence, or to constitute an abuse of discretion.") (*citing Jockey Club, Inc. v. Stern,* 408 So.2d 854, 855 (Fla. 3d DCA 1982)).

Portfolio argues that even if this Court were to determine that there was a contract, it initiated a claim for account stated, not breach of contract, and therefore section 57.105(7) does not apply. This Court respectfully disagrees.

In *Bushnell v. Portfolio Recovery Associates, LW,* 255 So. 3d 473 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2144a], the Second District was faced with the similar question as presented here. In that case, Portfolio Recovery brought a claim for an account stated opposed to breach of contract, and then voluntarily dismissed its claim against Bushnell. "Bushnell then filed a motion for award of attorney's fees and costs as the prevailing party, relying on the credit card agreement and section 57.105(7).". *Id.* at 475. In *Bushnell,* the credit card agreement, "contains a provision authorizing the creditor to recover its attorney's fees as part of its collection costs if it " 'ask[s] an attorney who is not our salaried employee to collect your account.' ". *Id.* The county court denied Bushnell's motion for attorney's fees finding that the underlying cause of action was not an " 'action to enforce the contract' as required under that statute". *Id.* The appellate court disagreed and determined that section 57.105(7) requires an action "*with respect to the contract*". *Id.* The appellate court presented an analysis to go through in order to be entitled to attorney's fees, stating:

> There are two requirements for application of the reciprocity provision in section 57.105(7): (1) the contract must include 'a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract,' and (2) the other party seeking fees must 'prevail[ ] in any action, whether as plaintiff or defendant, with respect to the contract.'

Id. As discussed above, in the instant action, the county court properly determined that there was a contract between Portfolio and Durand, and that the provision provided for attorney's fees. Second, the county court properly determined that Durand was the prevailing party because Portfolio voluntarily dismissed the case. *See id.* (Noting that in Florida, actions that are voluntarily dismissed, the defendants are the prevailing parties for purposes of attorney's fees). Furthermore,

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since section 57.105(7) provides for reciprocal attorney's fees, Durand is entitled to fees under this provision.

Last, Portfolio's argument that this is an action for an account stated and not a breach of contract so as to prevent Durand from being entitled to attorney's fees falls short. In *Bushnell*[1], the Second District stated the following:

> While a claim 'for an account stated is based on 'the agreement of the parties to pay the amount due upon the accounting, and not any written instrument,' the amount due here is based on the debtor's failure to pay *under the credit card contract.* Simply put, *if there had been no credit card contract, the amount due would not have accrued in the first place.* The credit card contract and the account stated cause of action are therefore *inextricably intertwined* such that the *account stated cause of action is an action 'with respect to the contract' under section 57.105(7).*

Id. at 477. (quoting *Farley v. Chase Bank, USA., N.A.,* 37 So. 3d 936, 937 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1296a]). Therefore, Portfolio's action for an account stated that was brought: to collect the amount due under a credit card agreement, the reciprocity provision in section 57.105(7) applies to Durand's request for attorney's fees made pursuant, to the terms of the agreement.

Accordingly, the Order Denying Plaintiff's Motion to Strike Defendant's Motion to Tax Costs and Attorney's Fees entered on October 27, 2014 is hereby **AFFIRMED**. Additionally, the Order on Motion for Attorney's Fees and Final Judgment entered on May 24, 2018 is hereby **AFFIRMED**. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

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[1]This Court recognizes there is a conflicting opinion in the First District Court of Appeal, *Ham v. Portfolio Recovery Assocs., LLC,* 260 So. 3d 450, 456 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D2667b], regarding whether attorney's fees under 57.105(7) can be properly awarded under a cause of action for an account stated. However, since neither of these opinions are directly from the Fourth District, this Court finds its sister district in *Bushnell v. Portfolio Recovery Associates, LLC,* 255 So. 3d 473 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2144a], persuasive authority. *See State v. Hayes,* 333 So. 2d 51, 53-54 (Fla. 4th DCA 1976) ("In the absence of a contrary Fourth District Court of Appeal opinion a Palm Beach County Circuit Court is bound to follow an opinion of another District Court of Appeal, such as a First District Court of Appeal opinion. This would also promote the constitutional provision that the Supreme Court hear cases in which there is conflict between the District Courts of Appeal. Hence, if a circuit court is bound to follow a 'foreign' district's decision, on appeal the circuit court's territorial district court will have the opportunity to follow the other District Court of Appeal opinion or to go a different route, inasmuch as the other district's opinion is only persuasive authority for a court of the same level. It is then the prerogative of the Supreme Court to resolve any resulting conflict.") (citing in part, *Spencer Ladd's, Inc. v. Lehman,* 167 So. 2d 731, 733 (Fla. 1st DCA 1964), *affd in part rev'd in part,* 182 So. 2d 402 (Fla. 1965)).

* * *

Criminal law—Refusal to submit to breath test—Evidence—Trial court erred in denying defendant's motion in limine to exclude evidence of his prior refusal to submit to breath testing, his driving record, and his admission to arresting officer that this was not his first rodeo where defendant offered to stipulate to having previously refused to submit to breath test—State cannot prove that court's error in rejecting stipulation and admitting evidence of two prior refusals did not contribute to conviction for current refusal, especially in light of sole defense that defendant did not refuse test but was unable to submit to test—New trial required

JAMES PENNINGTON, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 19-40AC10A. L.T. Case No. 18-3321MU10A. September 1, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County, Mindy Solomon, Judge. Counsel: Jason Kaufman, for Appellant. Nicole Bloom, for Appellee.

OPINION

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

Appellant was charged with refusal to submit to breath testing, as well as driving under the influence. At trial, Appellant was acquitted of the charge of driving under the influence, but convicted by a jury of the charge of refusal to submit to breath testing.

Prior to the trial, Appellant filed a motion in limine. Appellant offered to stipulate to having previously refused to submit to breath testing after being arrested for DUI, an element of the offense of refusal to submit to breath testing. Appellant argued that because he was stipulating to the prior refusal, the State should not be allowed to introduce other evidence of his prior refusal, such as his driving record and admissions to the arresting officer.

> The standard of review of a trial court's ruling on a motion in limine is abuse of discretion. *Dessaure v. State,* 891 So. 2d 455, 466 (Fla. 2004) [29 Fla. L. Weekly S744c]. However, the trial court's discretion is limited by the rules of evidence, and a trial court abuses its discretion if its ruling is based on an "erroneous view of the law or on a clearly erroneous assessment of the evidence." *McDuffie v. State,* 970 So. 2d 312, 326 (Fla. 2007) [32 Fla. L. Weekly S763a] (quoting *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990)).

Edwards v. State, 39 So. 3d 447, 448 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1452a].

The trial court erred in denying Appellant's motion in limine. Appellant analogizes the instant issue to a trial court's requirement to accept a stipulation to convicted felon status in cases involving the offense of possession of a firearm by a convicted felon.

> As a general matter, we recognize that the State has a reasonable interest in presenting the case in its own way and providing the jury with evidentiary value and depth in establishing the elements of a charged crime. However, the defendant also has a legitimate concern in being judged only on the crime charged, and not being convicted on an improper ground due to the admission of evidence that carries unfairly prejudicial baggage.

Brown v. State, 719 So. 2d 882, 887 (Fla. 1998) [23 Fla. L. Weekly S535b]. The court found that "[o]ffering into evidence anything beyond what is necessary to establish the defendant's legal status as a convicted felon is irrelevant to the current proceeding, has 'discounted probative value,' and may needlessly risk a conviction on improper grounds." *Id.* at 889. The "recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has, however, virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him." *Id.* (quoting *Old Chief v. U.S.,* 519 U.S. 172, 190, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997)).

Courts have extended the reasoning in *Brown* to other contexts. In felony DUI trials, the court should accept the defendant's stipulation to the three prior misdemeanor DUI convictions because the stipulation satisfies the State's burden of proof for that element. *State v. Harbaugh,* 754 So. 2d 691, 694 (Fla. 2000) [25 Fla. L. Weekly S188a]. In *Velcofski v. State,* the court found that the trial court should have accepted the defendant's stipulation that his license was permanently revoked instead of allowing the State to introduce the defendant's driving record, which included an extensive list of convictions and traffic infractions. 96 So. 3d 1069, 1071-72 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D2131a]. The court found that the State did not need the defendant's driving record to prove that his license was revoked in light of the stipulation. *Id.*

Although the holding in *Brown* has been limited to felon-in-

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possession cases by *Cox v. State,* 819 So. 2d 705 (Fla. 2002) [27 Fla. L. Weekly S505a], its reasoning is still applicable to the instant case. Likewise, although Appellant's prior refusals were not convictions, they were evidence of prior bad acts and prior DUI arrests.

Appellant's stipulation would have relieved the State of its burden to prove that he had previously refused to submit to breath testing. Had the court accepted the stipulation, the probative value of Appellant's driving history and his statements admitting to prior refusals would have been minimal. Appellant's statement that this was not his first rodeo should not have been admitted. Given that it was made in the context of field sobriety exercises, and not breath testing, its probative value to prove a prior refusal was tenuous, at best. In any event, the stipulation would have made it unnecessary for Detective Sapp to testify and the State to argue that "this was not [Appellant's] first rodeo."

The State's introduction of multiple forms of evidence showing two prior refusals and its arguments that this incident was not Appellant's "first rodeo" were especially harmful in light of Appellant's sole defense that he did not mean to refuse to submit to breath testing, but was physically unable to do so.

"The harmless error test. . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio,* 491 So. 2d 1129, 1135 (Fla. 1986). "[T]he erroneous admission of irrelevant collateral crimes evidence 'is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged.' " *Jackson v. State,* 166 So. 3d 195, 201 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1328d] (quotations omitted).

Appellee cannot prove beyond a reasonable doubt that the court's error in rejecting the stipulation and admitting evidence of Appellant's two prior refusals did not contribute to the conviction. Appellant's sole defense was that he did not refuse to submit to breath testing, but was merely unable to do so. Appellee's entire case rested on its argument that Appellant was "gaming the system" because he had previously refused to submit to breath testing. The jury would have been more likely to convict based on the evidence of two separate prior refusals instead of a stipulation that the State had met its burden of proving the prior refusal element of the crime, especially in light of the fact that Appellant's prior refusals became the focus of the State's case. Therefore, Appellant should receive a new trial where he can choose again whether to stipulate to the prior refusal.

The trial court did not err in denying Appellant's motion for judgment of acquittal or motion to suppress.

Accordingly, it is

ORDERED AND ADJUDGED that the trial court's ruling denying Appellant's motion in limine is hereby **REVERSED** and the trial court's ruling denying Appellant's motion to suppress and motion for judgment of acquittal is hereby **AFFIRMED,** and this matter is **REMANDED** to the trial court with directions to proceed in accordance with this opinion. (FEIN and MURPHY, III, JJ., concur.)

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Services rendered by licensed massage therapists—PIP statute's exclusion of coverage for massage does not exclude coverage for physiotherapy modalities performed by LMT, ordered by chiropractic physician and performed under physician's control and supervision

STAR CASUALTY INSURANCE COMPANY, Appellant, v. SOUTH FLORIDA PAIN AND REHABILITATION OF HIALEAH, LLC, a/a/o Justin Rodriguez, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE17-000545 (AP), Consolidated Case Nos. CACE17-000546 (AP), CACE17-000550 (AP), CACE17-000552 (AP), CACE17-011644 (AP). L.T. Case No. COCE14-012851. September 24, 2020. Appeal from the County Court of the Seventeenth Judicial Circuit, Broward County, Nina W. DiPietro and Kathleen McCarthy, Judges. Counsel: Nancy W. Gregoire, Birnbaum, Lippman & Gregoire, PLLC, Fort Lauderdale, for Appellant. Joseph R. Dawson, Law Offices of Joseph R. Dawson, P.A., Fort Lauderdale, for Appellee.

OPINION

Appellant, Star Casualty Insurance Company ("Insurer") appeals the County Court's October 26, 2016 final judgments in favor of the Appellee, South Florida Pain and Rehabilitation of Hialeah, LLC ("Provider"), and the County Court's May 16, 2017 final judgment awarding attorney's fees and costs to Provider as the prevailing party. Having carefully reviewed the briefs, the record, and the applicable law, this Court dispenses with oral argument, and finds that the October 26, 2016 and May 16, 2017 final judgments are hereby **AFFIRMED** for the reasons set forth below.

The consolidated cases stem from four final judgments entered on October 26, 2016 in connection with claims for PIP benefits submitted by Provider to Insurer. On receipt of Provider's bills, the Insurer denied reimbursement pursuant to section 627.736(1)(a)5., Florida Statutes, on the basis that Provider's licensed massage therapists ("LMTs") administered certain treatments, including hot packs (CPT 97010), electrical muscle stimulation (G0283), ultrasound therapy (CPT 97035), manual therapy (CPT 97140), neuromuscular reeducation, (CPT 97112), and therapeutic activities (CPT 97530) (the "Modalities").

Thereafter, Provider filed suit to recover PIP benefits resulting from Insurer's non-payment of the Modalities. The Insurer then filed its answer and affirmative defenses. As its first affirmative defense, Insurer alleged that "Plaintiff [Provider] is not entitled to recovery in this action pursuant to Fla. Stat. section 627.736(1)(a)5."

Section 627.736(1)(a)5. of the PIP statute states, as follows:

> Medical benefits do not include massage as defined in s. 480.033 or acupuncture as defined in s. 457.102, regardless of the person, entity, or licensee providing massage or acupuncture, and **a licensed massage therapist or licensed acupuncturist may not be reimbursed for medical benefits under this section**.

§ 627.736(1)(a)5., Fla. Stat. (emphasis added); *see McCarty v. Myers,* 125 So. 2d 333, 336 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D2235a] (noting that the PIP statute specifically excludes licensed massage therapists and licensed acupuncturists from being reimbursed for medical benefits); *see Southern Owners Ins. Co. v. Hendrickson,* 2020 WL 2502109 *1 (Fla. 5th DCA 2020) [45 Fla. L. Weekly D1165b] ("The plain text of section 627.736(1)(a)5. precludes a licensed massage therapist from being reimbursed for medical benefits.").

Provider then moved for summary judgment on Insurer's first affirmative defense, arguing that Insurer's interpretation of section 627.736(1)(a)5., Florida Statutes, was erroneous. The Insurer filed its response in opposition, arguing that as a matter of law, section 627.736(1)(a)5., Florida Statutes, forecloses recovery of benefits for massage services. On October 26, 2016, the County Court entered summary final judgments in favor of Provider finding that Provider was entitled to reimbursement for the Modalities administered by its LMTs to the Insureds. On May 16, 2017, the County Court entered final judgment awarding attorney's fees and costs to Provider as the prevailing party. This appeal follows.

The standard of review governing a trial court's ruling on a motion for summary judgment is *de novo. Moustafa v. Omega Ins. Co.,* 201 So. 3d 710, 714 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D2064a]. On *de novo* review of an order granting summary judgment, this Court is required to view the evidence, including any supporting affidavits, in

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the light most favorable to the non-moving party. *See Daneri v. BCRE Brickell, LLC,* 79 So. 3d 91, 94 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D76a]. The issue before the Court is whether the County Court erred in its interpretation of section 627.736(1)(a)5., Florida Statutes, as a mechanism to allow Provider to collect PIP benefits for the Modalities rendered by the LMTs.

The Provider's motion for summary judgment was supported by the affidavits of Craig Dempsey, Michael White, D.C., and Garret Weinstein, D.C. Craig Dempsey's, Chief Compliance Officer for the Provider, affidavit stated:

> Fla. Stat. 627.736(1)(a)5. (2013) does not preclude a medical facility which provides chiropractic services and physiotherapy modalities from submitting bills for therapy provided to patients under the care and guidance of license massage therapists ("LMT"). LMT's have a higher degree of education and training than chiropractic assistants ("CA"), and CA's also oversee therapy provided to patients and charges for those therapy sessions are fully compensable.

Michael White, D.C., the chiropractor overseeing the implementation of the physiotherapy Modalities stated that "[N]one of the LMT employees submitted any billing to the Defendant [Insurer] for them to be directly compensated." In his affidavit Garret Weinstein, D.C., described the physiotherapy Modalities administered to the Insured were more than simple "massage."

The Insurer offered no summary judgment evidence to rebut any of the factual representations asserted by the Provider by way of affidavits, and no controverting affidavit, interrogatory, deposition transcript was offered by the Insurer to support its opposition to the motion.

Here, the LMTs were employed by the Provider. There is no evidence before the Court that any LMT is seeking to be reimbursed for medical benefits. The services at issue were ordered by the treating chiropractor and performed under the chiropractor's control and supervision. The employees who provided the treatments held message therapist licenses, however there is no indication that having a license as a massage therapist was a requirement to perform the services. Further, there is no dispute that if the LMTs were different employees, such as chiropractic assistants, their services would be reimbursable.

Accordingly, the October 26, 2016 final judgments are hereby **AFFIRMED** and the May 16, 2017 final judgment awarding attorney's fees and costs to the Provider is also **AFFIRMED**. Further, the Provider's Motion for Attorney's Fees is hereby **AFFIRMED** in an amount to be determined by the County Court. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ., concur.)

* * *

JOSEPH MITCHLER, Appellant, v. SUNSHINE HOLIDAY, LLC, d/b/a SUNSHINE HOLIDAY & RV MH PARK, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE18-004855 (AP). L.T. Case No. COWE16-011650 (83). September 1, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Ellen Feld, Judge. Counsel: John P. Kelly, The Soto Law Group, Ft Lauderdale, for Appellant. Matthew Chait, Shutts & Bowen, LLP, West Palm Beach, 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 is hereby **AFFIRMED**. Appellee's Motion for Attorneys' Fees and Costs is hereby **GRANTED** as to appellate attorney's fees, with the amount to be determined by the county court upon remand, and **DENIED** as to costs, **WITHOUT PREJUDICE** to Appellee to file a motion in the county court pursuant to Florida Rule of Appellate Procedure 9.400(a). *See* Fla. R. App. P. 9.400(a) ("Costs shall be taxed by the lower tribunal on a motion served no later than 45 days after rendition of the court's order."). Further, Appellant's Motion for Appellate Attorney's Fees and Costs is hereby **DENIED**. (BOWMAN, TOWBIN SINGER, and RODRIGUEZ, JJ ., concur.)

* * *

DONALD M. FRANCIS, Appellant, v. CITY OF TAMARAC, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE18-006600 (AP). July 30, 2020. Appeal of a final administrative order issued by City of Tamarac, Intersection Safety Program, Hearing Officer, Alexia Gertz. Counsel: Donald M. Francis, pro se, Appellant. Shana Bridgeman, Law Offices of Goren, Cherof, Doody & Ezrol, P.A., Ft. Lauderdale, for Appellee.

OPINION

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

* * *

VANESSA LOUIS, Appellant, v. EDSON DA SILVEIRA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE18-021794 (AP). L.T. Case No. CONO18-001793. September 1, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Steven P. Deluca, Judge. Counsel: Vanessa Louis, Pro se, Pompano Beach, Appellant. Edson Da Silveira, Pro se, Coconut Creek, Appellee.

OPINION

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

* * *

ALLEN E. POWELL, Appellant, v. BAYVIEW FLORIDA PROPERTIES, LLC, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-009786 (AP). L.T. Case No. COWE19-001486. September 11, 2020. Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Phoebee R. Francois, Judge. Counsel: Allen E. Powell, Pro Se, Dania Beach, for Appellant. Peter D. Weinstein, Cole, Scott, & Kissane, Plantation, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, the Judgment for Eviction entered on April 12, 2019 is hereby **AFFIRMED**.[1] (BOWMAN, TOWBIN SINGER, AND RODRIGUEZ, JJ., concur.)

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[1]Final actions of eviction proceedings under Florida law are tolled when a residential tenant is adversely affected by the COVID-19 emergency. Office of the Governor EXECUTIVE ORDER NUMBER 20-180 (August 1, 2020) extended until October 1, 2020, pursuant to EXECUTIVE ORDER NUMBER 20-211 (August 31, 2020).

* * *

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Volume 28, Number 8
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CIRCUIT COURTS—ORIGINAL

Guardianship—Incapacitated person in permanent and persistent vegetative state—Discontinuance of life-prolonging procedures—Petition for authorization for public guardian to consent to end life-prolonging procedures is granted where ward did not express wishes regarding use of life-prolonging procedures; uncontroverted evidence shows that ward has terminal condition and does not have reasonable probability of recovering capability; and guardian, family and physicians agree that ending-life-prolonging procedures is in best interests of ward

IN RE: GUARDIANSHIP OF LIZBETH YOUNG, An Incapacitated Person. Circuit Court, 2nd Judicial Circuit in and for Liberty County. Case No. 15-14-GA. June 15, 2020. David Frank, Judge.

ORDER GRANTING EMERGENCY PETITION FOR AUTHORIZATION TO WITHHOLD OR WITHDRAW LIFE-PROLONGING PROCEDURES

This cause came before the Court on the North Florida Office of Public Guardian's ("guardian") petition for authorization to consent to end life-prolonging procedures for Lizbeth Young ("ward") and for authorization of hospice services, and the Court having reviewed the petition and supporting affidavit, heard testimony of medical professionals and family members, and being otherwise fully advised in the premises, finds

PROCEDURAL HISTORY

The guardian filed the petition on May 27, 2020. On the same day it learned of the petition, the Court entered an order setting the matter for preliminary hearing. The preliminary hearing was conducted two days later, on Friday, June 5, 2020, via Zoom remote video-conferencing.

The guardian was instructed to serve notice of the petition and the preliminary hearing on the following persons:

(1) the patient;

(2) the patient's spouse;

(3) the patient's adult children;

(4) any guardian and any court-appointed health care decision-maker;

(5) any person designated by the patient in a living will or other document to exercise the patient's health care decision in the event of the patient's incapacity;

(6) the administrator of the hospital, nursing home, or other facility where the patient is located;

(7) the patient's principal treating physician and other physicians believed to have provided any medical opinion or advice about any condition of the patient relevant to this petition; and

(8) all other persons the petitioner believes may have information concerning the expressed wishes of the patient.

The Court expressly stated in the order setting the preliminary hearing that the ward's next of kin and primary treating physician should appear for the hearing even though they may agree with the request. The Court also advised the guardian to be prepared to prove facts sufficient to establish the need for the relief requested, including, but not limited to, facts to support the allegation that the patient lacks the capacity to make the requisite medical treatment decision.

Ms. Campbell, the guardian's executive director, and Ms. March, the guardian representative, appeared for the preliminary hearing via video. Ms. Mary Clarke Stone, the ward's older sister, appeared via telephone. The undersigned judge was physically present in the courtroom and the hearing was digitally court reported.

At the preliminary hearing, the Court gathered as much information as possible, but there were too many unanswered questions for the Court to rule. An expedited follow-up evidentiary hearing was set for Tuesday, June 11, 2020.[1]

At the evidentiary hearing, the Court considered the testimony of two treating physicians, a nurse case manager, the ward's next of kin, and the executive director of social services from Consulate Health Care. In addition, the Court requested that a visit with the ward be arranged. Because of the pandemic, the visit was conducted "virtually" with video and audio equipment. The Court was able to personally observe the condition of the ward's entire body and to see her reaction and lack of reaction to various stimuli.

After a brief recess to review all the relevant information, the Court issued its ruling from the bench. To prevent any delay, the Court advised the guardian that she did not have to wait for the written order, which might not be issued for several days, and that she could proceed immediately with her course of action.

FACTS

Most of the pre-guardianship information on the ward, Lizbeth Young, comes from an older sister, Mary Clarke Stone, and the guardianship case court file, particularly the examining committee that submitted reports on her capacity.

In the summer of 2014, and apparently after a rough seven-year stint in Tallahassee homeless shelters, Ms. Stone, referred Lizbeth to the Office of the Public Guardian. Ms. Stone believed her 64-year-old sister was suffering from "traumatic brain injury, delusion, poor health and [possibly] a stroke."

Ms. Stone reported that Lizbeth sustained a head injury, broken leg, and broken collarbone from an automobile accident when she was seven years old. She also reported that Lizbeth only began manifesting symptoms of mental illness after she was an adult. It appears that some of Lizbeth's family tried to care for her over the years, but lost contact with her at some point. There is also indication that some family members did not want anything to do with her. Lizbeth is long divorced from her husband and has two children and two sisters.

The Public Guardian filed petitions for court orders determining that Lizbeth was incapacitated and appointing a plenary guardian to manage her affairs.

Pursuant to the standard procedure, three mental health professionals were appointed to examine Lizbeth. The main and consistent diagnosis by all three examiners was delusional disorder. One noted "residuals from traumatic brain injury." The examiners differed on whether Lizbeth was having any difficulties with her "activities of daily living." It appears that Lizbeth was taking several medications at the time, but there was no history of drug or alcohol abuse. Lizbeth apparently believed she was married to an attorney who would come and get her and take care of her after he finished building their new home.

On January 22, 2015, the court issued an order determining Lizbeth to be incapacitated.

On the same day, the court entered an order appointing the Public Guardian Lizbeth's permanent plenary guardian of person and property. Among other duties, responsibilities, and powers, the court granted the guardian, "All powers or authority conferred by the laws of the State of Florida pursuant to Chapter 744, Florida Statutes, applicable to guardians of the person, including but not limited to: i. the power to make health care decisions on behalf of the Ward, including giving informed consent, refusing consent or withdrawing consent to any and all health care . . . ."

It appears that Lizbeth moved from a Tallahassee shelter to Barnums Assisted Living Facility in Bristol during the summer of 2015. Venue for the guardianship was changed to Liberty County by a court order issued on June 9, 2015.

In March of 2019, Lizbeth moved one final time to Consulate

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Health Care of Tallahassee, a nursing home.

Her stay at Consulate was interrupted by an acute episode, possibly an infection with a loss of blood pressure, that landed her at Tallahassee Memorial Healthcare on April 27, 2020.

FLORIDA LAW ON END-OF-LIFE MEDICAL DECISIONS

The Fourth District was the first to address whether a person had a legal right to control end of life medical issues in *Satz v. Perlmutter,* 362 So.2d 160 (Fla. 4th DCA 1978), approved, 379 So.2d 359 (Fla. 1980). In *Satz,* the State appealed a trial court order permitting the removal of an artificial life sustaining device from a competent terminally ill adult. *Id.* The Fourth District affirmed by adopting the reasoning of a New Jersey court that upheld the right based on the common law doctrine of informed consent—to be free from nonconsensual invasion of bodily integrity—and the regard for human dignity and self-determination that flow from the U.S. Constitution's right of privacy. *Id.* citing *Superintendent of Belchertown State Sch. v. Saikewicz,* 373 Mass. 728, 739, 370 N.E.2d 417, 424 (1977).[2] The *Satz* court was passionate about its rationale:

> It is all very convenient to insist on continuing Mr. Perlmutter's life so that there can be no question of foul play, no resulting civil liability and no possible trespass on medical ethics. However, it is quite another matter to do so at the patient's sole expense and against his competent will, thus inflicting never ending physical torture on his body until the inevitable, but artificially suspended, moment of death. Such a course of conduct invades the patient's constitutional right of privacy, removes his freedom of choice and invades his right to self-determine.

Id. at 164.

Reviewing the Fourth District's decision in *Satz,* the Florida Supreme Court phrased the specific question as, ". . .whether a competent adult patient, with no minor dependents, suffering from a terminal illness has the constitutional right to refuse or discontinue extraordinary medical treatment where all affected family members consent." 379 So.2d at 360. It answered yes and approved the ruling and rationale of the Fourth District. *Id.*

Shortly after *Satz,* the Florida Supreme Court addressed whether the same right applied to a person who is incapacitated in *John F. Kennedy Memorial Hospital, Inc. v. Bludworth,* 452 So.2d 921 (Fla. 1984). The court held that, "[t]his right of terminally ill patients should not be lost when they suffer irreversible brain damage, become comatose, and are no longer able to personally express their wishes to discontinue the use of extraordinary artificial support systems. *Id.* at 924.

In *Bludworth,* the Florida Supreme Court agreed with the reasoning and holding in a prior Second District opinion *In Re. Guardianship of Barry,* 445 So.2d 365 (Fla. 2d DCA 1984).

The *Barry* court importantly noted that ". . .decisions of this character have traditionally been made within the privacy of the family relationship based on competent medical advice and consultation by the family with their religious advisors, if that be their persuasion." *Id.* at 371. The Florida Supreme Court in *Bludworth* reinforced and formalized the principle. "The decision to terminate artificial life supports is a decision that normally should be made in the patient--doctor-family relationship. Doctors, in consultation with close family members are in the best position to make these decisions. The focal point of such decisions should be whether there is a reasonable medical expectation of the patient's return to a cognitive life as distinguished from the forced continuance of a vegetative existence." 452 So.2d at 926.

The *Barry* court then explained what must be done when the preferred, traditional course—honoring the request of a competent patient—is not an option. In such situations, the guiding principle must be "substituted judgment." The idea is simple. "Under this doctrine the court substitutes its judgment for what it finds the patient, if competent, would have done." *Id.* at 370-71. The Florida Supreme Court added, "However, before either a close family member or legal guardian may exercise the patient's right, the primary treating physician must certify that the patient is in a permanent vegetative state and that there is no reasonable prospect that the patient will regain cognitive brain function and that his existence is being sustained only through the use of extraordinary life-sustaining measures. This certification should be concurred in by at least two other physicians with specialties relevant to the patient's condition." 452 So.2d at 926.

At the same time, the Florida Supreme Court made it clear that trial courts must be readily accessible when there is a request or need for court intervention. "The courts, however, are always open to hear these matters if request is made by the family, guardian, physician, or hospital. Disagreement among the physicians or family members or evidence of wrongful motives or malpractice may require judicial intervention upon the filing of an appropriate petition. *Id.* at 926-27.

The Florida Supreme Court held that artificial nutrition and hydration also could be refused, along with other modes of medical life prolonging treatment. *In re Guardianship of Browning,* 568 So.2d 4, 17 (Fla. 1990). Also important in *Browning,* the court extended the application of the right to a person who is "unable to personally or directly exercise the right to refuse medical treatment," in addition to a patient who is deemed "comatose." *Id.* at 13.

After a period when the only guidance came from the courts, end of life medical decisions moved to statutory law with the passage of the Life-Prolonging Procedure Act of Florida in 1984. The statutory schemes evolved over the subsequent years as Legislatures struggled with specific procedures to address health care directives and health care surrogate decision-making.

One of these refinements is very relevant to the present matter. In 1990, the Legislature passed a bill that created a process for designating a surrogate, even though the patient had not done so, and was unable to do so. The statute established a priority of persons to be designated a "proxy." That law has been amended over time and is currently codified in Florida Statute 765.401.

Another relevant refinement in the same law was introduction of "best interests" analysis. Unfortunately, it was not clear how the analysis interacted with the "substituted judgment" analysis. The issue eventually was clarified by an amendment that adopted the procedure outlined in *Barry* where the Second District permitted a "best interests" standard when it was realistically impossible to determine the incompetent patient's wishes. 445 So.2d at 370. This is also now codified in Florida Statute 765.401 and 765.205(1)(b).

The primary controlling authority for the present matter, therefore, is Florida Statute 765.401. The statute encompasses the procedure to be used to enforce the right of an incapacitated person to end life-prolonging procedures with a proxy or surrogate using substituted judgment and best interests analyses. Fla. Stat. 765.401 (2019). The statute lists person who can be a proxy and make decisions for the incapacitated person in order or priority. First on the list is the "judicially approved guardian," the petitioner in this case. The statute outlines the procedure the proxy must follow:

> Before exercising the incapacitated patient's rights to select or decline health care, the proxy must comply with the provisions of ss. 765.205 and 765.305, except that a proxy's decision to withhold or withdraw life-prolonging procedures must be supported by clear and convincing evidence that the decision would have been the one the patient would have chosen had the patient been competent or, if there is no indication of what the patient would have chosen, that the decision is in the patient's best interest.

The statute incorporates two other statutes—Florida Statutes 765.205 and 765.305. Section 765.205 outlines the responsibilities of a health care surrogate, such as records procedures and applications

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for benefits. The most pertinent subsection for the present case is 765.205(1)(b), which is the responsibility to:

> Consult expeditiously with appropriate health care providers to provide informed consent, and make only health care decisions for the principal which he or she believes the principal would have made under the circumstances if the principal were capable of making such decisions. If there is no indication of what the principal would have chosen, the surrogate may consider the patient's best interest in deciding that proposed treatments are to be withheld or that treatments currently in effect are to be withdrawn.

Florida Statute 765.305 is also very pertinent to the current matter. That statute provides:

> In the absence of a living will, the decision to withhold or withdraw life-prolonging procedures from a patient may be made by a health care surrogate. . . . Before exercising the incompetent patient's right to forego treatment, the surrogate must be satisfied that: (a) The patient does not have a reasonable medical probability of recovering capacity so that the right could be exercised by the patient. (b) The patient has an end-stage condition, the patient is in a persistent vegetative state, or the patient's physical condition is terminal.[3]

Although not expressly incorporated into Section 765.401, Section 765.306 provides relevant and controlling guidance for the present matter:

> In determining whether the patient has a terminal condition, has an end-stage condition, or is in a persistent vegetative state or may recover capacity, or whether a medical condition or limitation referred to in an advance directive exists, the patient's primary physician and at least one other consulting physician must separately examine the patient. The findings of each such examination must be documented in the patient's medical record and signed by each examining physician before life-prolonging procedures may be withheld or withdrawn.

Although not implicated by the facts in the current case, Florida Statute 765.404 provides the criteria that must be specifically met if the patient's condition is "persistent vegetative state;" and Florida Statute 765.105 and Florida Probate Rule 5.900 provide a procedure that can be used by any interested person to judicially challenge the surrogate or proxy's decisions.

Finally, Florida Administrative Code 58m-2.009, subsections (6), (7), and (15) provide more specific guidance to a professional guardian charged with this unenviable responsibility. Guardians must follow the standards for decision-making and informed consent as outlined and must bring the matter to the court if the patient's past and current wishes are in conflict with each other or in conflict with the guardian's best interests analysis.

Under Florida's statutory scheme, we first look to the patient's directives, then the patient's wishes, and then the "bests interests" of the patient.

There is a paucity of guidance on best interests analysis in both Florida decisional law and regulatory authorities. In an article she co-authored, Professor Kathy Cerminara of Nova Southeastern's Sheperd Broad College of Law recommends guardians and others charged with the responsibility answer a set of questions to guide best interests decision-making. L Syd M Johnson and Kathy L Cerminara, *All things considered: Surrogate decision-making on behalf of patients in the minimally conscious state, Clinical Ethics,* 2020. The questions focus on chances for improvement, the ability to feel pain, pleasure, emotion, or intellectual stimulation, the ability to communicate and socialize, and the overall quality of life the patient is experiencing now and likely will experience in the future.

HEARING TESTIMONY

Linette Hubbell, MD, is an internal medicine hospitalist employed by Tallahassee Memorial Healthcare. Several doctors and medical professionals treated Lizbeth during her 45 day stay at the hospital, sometimes on a rotation basis. The two physicians who were the most engaged with Lizbeth were Dr. Hubbell and Dr. Murphy.[4] Dr. Hubbell is the closest thing to a current primary treating physician for Lizbeth.

Dr. Hubbell testified that Lizbeth has a "terminal condition" and the chances she will recover her capacity, or recover from her medical ailments, are "slim to none." She testified that, because Lizbeth could not swallow due at least in part to advanced dementia with aspiration pneumonia, nasogastric tube ("NGT") intubation was administered. During such intubation, a plastic tube is inserted through your nostril, down your esophagus, and into your stomach.

Dr. Hubbell testified that, although needed to provide Lizbeth nutrition and hydration, there are many harmful side effects that accompany intubation and immobilization. Illustrative examples of these harmful effects that have plagued Lizbeth include: serious infections, to include urinary tract infections that could move to her legs, a decreased (malnourished) abdomen, deep tissue injuries, fluid accumulation so bad it was seeping through the pores in her skin, skin ulcers, the swelling of her extremities, poor circulation, and gastrointestinal bleeding. She noted how fluid escaping the blood vessels moves into Lizbeth's surrounding body tissues and that in turn causes a dangerous drop in blood pressure.

Dr. Hubbell testified that brain scans indicate that portions of Lizbeth's brain have been damaged, likely due at least in part to previous strokes, and the damage has left her with almost no functional cognition. However, although there is no way to know for sure, it is certainly possible that Lizbeth can feel some level of pain and discomfort from the NGT and the other maladies noted above. She testified that NGTs are only intended to be in place for two weeks and Lizbeth's had been in place for three. The standard procedure would be to replace the NGT with a percutaneous endoscopic gastrostomy ("PEG"). A PEG is an endoscopic intubation in which a tube is passed into a patient's stomach through the abdominal wall. Dr. Hubbell warned that Lizbeth's medical profile is so fragile that it is likely physicians would decline to emplace a PEG tube for fear that Lizbeth would not "tolerate it." She noted that two gastrointestinal specialists concluded the same during consultations.

Dr. Hubbell testified that if the NGT is not removed, Lizbeth likely would continue to suffer the maladies described above and more. She likely would begin to bleed through her nose, which would become massively infected, which could then advance to her brain. And if removed, as part of a cessation of life-prolonging procedures, Lizbeth likely will die in two to seven days. She assured the Court that the end-of-life "comfort care" that would be provided at hospice, if she is transitioned, would be at least as good as the hospital, maybe better. They are the experts. Comfort care includes medications that are expected to keep persons who can feel pain comfortable, even though they will no longer be nourished or hydrated.

Jean Murphy, M.D., an experienced Tallahassee Memorial Healthcare internal medicine hospitalist with an additional specialty in hospice and palliative care, also treated Lizbeth. She testified via affidavit.

Both physicians testified that: Lizbeth has a diagnosis of advanced dementia with aspiration pneumonia, which is a terminal condition; Lizbeth's condition continues to deteriorate and there is no reasonable degree of medical probability that she will recover; Lizbeth does not have a reasonable medical probability of recovering capacity so that the right [to refuse life-prolonging procedures] could be exercised by her; Lizbeth is likely to expire in the near future; and that resuscitation will cause pain and suffering. Both recommend a Do-Not-Resuscitate order and hospice referral. They testified to within a reasonable degree of medical probability.

Dr. Hubbell concluded her testimony by saying the hospital has

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"done everything for [Lizbeth]" and continuing the current regime is "almost cruel."

Jason Stark is the Tallahassee Memorial Healthcare Case Management Discharge Registered Nurse Team Leader. He is a highly trained and experienced emergency medical technician and acute care case manager.

Nurse Stark testified that Lizbeth is unresponsive to touch and sound. He demonstrated this during the virtual hospital visit, *see below,* by yelling her name and tapping on her sternum.

Nurse Stark's description of Lizbeth was consistent with the Court's own observations during the virtual visit. She does make sounds; however, they do not appear to be an attempt to speak. Rather, they appear to be a guttural physiological reaction, like coughing, that is not driven by cognition. Nurse Stark testified that there were no indications that the blinking of her eyes, or even the full opening of her eyes, which occurred during the visit, was an attempt to cognitively communicate. He explained that it was the body's reflexes, akin to a "blank stare."

Paula Davis, the Director of Social Services for Consulate Healthcare of Tallahassee, also testified. She based her testimony both on personal knowledge of Lizbeth's life at the nursing home and a records review.

Ms. Davis testified that Lizbeth lived at Consulate for approximately one year before being admitted to Tallahassee Memorial Healthcare. She noted that Lizbeth's quality of life was poor; "a 4" on a scale of 1-10. There were a few occasions when Lizbeth would join a group activity, like a sing-a-long. But she mostly was quiet and kept to herself. She was able to individually manage her wheelchair, but she did not take advantage of that and typically stayed in the same area.

Ms. Davis testified that Lizbeth was a 3 out of 15 on the Brief Interview for Mental Status (BIMS) a basic tool for measuring cognitive ability. She was considered a "maximum assist," which meant she needed assistance with all her activities of daily living. She was totally dependent on the care she received at the nursing home.

Three family members testified—Lizbeth's sister Mary Clarke Stone, Lizbeth's daughter Cynthia Young Bocus, and Lizbeth's son Gerald Young. They, plus Lizbeth's other sister, are the relatives closest in degree to Lizbeth who are still living.

All three family members testified that only Ms. Stone attempted to occasionally stay in touch with Lizbeth over the years. Lizbeth's children wanted little or nothing to do with her. The last time Ms. Stone saw Lizbeth was four years ago. The last time Ms. Bocus spoke with Lizbeth was approximately 15 years ago. Ms. Bocus feels that Lizbeth "abandoned her" when she was 14 years old. The last time Mr. Young was with Lizbeth was approximately 25 years ago. Mr. Young stated that, at one point, Lizbeth was "in denial of having children at all."

After hearing the testimony of the three medical professionals, all three family members testified that they do not want Lizbeth to suffer; they want Lizbeth to pass "peacefully;" and they consent to the withdrawing and withholding of life-prolonging procedures.

There was no testimony or documents that indicated any end-of-life preferences expressed by Lizbeth while she was competent.

THE VIRTUAL HOSPITAL VISIT

Due to the excellent work of Tallahassee Memorial Healthcare's general counsel, Murray Moore, Public Guardian Karen Campbell, and the dedicated doctors and nurses who made time to participate during a pandemic with very little notice, the Court was able to (remotely) visit Lizbeth. The Court considered seeing Lizbeth in her current condition extremely important to this process.

Lizbeth's face and head were mostly motionless and the NGT tube was prominently positioned over and through her nose. She made occasional movements with her eyes, as described above, including a brief period of time when she fully opened them. When she did briefly open her eyes, they stared blankly straight ahead as if looking at a fixed point on the wall. The only sound she made was a very soft grunting noise once or twice. She did not respond in any way when Nurse Starke attempted to stimulate her.

Lizbeth's body appeared malnourished. Her skin was discolored and swollen at various places. There were needles inserted into her body at various points. The skin ulcers were clearly visible and covered large portions of her body. Her overall appearance was gruesome.

FINDINGS

We should start by noting that this case is not a Terri Schiavo-like scenario in which family members are fighting over the proper course. Here, the properly appointed guardian is requesting court approval to give consent to end life-prolonging procedures that currently are being administered to her ward, Lizbeth Young.

Nonetheless, there is no other scenario, other than the present, in which a circuit civil judge must decide whether to approve a course of action that will allow a human to die. The facts of this case, simply put, are heart-wrenching. The primary treating physician described what's happening to Lizbeth as "almost cruel." That may have been an understatement.

We must be mindful of the public policy that decisions such as these are best left to the patient, family and physician without delays that result when a court must intervene. Indeed, the guardian arguably had everything she needed to make the call without filing a petition with the Court. On the other hand, Florida law requires trial courts to be readily assessable to make such decisions if needed *or requested.* The guardian has requested approval of the serious and difficult action she will take.

The controlling procedure and analysis this Court must apply is fairly well set forth. This is due in large part to the wealth of appellate case law and direction generated by the Schiavo case, and because Florida was one of the first states to engage the issue of surrogate medical decision-making. The process cannot be driven by emotion. Neither the feelings of the judge and guardian, nor the feelings of the family, control. It is the decision the patient makes or would make, plain and simple. The Court must strictly apply Florida and federal law to figure that out. *In re Guardianship of Schiavo,* 916 So. 2d 814, 818 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D743b]. "The trial judge must make a decision that the clear and convincing evidence shows the ward would have made for herself. § 765.401(3). It is a thankless task, and one to be undertaken with care, objectivity, and a cautious legal standard designed to promote the value of life." *Id.* at 818.

In this case there is a total lack of evidence regarding the wishes of the ward, Lizbeth Young. As discussed above, that means the guardian and the Court are required to make a "best interests" determination.

Two very qualified physicians have testified and documented in Lizbeth's medical records that she has a terminal condition and does not have a reasonable medical probability of recovering capacity.

The clear and convincing evidence is that ending life-prolonging procedures is in the best interests of Lizbeth.

The evidence that artificially prolonging Lizbeth's life is not in her best interests includes: the utterly miserable quality of life she will endure until she passes if intubation continues, the almost non-existent possibility that she could medically recover, the likelihood that she will expire in the near future even if intubation continues, the pain and suffering she might feel from intubation and immobility and the attendant harmful side effects from both. Finally, Lizbeth's guardian, physicians, and family agree that ending life-prolonging procedures is in her best interests.

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What evidence could there be that ending life prolonging procedures is *not* in Lizbeth's best interest? Here, there are no known religious objections, no family objections, no indication that Lizbeth would want to artificially prolong her life.

One possibility is that ending intubation—nutrition and hydration—would cause Lizbeth to "starve," which would be painful. This was an issue in the Schiavo case that generated a multitude of studies and attention. However, it is the uncontroversial conclusion of much learned opinion that the assumption is false.[5] Moreover, Dr. Hubbell testified that the expert comfort care at hospice would include a combination of medications and care that would address any sensation of pain that could be related to the cessation of nutrition and hydration.[6]

Accordingly, it is

ORDERED and ADJUDGED that the petition is GRANTED. The guardian is authorized to consent to the withdrawal and withholding of life prolonging procedures administered to the ward, including the removal of the NGT. The guardian is further authorized to consent to and direct that medical personnel not resuscitate Lizbeth Young. The guardian's request for approval of hospice services is also GRANTED.

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[1]Between the preliminary hearing and the final evidentiary hearing, the Court consulted with Kenneth W. Goodman, PhD, FACMI, FACE. Dr. Goodman is the founder and director of the University of Miami Miller School of Medicine's Institute for Bioethics and Health Policy and co-director of the university's Ethics Programs. He directs the Florida Bioethics Network and chairs the UHealth/University of Miami Hospital Ethics Committee and the Adult Ethics Committee for Jackson Memorial Health System. He is an expert on issues surrounding end-of-life medical decisions, especially within the context of Florida's specific statutory framework. The Court is grateful for the generous amount of time Dr. Goodman spent discussing the medical, moral, and legal issues generated by "life-prolonging procedures," and the wisdom he shared.

[2]Later, Florida courts also invoked the Florida Constitution's right to privacy adopted on November 4, 1980 as Article I, section 23, of the Bill of Rights to the Florida Constitution. *In re Guardianship of Barry,* 445 So.2d 365, 370 (Fla. 2d DCA 1984).

[3]Florida Statutes 765.101 defines the three conditions as follows:

(4) "End-stage condition" means an irreversible condition that is caused by injury, disease, or illness which has resulted in progressively severe and permanent deterioration, and which, to a reasonable degree of medical probability, treatment of the condition would be ineffective.

(15) "Persistent vegetative state" means a permanent and irreversible condition of unconsciousness in which there is:

(a) The absence of voluntary action or cognitive behavior of any kind.

(b) An inability to communicate or interact purposefully with the environment.

(22) "Terminal condition" means a condition caused by injury, disease, or illness from which there is no reasonable medical probability of recovery and which, without treatment, can be expected to cause death.

[4]The guardian confirmed that the observations, prognoses, and conclusions of both doctors were documented in Lizbeth's medical records.

[5]C. Christopher Hook, M.D. and Paul S. Mueller, M.D., The Terri Schiavo Saga: The Making of a Tragedy and Lessons Learned, Mayo Clinic Proceedings, November 2005, Volume 80, Issue 11, Pages 1449-1460.

[6]The definition of life-prolonging procedures is, "any medical procedure, treatment, or intervention, including artificially provided sustenance and hydration, which sustains, restores, or supplants a spontaneous vital function. ***The term does not include the administration of medication or performance of medical procedure, when such medication or procedure is deemed necessary to provide comfort care or to alleviate pain.*** Fla. Stat. 765.101(12) (2019) (emphasis added)

* * *

Discovery—Non-parties—Foreign subpoenas—Interstate Depositions and Discovery Act—Motion to compel non-party Florida corporation to produce documents for use in foreign litigation is denied—Documents sought by plaintiff are either not included in wording of subpoena or not relevant to underlying case

HAMPTON BARRINGER LUZAK, Plaintiff, v. MERRILL B. LIGHT, MERRILL U. BARRINGER, as Personal Representative of the Estate of Paul Brandon Barringer, II, J. RANDOLPH LIGHT, JR., MERRILL B. LIGHT as putative trustee of the Paul B. Barringer, II, Revocable Trust dated December 4, 1998, and MERRILL B. LIGHT as Trustee of the Merrill Barringer Light Revocable Trust, Defendants. IN THE MATTER OF: ESTATE OF PAUL B. BARRINGER, II. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 19-342-CA. August 5, 2020. David Frank, Judge. Counsel: Christina L. Cutillo, Tallahassee; and James R. Gilreath and William M. Hogan (pro hac vice), Greenville, SC, for Plaintiff. Kelly Overstreet Johnson, Tallahassee; Charles B. Molster, III, Washington, DC; Alice F. Paylor, Charleston, SC; J. Ashley Twombley, Beaufort, SC; Douglas L. Kirby, Tallahassee; and Edward J. Fuhur (pro hac vice) and Johnathon Schronce (pro hac vice), Richmond, VA, for Defendant.

AMENDED ORDER DENYING PLAINTIFF'S AMENDED MOTION TO COMPEL

This cause came before the Court on plaintiff's Amended Motion to Compel Production of Documents, and the Court having reviewed the motion; the subject subpoena; the operative complaint in the underlying action pending in South Carolina; the responses to the motion, and all other materials submitted in support of or in opposition to the motion, heard argument of counsel, and being otherwise fully advised in the premises, finds

Procedural History

Plaintiff has been litigating an internecine family dispute for more than five years in states other than Florida, most recently in South Carolina. As part of the dispute in South Carolina, plaintiff issued a subpoena for documents in August of 2017 to Coastal Forest Resources Company ("CFRC"), a non-party corporate entity located in Gadsden County, Florida.

Because CFRC, the entity in possession of the documents, resides in Florida, the plaintiff was required to follow the uniform law adopted by Florida that covers out of state depositions and document discovery. That operative law was adopted in 2019—the Interstate Depositions and Discovery Act, which is set forth in Florida Statute 92.251.

The statute requires the moving or enforcing party to first process the subpoena with the clerk of court in the Florida county where the person or entity being subpoenaed is located, sometimes referred to as "domesticating" the subpoena. Fla. Stat. 92.251(3) - (4) (2019). The subject subpoena apparently was processed with the Gadsden County Clerk of Court on September 8, 2017. There have been no objections to the domestication of the subpoena or service on CFRC by any parties to the litigation.

On April 18, 2019, plaintiff filed a Motion to Compel Production of Documents in this Court, asserting that CFRC failed to comply with the subpoena.

On September 26, 2019, the Court heard the motion and issued an order granting in part and denying in part. The request to compel production of documents described in paragraph 22 was granted. The ruling on the request to compel production of documents described in paragraphs 42 and 43 reads as follows:

> CFRC's objections to Plaintiff's requests nos. 42 and 43 within the Subpoena attached as Exhibit A to the Motion to Compel Production of Documents are SUSTAINED. However, Plaintiff is permitted to provide CFRC with clarification as to the specific categories and types of documents that Plaintiff is requesting under requests nos. 42 and 43. Such clarified requests must be relevant to the sibling dispute in the South Carolina litigation. This Court reserves jurisdiction to address any additional objections to these requests after Plaintiff has provided such clarification to CFRC.

Order on Plaintiff Hampton B. Luzak's Motion to Compel Production of Documents at 2.

On February 14, 2020, plaintiff filed the pending Amended Motion to Compel Production of Documents ("amended motion"). It raises three issues: "(1) the documents requested in paragraph 22 of Plaintiff's subpoena originally issued in South Carolina on July 21, 2017; (2) the documents requested in Plaintiff's 'Clarification of CFRC Subpoena Paragraphs 42 and 43 Pursuant to Order of September 26, 2019 of the Honorable David Frank'; and (3) the last three documents

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set forth on CFRC's privilege log submitted October 7, 2019 which documents CFRC withheld from production." The parties have resolved by agreement issue #3 regarding documents listed on CFRC's privilege log.

The first hearing on the amended motion was on June 22, 2020. At that hearing the Court did not rule on the matter; it only discussed the appropriate procedure to be followed with counsel. On June 23, 2020 the Court issued its order addressing the procedure to follow pursuant to the interstate uniform law, Florida's Section 92.251. The Court gave the plaintiff the option of pursuing the matter with this Court, the discovery state court, or taking it back to the trial state court in South Carolina.[1]

Plaintiff choose to pursue the matter with this Court and set a final hearing for July 23, 2020. At the hearing, all counsel of record were given the time they requested to present evidence and argue their positions. This order follows.

Florida Law Applies

When considering a request to enforce an out-of-state subpoena, Florida courts apply Florida law. The controlling statute reads:

> An application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under subsection (3) must comply with the statutes and rules of this state and be submitted to the court in the county in which discovery is to be conducted.

Fla. Stat. 92.251(6) (2019).

The drafters of the uniform law noted more specifically:

> Evidentiary issues that may arise, such as objections based on grounds such as relevance or privilege, are best decided in the discovery state under the laws of the discovery state (including its conflict of laws principles).

Comments to the Uniform Interstate Depositions and Discovery Act drafted by The National Conference of Commissioners on Uniform State Laws and by it Approved and Recommended for Enactment in All the States at its Annual Conference Meeting, Pasadena, California, July 27-August 3, 2007.

Florida law mandates restraint when compelling private or financial information from non-parties, and such discovery is permitted only where the need for the information outweighs the privacy rights of the non-party. *Westco, Inc. v. Scott Lewis' Gardening & Trimming, Inc.,* 26 So.3d 620 (Fla. 4th DCA 2009) [35 Fla. L. Weekly D58a]. In Florida, discovery is limited to those matters relevant to the litigation as framed by the parties' pleadings. *Katz v. Riemer,* No. 3D19-1271, 2020 WL 2176639 (Fla. 3d DCA May 6, 2020) [45 Fla. L. Weekly D1093a]; *Diaz-Verson v. Walbridge Aldinger Company,* 54 So.3d 1007 (Fla. 2d DCA 2010) [36 Fla. L. Weekly D26b] ("Here, the pleadings, i.e., the second amended complaint, do not establish the relevance of any of Diaz-Verson's personal financial information, and the unsworn representations of counsel at a hearing, even if somehow properly considered, cannot create relevance where it does not otherwise exist.")

Issue #1—Paragraph 22 of the Subpoena

In paragraph 22, plaintiff requested the following documents from CFRC:

> Any and all documents, including emails and/or other correspondence, reflecting or relating to any loans or other advancement of funds by CFRC to Randy Light or to any creditor or other obligee of Randy Light.

Subpoena at 5.

Here, there was no need to consider relevancy or privilege or any of the other myriad boilerplate objections initially asserted by CFRC. Those objections were overruled at the first hearing. The response asserted by CFRC at the final hearing was that there were no documents responsive to the request *as worded.*

When plaintiff was asked at the final hearing to expand and specifically describe exactly what she is seeking in paragraph 22, the answer was a very long list of various corporate documents related to the company's payment(s) of Merrill B. Light's attorney's fees incurred during previous litigation in Virginia.

Unfortunately for plaintiff, the many items she seeks regarding these payments are simply not included in the wording of paragraph 22, thus giving CFRC the opportunity to respond with "none."[2] Hence, there is nothing to compel.

Plaintiff may serve another subpoena, pursuant to Section 92.251 and the Florida Rules of Civil Procedure, and specifically request the documents concerning attorneys' fees in the Virginia litigation that plaintiff's counsel described at the final hearing. Defendants can then assert their objections, if any, also pursuant to the Florida Rules of Civil Procedure. Any disputes that cannot be resolved directly by the parties can be brought back to this Court.

Issue #2 - Paragraphs 42 and 43 of the Subpoena

Plaintiff's Clarification Request (paragraphs 42 and 43) asked for the following documents and information from CFRC:

> For the fiscal years ending September 29, 2013 and September 28, 2014, produce the following Documents of CFRC and its subsidiaries:
>
> (a) the cash disbursements journal or functional equivalent showing expenditures of CFRC and its subsidiaries; (b) the bank statements, with monthly cash reconciliation, of CFRC and its subsidiaries for accounts on which disbursements are drawn covering the above periods to include copies of cancelled checks and any other withdrawal documents that are a part of the bank statements provided by the financial institution(s), or allow access by Plaintiff's designee to the information in (b); (c) trial balance from CFRC and each subsidiary company; and (d) all form 1099s issued for those periods from CFRC and each subsidiary, with leave to request additional source documents, to be identified by Plaintiff, related to information referenced in (a) through (d) above after review of (a) through (d) above.
>
> The cash disbursements journal or its functional equivalent, requested in (a) above, should contain the following information at a minimum: date of disbursement, payee, dollar amount, reference number, and CFRC or subsidiary account number to which the expenditure was charged.

Before addressing the inevitable overly broad and burdensome objections, the Court analyzed the relevancy of the information sought in the context of the operative complaint from the underlying South Carolina case. The Court reviewed every count and claim identified by plaintiff at the hearing as her basis for relevancy of the information. For the reasons stated at the hearing, none of the counts or claims in the complaint established the relevancy required to overcome CFRC's right to privacy.

Interestingly, plaintiff also contended that the information sought here is relevant to show Mr. and Ms. Light's history of committing fraud and generally conspiring to do bad things The idea being if they acted that way in the past, you can surmise that they have acted that way in the present case.

Such evidence is classic bad character or propensity evidence. With very limited exceptions that do not apply here, evidence of a person's character is "patently inadmissible" in Florida to prove that the person acted in conformity with it on a particular occasion. *Cruz-Cedeno v. State,* 294 So.3d 1007 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D932a].

The relevance objections to paragraphs 42 and 43 are SUSTAINED.

Accordingly, it is

ORDERED and ADJUDGED that the amended motion is

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DENIED.

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[1]Although not specifically addressed by a Florida court, the comments to the uniform law conference that drafted the Interstate Depositions and Discovery Act give an enforcing party this choice. The comments state, "Nothing in this act limits any party from applying for appropriate relief in the trial state. Applications to the court that affect only the parties to the action can be made in the trial state. For example, any party can apply for an order in the trial state to bar the deposition of the out-of-state deponent on grounds of relevance, and that motion would be made and ruled on before the deposition subpoena is ever presented to the clerk of court in the discovery state." This Court firmly believes that addressing relevance objections with the trial state court is the better approach.

[2]Technical objections based on semantics can be a dodge frowned upon by the Court but are not per se improper. The use of the phrase "obligee" of Mr. Light, rather than just asking for information on Ms. Light, was part of the problem. To expedite the matter, the Court asked the parties if they were willing to have the Court rule on the items plaintiff seeks as clarified, but CFRC declined.

* * *

Criminal law—Sale and possession of cocaine— Sentencing—Guidelines—Downward departure—Defendant's two sales of his personal use cocaine to undercover detective within 24-hour period during time of financial strain was unsophisticated and isolated act for which defendant has shown remorse—Downward departure sentence is justified—Fact that defendant has prior criminal history does not preclude finding that offense was isolated incident where there was significant temporal break not occasioned by incarceration since prior offenses—Where defendant is 58 years old and has suffered a recent stroke, increased risk to defendant's health if incarcerated during COVID pandemic also justifies downward departure

STATE OF FLORIDA, v. LARRY BERNARD MATHIS, Defendant. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 2018-CF-13243, Division CR-E. October 2, 2020. Tatiana R. Salvador, Judge. Counsel: Jesse Nardy, State Attorney's Office, Jacksonville, for State. A. Russell Smith, Law Offices of A. Russell Smith, P.A., Jacksonville, for Defendant.

WRITTEN FINDINGS REGARDING DOWNWARD DEPARTURE SENTENCE

This matter came before the Court for sentencing on September 25, 2020, following the entry of Defendant's open plea to the Court on January 21, 2020 to two counts of sale of cocaine, each a second degree felony, and one count of possession of cocaine, a third degree felony. This Court considered the Defendant's sentencing memorandum, filed herein on September 22, 2020, the testimony and evidence presented at the sentencing hearing on September 23, 2020, the arguments presented by counsel, and the legal authority presented, and this Court finds and rules as follows:

As to the crimes charged and for which the Defendant pled guilty, the Defendant scores 24.45 months as a minimum in prison under the sentencing guidelines, and up to a maximum of 15 years in prison on each of counts 1 and 2, and up to a maximum of 5 years in prison on count 3. The Defendant is 58 years old and, during the pendency of this case before the Court, suffered a stroke, which, along with the COVID pandemic, caused a delay between the acceptance of the plea and the rendition of sentence.

In the instant case, the parties stipulated to the facts as learned during the discovery depositions. On December 5, 2018, a detective with the Jacksonville Sheriff's Office ("JSO") began cold-calling telephone numbers stored on her cell phone, which numbers she had acquired from prior police investigative work in 2013-2014. On that day, the detective made telephone contact with the Defendant. She pretended to be a friend from his past, and inquired about buying drugs. On that same date, the detective went to Defendant's house and he sold her 1 gram of cocaine for $60, which sale was captured on surveillance video. The detective called Defendant again, asking for more drugs, and the next day, she went to Defendant's home and again the Defendant sold her 4.3 grams of cocaine for $180. The second sale was also captured on surveillance video.

The detective confirmed in deposition that JSO had no intelligence or probable cause to suspect that Defendant was selling drugs. Defendant was not being targeted as a drug seller. Moreover, phone records obtained demonstrated that the phone number called by the detective was not owned by or associated with Defendant in 2013-2014, but belonged to another named individual. Defendant just happened to answer the detective's call. Nonetheless, when asked for drugs, Defendant sold cocaine to the detective.

Defendant testified that he sold the drugs to the detective because he was under financial pressure at the time, occasioned by his wife's metastatic breast cancer diagnosis and treatment, his sister's breast cancer diagnosis and treatment, and another sister's care and treatment for paranoid schizophrenia—all of whom he helped to support financially, among other family members. Additionally, the Defendant testified that he sold drugs to the detective which were for his personal use. While Defendant has been able to maintain continuous employment for 14 years, he admitted that he was addicted to cocaine and unable to stay clean. Indeed, when he was arrested later pursuant to a warrant, additional cocaine was found in his pocket, which formed the basis for the charge in count 3.

Moreover, Defendant's prior criminal record demonstrates a long-standing problem with drugs—he has three prior convictions from 1997, 2006 and 2008 for possession of cocaine. In addition to those convictions, he has four older felony convictions from 1988-1989, over 30 years ago.[1] All of these convictions were included on the Defendant's sentencing guidelines score sheet. While the Defendant points out that his last scoreable offense was his conviction for possession of cocaine on January 8, 2008 (more than 10 years before the instant offenses), he did not complete his probationary sentence in that matter until July 2009—putting it within 10 years of December 5-6, 2018, the date of the instant offenses. Therefore, Defendant's prior convictions, no matter how old, have been properly included on his sentencing guidelines score sheet.

At the sentencing hearing, the State recommended a term of imprisonment pursuant to the guidelines. The Defendant requested a downward departure based upon one statutory factor under Florida Statute 921.0026(2) and one non-statutory factor. Defendant asserts that the instant offense was committed in an unsophisticated manner and were isolated incidents for which the Defendant has shown remorse. *See Florida Statute* 921.0026(2)(j). Additionally, the Defendant asserted that the COVID pandemic and its resultant risks to Defendant if incarcerated with the Department of Corrections also justified a downward departure of the guideline sentence.

A trial court's decision whether to depart downward from the sentencing guidelines is a two-part process. *Banks v. State,* 732 So. 2d 1065 (Fla. 1999) [24 Fla. L. Weekly S177a]. First, the trial court must determine whether there is a valid legal ground for a downward departure and adequate factual support for the ground(s) for departure; and second, the Court must determine whether departure is the best sentencing option for the Defendant in the pending case. *Id.* at 1067. The main questions are: 1) whether the Court *can* depart from the guidelines; and 2) whether the court ultimately *should* depart from the guidelines. Whether departure from sentencing guidelines is the best sentencing option for a defendant is a judgment call within the sound discretion of the trial court and will be sustained on review absent an abuse of discretion, which occurs only where no reasonable person would agree with trial court's decision. *State v. Stanton,* 781 So. 2d 1129 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D527a]. "When a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." *Nibert v. State,* 574 So. 2d 1059, 1062 (Fla. 1990); *see also Davis v. State,* 698 So. 2d 1182, 1191

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(Fla. 1997) [22 Fla. L. Weekly S331a] (reaffirming that "a trial court must find that a particular mitigating circumstance has been proved whenever the defendant has presented a 'reasonable quantum of competent, uncontroverted evidence' of that mitigating circumstance").

In this matter, this Court finds that, based on the evidence and arguments presented at the sentencing hearing and upon this Court's review of the court record, there exists a statutory mitigating circumstance under Florida Statute 921.0026 that reasonably justifies a downward departure of the guideline sentence in this matter, to wit: the offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse. *See Florida Statute* 921.0026(2)(j). The Defendant's sale of cocaine to the detective was unsophisticated—"artless, simple and not refined." *State v. Salgado,* 948 So. 2d 12, 17 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2801b]." He did not actively seek out an opportunity to sell drugs, but rather was cold-called by the detective at a number that was not known by law enforcement to be his. He had the misfortune of answering the call. Additionally, once he agreed to sell cocaine to the undercover detective—a stranger—he invited her to his home on both occasions to pick up the drugs, as opposed to meeting in another location away from his home and family—an unsophisticated act. The two sales, which occurred within 24 hours of each other and with the same undercover detective, do not demonstrate "several distinctive and deliberate steps" on Defendant's part sufficient to demonstrate sophistication. *State v. Fureman,* 161 So. 3d 403, 405 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D408b]. Rather, without prior intelligence or probable cause to believe Defendant was involved in drug activity, law enforcement contacted him by chance and he agreed to sale his personal use cocaine for some money during the 2018 December holiday season, when he was under the financial strain of his wife's and sisters' medical care and support. *See State v. Randall,* 746 So. 2d 550 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D2826a] (finding that sale of cocaine on four instances to the same confidential informant over a period of several days in December at a time when Defendant was trying to provide for his family constituted unsophisticated and isolated incidents leally sufficient to support a downward departure sentence). Thus, this Court finds that the Defendant established by a preponderance of the evidence that his acts were unsophisticated.

Likewise, this Court also finds that Defendant's acts were isolated. The trial court's decision that a criminal offense is or is not an isolated incident is a factual issue, which will be sustained by the appellate courts if competent, substantial evidence supports the finding. *Childers v. State,* 171 So. 3d 170, 172 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1728a]. While there were *two* sales of cocaine in the instant case, this Court nonetheless finds they were isolated, as they occurred to the same detective within a 24-hour period of time. *See Randall,* 746 So. 2d at 552 (affirming the trial court's finding that the four sales "constituted isolated incidents, close in time, to the same person," justifying a downward departure sentence). Defendant's actions did not constitute multiple incidents over a period of months, or multiple offenses over a course of time, which would negate a finding that the incidents were isolated. *See State v. Walters,* 12 So. 3d 298, 301 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D1209a] (finding acts were not isolated where defendant committed fifty separate money laundering transactions over the course of six months); *State v. Strawser,* 921 So. 2d 705, 707 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D421a] (finding that an offense could not be isolated were there were multiple incidents involving one victim over a period of months).

This Court recognizes that the Defendant has several prior felony convictions, which the State argues would prohibit this Court from finding that the Defendant's acts were isolated. Indeed, an "*extensive* criminal history" precludes finding that an offense is an "isolated incident." *Wallace v. State,* 197 So. 3d 1204, 1205 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D1668b] (emphasis added). However, it is incorrect to conclude that the existence of a prior criminal record per se negates a finding of "isolated incident" or precludes a downward departure sentence. *Id.* "Trial judges . . .may consider the time between offenses, the types of offenses, and whether they suggest a pattern." *Id.* "[T]here is no bright-line rule for deciding whether an offense is an isolated incident." *State v. Gaines,* 971 So. 2d 219, 221 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D133a]. In this case, four of the Defendant's felony convictions are over 30 years old, three of which were obtained on the same day, and for which he received concurrent sentences. And his last felony convictions, all for possession of cocaine, occurred in 1997, 2006 and 2008—still a significant temporal break between the convictions and his instant offenses. And the temporal break was not occasioned because the Defendant was incarcerated—he was sentenced to probation on his last felony conviction, which he successfully completed in July 2009. Since that time, he has maintained employment, supported his family, and during the last two years while out on bail in this matter, has not violated any conditions of his pre-trial release. Therefore, this Court finds that the Defendant has established by a preponderance of the evidence that this incident does not suggest a pattern, but was isolated.

Lastly, in finding that Florida Statute 921.0026(2)(j) justifies a downward departure sentence herein, this Court also finds that the Defendant is remorseful. The uncontroverted testimony established that the Defendant has taken responsibility for his actions and was deeply remorseful for committing these acts and putting his family in jeopardy. He did not contest or deny that he sold the drugs, and instead apologized for doing so.

The mitigating factor delineated in Florida Statute 921.0026(2)(j) would alone justify a downward departure sentence, however the Defendant maintains that another mitigating factor justifies a departure. Defendant asserts that his particular and increased risk of being incarcerated in the Department of Corrections during the COVID pandemic, as a 58-year-old man with health issues occasioned by his recent stroke, also supports a departure sentence. While this Court has not previously based a downward departure on the risks of COVID, or for that matter, has not previously based a downward departure to date on any non-delineated mitigating factor, the plain language of Florida Statute 921.0026(1) provides that "[m]itigating factors to be considered include, *but are not limited to,* those listed in subsection (2)." (emphasis added). And following that, Florida Statute 921.0026 (2) provides: "Mitigating circumstances under which a departure from the lowest permissible sentence is reasonably justified include, *but are not limited to*:" subparagraphs a-n, which outline the statutory mitigating factors (emphasis added). Additionally, the Florida Supreme Court has recognized that "[s]ection 921.0026(2) sets out a *non-exclusive list of mitigating circumstances* under which a downward departure sentence is reasonably justified for non-capital felonies committed on or after October 1, 1998." *State v. Chubbuck,* 141 So. 3d 1163, 1169 (Fla. 2014) [39 Fla. L. Weekly S437a] (emphasis added); *see also Voight v. State,* 993 So. 2d 1174, 1176 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D2607f] (holding that a downward departure for reasons not delineated by statute is "permissible if supported by competent, substantial evidence and not otherwise prohibited."). Thus, this Court considered the Defendant's evidence and arguments relative to the non-delineated mitigating factor.

The Defendant established by competent, substantial evidence that he is 58 years old and suffered a stroke during the pendency of these proceedings, thus putting him in a category of individuals at greater risk of mortality from COVID, due to his particular compromised immunities. While our county jail currently has managed to keep the

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COVID outbreak at bay—as of September 22, 2020, there were only 12 COVID positive inmates in the three facilities that house the 2500+ inmates in Duval County—the numbers and risk in the Department of Corrections is greater. Approximately 16,000 of the 80,000+ inmates and 3062 staff in DOC have tested positive as of the last report, and some have died. Therefore, the Court also finds that Defendant's increased risk, due to his age and health condition, during this world-wide COVID pandemic justifies a downward departure herein.

[1]According to the Judgments and Sentences provided by the State, the first felony conviction occurred on July 19, 1988. Thereafter, the remaining three felony convictions occurred on the same day, August 28, 1989, and the sentences for same were imposed concurrently.

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Municipal corporations—Utilities—Action against city for breach of contract based on alleged overbilling for water services and conversion of water service deposits—Dismissal is appropriate where complaint failed to identify contract allegedly breached, contract was not attached to complaint, and complaint alleged an amalgamation of at least seven breaches within single count

GEORGE SUAREZ, TANIA SUAREZ, ROSCOE PENDLETON, ADEL RAAD, CHARAF RAAD, STEVEN BARRETT, NATASHA ERVIN, TAXES BY NATASHA ERVIN, a Florida Corporation and ALFONSO J. ERVIN, III, Plaintiffs, v. CITY OF OPA-LOCKA, FLORIDA, a municipal Corporation, Defendant. Circuit Court,11th Judicial Circuit in and for Miami-Dade County, Circuit Civil Division, Complex Business Litigation. Case No. 2017-008285-CA-01 (43). September 17, 2020. Michael A. Hanzman, Judge. Counsel: Michael A. Pizzi, Jr., Michael A. Pizzi, Jr., P.A., Miami Lakes; Benedict P. Kuehne and Michael T. Davis, Miami; and David P. Reiner, II, Reiner & Reiner, P.A., Miami, for Plaintiffs. Detra Shaw-Wilder, Rachel Sullivan, Robert J. Neary, and Dwayne A. Robinson, Kozyak Tropin & Throckmorton LLP, Miami; and Burnadette Norris-Weeks, Opa-Locka Municipal Complex, Opa-Locka, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs, eight individuals and one business residing/located in the City of Opa Locka,[1] bring this action "individually and on behalf of thousands of similarly situated aggrieved residents, businesses, and City water customers . . ." advancing claims arising out of what they allege to be "the City's flawed and corrupt water billing system." Second Amended Complaint ("SAC") pp. 1-2. Specifically, Plaintiffs allege that they, and the members of the classes they seek to represent, have: (a) "for years been subjected to government-prepared inflated water bills and [the] theft of customer's deposits due to water meters that do not work;" and (b) that City officials and employees "do not read the water meters" but rather "artificially inflate customers water bills by flawed estimates and guessing . . . ." SAC p. 2. The SAC pleads claims for "Breach of Contract" (Count I), Conversion (Count II), and Preliminary and Permanent Injunction (Count III).

Defendant, the City of Opa-Locka, Florida ("Defendant" or "City"), moves to dismiss the SAC, insisting that: (a) Plaintiffs' claims are barred by sovereign immunity; (b) Plaintiffs have not identified or attached the contract sued upon or specified how that contract was breached; (c) the conversion count fails to state a claim because the funds at issue—namely the customers' water deposits—were not required to be segregated and, *a fortiori,* are not specific and identifiable; and (c) all claims are barred by statute of limitations. The motions have been fully briefed and the Court entertained oral argument on September 3, 2020. The matter is now ripe for disposition.

II. FACTS

The facts alleged in the SAC, which at this stage of the case must be presumed true, *see, e.g., Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc.,* 842 So. 2d 204 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D847a], are as follows: "Pursuant to Chapter 21 of the Code of the City of Opa-Locka," Plaintiffs—and the class members they hope to represent—were "required to purchase water from the City of Opa-Locka in order to obtain water within the City of Opa-Locka." SAC ¶ 9. The City is concomitantly obligated "to provide water service at reasonable rates and in a manner that is not arbitrary, irrational, or capricious." SAC ¶ 11. Thus, according to the SAC, the parties' respective rights and obligations are contractual in nature: "Plaintiffs and all members of the Class have contracted with the City of Opa-Locka to obtain water service in exchange for reasonable payment for the water service provided and used." SAC ¶ 14.

The SAC alleges that "the City's water meters do not and have not worked for many years—more than a decade—and that the City has been well aware of that fact." SAC ¶ 12. Yet the City "has not informed" its water customers "of the deficient and defective water meters and water services billings, even though the City and its responsible officials have known and reasonably understood the fact of the deficient water system." SAC ¶ 13. The City instead elected to invoice its customers "based on a billing system that was inaccurate, arbitrary, and capricious," SAC ¶ 28, resulting in twenty million dollars ($20,000,000.00) being "overcharged or improperly charged to customers." SAC ¶ 24. The City "knew or reasonably understood its water meters were inaccurate and inaccurately maintained;" it "did not correct the inaccuracies;" and the invoices it sent were "inflated and exaggerated, and did not represent a fair and accurate amount due for water service." SAC ¶¶ 25-27.

Aside from overbilling certain customers, Plaintiffs also allege that "at least" hundreds of other customers "receive water service for free and are not connected to the City's water billing system" at all. SAC ¶ 41. According to Plaintiffs, this "artificially increases the costs to other water customers." SAC ¶ 41. While Plaintiffs do not explain how the receipt of free water by some residents causes an increase in the price paid by other residents—"artificially" or otherwise—the Court again must assume this allegation to be true—at least for now.

Finally, Plaintiffs allege that they, and "all water customers are required to provide a deposit to the City . . . as a condition of obtaining water service, which deposit was to be returned to the water customers." SAC ¶ 43. According to the SAC, "City officials took the water deposits, converted them for unauthorized uses in violation of the City's agreement with the plaintiffs and all similarly situated customers, and has not returned the deposits to the customers." *Id.*

In sum, Plaintiffs allege that "[t]he water system in the City . . . has been rife with corruption, mismanagement, and selective arbitrary enforcement for decades, resulting in damages to the plaintiffs and all other similarly situated persons and businesses, including financial damages and deprivation of contracted-for services." SAC ¶ 42.

III. PROCEDURAL HISTORY

While the Court typically would not delve into the procedural history of a case in adjudicating a motion to dismiss, this litigation has travelled a somewhat unorthodox route, and a brief look at its past is necessary to place the Court's ruling in proper context.

On June 20, 2018, the Court's predecessor denied the City's "Amended Motion to Dismiss" Plaintiffs' First Amended Complaint.[2] The City then filed an "Answer, Affirmative Defenses, and Counter-claim" on July 13, 2018. (Docket Entry 64). On August 23, 2018, the City then moved for summary judgment, insisting that (a) Plaintiffs lacked standing; (b) Plaintiffs had failed to allege or provide record evidence of a contract; (c) the City was immune "from liability for civil theft;" (d) Count I—for breach of contract—was "time-barred;" and (e) Count III sought only a remedy (injunctive relief) and was not an "independent claim." (Docket Entry 71).

On January 13, 2019, the Court's predecessor denied the City's motion for summary judgment, but "dismissed" Count II of Plaintiffs' First Amended Complaint (the Civil Theft claim) with "leave to

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replead" a claim for conversion. (Docket Entry 113). Plaintiffs then filed the SAC, replacing the claim of civil theft with a claim of conversion. (Docket Entry 124). On February 1, 2019, the City filed the present motion to dismiss. (Docket Entry 129). On February 18, 2019, Plaintiffs filed their response in opposition, (Docket Entry 140), and Defendant filed its reply in support of the motion on March 7, 2019. (Docket Entry 151). This motion was therefore fully briefed as of March 2019. It appears, however, that it was never set for hearing.

In the meantime, on June 7, 2019, the Court's predecessor entered an order granting Plaintiffs' motion for class certification pursuant to Fla. R. Civ. P. 1.220. That order certifies two classes. The first certified class is defined as all City residents and businesses that were "required to place water deposits with the City," and "who are entitled to have those deposits safeguarded in segregated accounts, who are entitled to the return of those deposits, and who have not received the return of deposits from the City." The second certified class is defined as all City "water utility customers" who "who paid for water utility services in excess of the amounts they were liable to pay as calculated based on reasonable rates and functioning and accurate water meters and readings." (Docket Entry 162). An appeal of that class certification order is presently pending in the Third District.

The City also attempted to appeal the Court's predecessor's unelaborated order denying its motion for summary judgment based on sovereign immunity. The Third District, however, questioned whether that order was appealable, as it could not ascertain the basis for the ruling. *See, e.g., Key v. Almase,* 253 So. 3d 713 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1804a] (finding no jurisdiction under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(x) to review order that did not specifically find the absence of immunity as a matter of law).[3] The appellate court then relinquished jurisdiction so the trial court could clarify its decision. By that time this Court had assumed responsibility for this case and was obviously not in a position to assist. It therefore granted the City's request to reconsider the sovereign immunity issue and the City dismissed its appeal.

So the bottom line is that a motion to dismiss the SAC remains pending, the sovereign immunity issue has not been decided, but two classes have already been certified, subject to appellate review. That class certification order notwithstanding, the Court concludes that the SAC is clearly deficient and, as a result, will require that it be amended.[4]

IV. ANALYSIS

A. What is the Express Contract?

Since the commencement of this case the City has been attempting to ascertain what constitutes the "contract" it has allegedly breached. It has never received a straight answer. As pointed out earlier, the SAC alleges that pursuant to Chapter 21 of the City's Code, Plaintiffs are "required to purchase water from the City," SAC ¶ 9, and that the City is "required to provide water service at reasonable rates and in a manner that is not arbitrary, irrational, or capricious." SAC ¶ 11. The SAC also alleges that "Plaintiffs and all members of the Class have contracted with the City . . . to obtain water service in exchange for reasonable payment . . ." SAC ¶ 14. Count I alleges that the City "entered into contracts" with residents "to provide water service in return for payment of water deposits and payment of accurate and timely invoices for water service actually provided to and used by the plaintiffs." SAC ¶ 60. All of these contracts are alleged to be "identical." SAC ¶¶ 61, 62. The SAC, however, does not allege what constitutes these "contracts." It instead cryptically refers to "the contract for water service," "the water services agreement," and the City's "contractual obligation" to provide water. SAC ¶¶ 61-65.

At oral argument, the Court pressed counsel to finally disclose what constitutes this illusive "contract." The Court began by pointing out that it seems to me that it has taken far too long, and we have unnecessarily dragged out a clear, concise allegation of exactly what this contract is, is it oral, is it written? If it's written, where is it and attach it. And let's see the contracts." Tr. p 23, Sept. 2, 2020. Then, after counsel attempted to divert the Court's attention and persuade it not to re-visit Count I because its predecessor had previously denied the City's motion to dismiss that claim, I again pointedly asked: "Mr. Kuehne, just tell me what the contract is. It's a simple question." Tr. p 27.[5]

In response to this simple question, the Court did not receive a simple answer. First, counsel told the Court that the "contract" is "two things"—"the binding ordnance" and "a water contract." Tr. p 27. The SAC, however, never alleges that the ordinance constitutes an "express" contract or a contract at all. Nor has it identified or attached any "water contract." Later, counsel claimed that the "water contract" was evidenced by an "application and deposit," neither of which are attached to the SAC. Tr. p. 31. Finally, when asked whether those documents were "evidence" of a contract or the contract itself, counsel said they were "both." Tr. p 32. He then claimed that the "contract" consisted of the "ordinance," the "application," and the "deposit slip." *Id.* So, the Court tried to sum it up, asking:

> So you're relying on the ordinance together with the application and deposit slip, those two documents, as reflecting the express contract, correct? Fair to say?

Tr. pp 35-36. Counsel responded "[f]air to say, Judge." Tr. p. 36. But later counsel added the invoices the City sent to customers to the "list" of documents constituting the "contract." Tr. p. 40. None of these documents are attached to the SAC, and the pleading never alleges that *any* of these items, singularly or collectively, constitute(s) an "express contract."

This defect is hardly academic, as the question of whether the City enjoys "sovereign immunity" turns upon whether: (a) there is an "express contract" between the parties; and (b) whether that "express contract" imposes upon the City the obligations Plaintiffs allege were breached. *See, e.g., City of Miami Firefighters' & Police Officers' Ret. Tr. & Plan v. Castro,* 279 So. 3d 803, 807 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2343a] ("[o]ur analysis [of the sovereign immunity issue] focuses on whether the Pension Ordinances [the contract] impose the express duty that the plaintiffs alleged was breached"). So until the Court knows precisely what the "contract" is, and precisely what it says (or does not say), it cannot meaningfully address this threshold defense. This illustrates why a plaintiff suing on a written contract is required to attach it to the pleading. *See, e.g., Walters v. Ocean Gate Phase I Condo.,* 925 So. 2d 440, 443-44 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D1006c] ("[t]he failure to attach appropriate documents was problematic because '[a] complaint based on a written instrument does not state a cause of action until the instrument or an adequate portion thereof, is attached to or incorporated in the complaint' ").[6]

B. What are the Alleged Breaches?

As pointed out earlier, the SAC contains a *single* count for "Breach of Contract" which pleads multiple alleged breaches. Paragraph 65 alleges that:

> 65. The City breached its contractual obligation to provide water service to each customer, to maintain accurate water meters, to accurately account and bill for the water used by each customer, to secure customer deposits, and to continue water service for customers without shutting off or cancelling water service absent accurate notice and only for reasons associated with a breach by water customers, among other contract obligations.

Paragraphs 66 and 67 then allege:

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66. The City of Opa-Locka violated the City's Code, as well as Florida Law and the Constitution of the State of Florida, by overcharging for water services in a system that is arbitrary, unreasonable, and abusive. This constitutes a breach of contract.

67. The City has breached its obligation to provide water for a reasonable cost to plaintiffs and all other water customers under the terms of the water utility.

So from a simple reading of these allegations it is apparent that Plaintiffs have alleged an amalgamation of at least seven (7) breaches: They include:

1. failing to "provide water services to each customer;"
2. failing to "maintain accurate water meters;"
3. failing to "accurately account for and bill for the water used by each customer;"
4. failing to "secure customer's deposits;"
5. "shutting off or cancelling water absent accurate notice and [not] for reasons associated with a breach by water customers;"
6. "overcharging for water services;" and
7. failing to provide "water for a reasonable cost."

SAC ¶¶ 65-67. Each of these alleged breaches are again pled in a *single* count. Some appear intertwined/related, while others appear distinct.[7] And when pressed, counsel identified yet another alleged breach: letting some customers "continue to have water without paying." Tr. p 47.

While the Court, in an ordinary case, might not be concerned over a plaintiff pleading multiple alleged breaches of a single contract in a single count, doing so here is unpardonable for two reasons. First, and as the Court pointed out earlier, in determining whether the City is entitled to sovereign immunity, this Court must assess whether the contract—whatever that is—imposes upon the City the duties Plaintiffs claim were breached. *See, e.g., Castro,* 279 So. 3d at 807. The contract—once it is identified and attached to the pleadings—*may* impose some of the duties Plaintiffs claim were breached but not others. In other words, the City *may* enjoy immunity against some, but not all, of Plaintiffs' breach of contract claims.

Second, the question of whether Plaintiffs' claims are amenable to class-wide proof in a single trial also must be analyzed breach by breach. It is not sufficient to say that a breach of contract claim is, *ipso facto,* subject to class-wide proof merely because the contract with each class member is identical. Each alleged breach must be viewed independently to determine whether common issues of fact/law predominate, or whether individualized questions render the claim unsuitable for class treatment. *See, Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Services, Inc.,* 601 F.3d 1159, 1171 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C658a] (explaining that while "[i]t is the form contract, executed under like conditions by all class members, that best facilitates class treatment," class certification may be inappropriate when there exists a " 'distinct possibility that there was a breach of contract with some class members, but not with other class members.' ") (citing *Broussard v. Meineke Disc. Muffler Shops, Inc.,* 155 F.3d 331 (4th Cir. 1998)); *see also, Klay v. Humana, Inc.,* 382 F.3d 1241 (11th Cir. 2004) [17 Fla. L. Weekly Fed. C998a] (rejecting class certification because defendants allegedly breached the contract through a variety of computer algorithms that were not subject to generalized proof, so each physician would have to prove a variety of individualized circumstances leading to the breach).[8]

Plaintiffs' failure to attach the "contract," and their failure to allege each breach in a separate count, will also impede the Court's ability to determine whether sufficient evidence exists to reach a trier of fact on *each* particular claim. And finally, once the contracts are attached they may (or may not) negate Plaintiffs' conversion claim altogether, as the City insists that the deposit receipts Plaintiffs say are part of the "contract" clearly and unambiguously provide that deposits are not subject to segregation and may be used by the City in any manner it deems appropriate *(i.e.,* as general revenue); a claim the Court cannot adjudicate on a motion to dismiss due to Plaintiffs' failure to attach the allegedly uniform deposit receipt to the SAC. *See, e.g., Sobi v. Fairfield Resorts, Inc.,* 846 So. 2d 1204, 1206 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1350a] (on a motion to dismiss, "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").

V. CONCLUSION

This Court cannot effectively manage this case until Plaintiffs: (a) file a pleading specifying what the "contract" is and attaching it; and (b) allege each specific breach in a separate count. *See, e.g., Dubus v. McArthur,* 682 So. 2d 1246, 1247 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D2530a] ("the task of the trial court here was made more difficult because the appellants' amended complaint improperly attempts to state in a single count separate causes of action"). And Plaintiffs persistent failure to clearly articulate and plead what constitutes the contract, attach that "contract" to their pleading, and plead each alleged breach independently, has resulted in procedural chaos and a waste of considerable party and judicial resources. Litigation is not hide and seek. A defendant sued for breach of contract should know what the "contract" is, whether it is express or implied, whether it:is written or oral, and how it was allegedly breached. It should not take years of wrangling in the trial court and multiple interlocutory appeals to get the answers to these basic questions.

Accordingly, it is hereby **ORDERED**:

Defendant's Motion to Dismiss the Plaintiffs' SAC is **GRANTED**. Plaintiffs shall have leave to file a Third Amended Complaint which shall specify the "contract" being sued upon and, if written, said contract shall be attached to the pleading. Plaintiffs also shall plead *each* alleged breach in a separate free-standing count. *K R. Exch. Services, Inc. v. Fuerst, Humphrey, Ittleman, PL,* 48 So. 3d 889 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2317a] (Florida Rules of Civil Procedure 1.110 requires that each distinct claim be pled in a separate count). Plaintiffs' Third Amended Complaint shall be filed within twenty (20) days.[9]

---

[1]George Suarez, Tania Suarez, Roscoe Pendleton, Adel Raad, Charaf Raad, Steven Barrett, Natasha Ervin, Taxes by Natasha Ervin, A Florida Corporation, and Alfonso J. Ervin III.

[2]Plaintiffs' First Amended Complaint (Docket Entry 21) pled claims for Breach of Contract (Count 1), Civil Theft (Count II), and Injunctive Relief (Count III).

[3]Plaintiffs had argued on appeal that the Third District in fact lacked jurisdiction for this reason. *See* Corrected Answer Brief at p. 19 (arguing that the trial court's unelaborated order was not appealable because the "trial court never ruled as a matter of law that the City was not entitled to sovereign immunity."

[4]Whether class certification should be determined prior to deciding dispositive motions is an academically debated question. *See Newberg on Class Actions* §7:8 (5th Ed.). While Rule 1.220(d)(1)—like its Federal counterpart—directs the court to decide the issue of class certification "as soon as practicable," the decision should not be made until "the parties have had an adequate opportunity to discover facts necessary to support all the requirements of a class action," *Whigum v. Heilig-Meyers Furniture Inc.,* 682 So. 2d 643, 645 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D2384b], and until the court is in a position to undertake the "rigorous analysis" mandated. *Vega v. T-Mobile USA, Inc.,* 564 F. 3d 1256 (11th Cir. 2009) [21 Fla. L. Weekly Fed. C1706a]. This Court likely would have deferred the class certification decision until after the pleadings were closed, and possibility until after the dispositive issue of whether the City is immune from suit had been adjudicated.

[5]The Court rejects Plaintiffs' claim that it cannot/should not address whether Count I is adequately pled because its predecessor denied the City's motion to dismiss the breach of contract claim contained in the First Amended Complaint, and the claim remains the same in the SAC. Once Plaintiffs amended, the City was free to move against all counts and, in any event, the Court's predecessor's denial of the motion to dismiss is an interlocutory order this Court may revisit at any time. *See, e.g., Margulies v. Levy,* 439 So. 2d 336 (Fla. 3d DCA 1983). And this Court now has an obligation to manage this case; something it cannot effectively do until the defects in the Plaintiffs'

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SAC are cured.

[6]While the Court is not yet in a position to address the City's claim of sovereign immunity, from a review of the record it appears that the issue being debated is whether immunity is waived with respect to all claims arising out of an "express contract," or whether a plaintiff must *also* allege—and prove—the breach of an "express" undertaking contained within that "express contract." It is no doubt true that a municipality waives sovereign immunity when it enters into an "express contract," *see, e.g., City of Fort Lauderdale v. Israel,* 178 So. 3d 444 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D2325a], and does not waive sovereign immunity for claims based upon implied contracts. *See, e.g., Pan-Am Tobacco Corp. v. Dept of Corr.,* 471 So. 2d 4 (Fla. 1984). That does not, however, necessarily mean that immunity attaches unless a plaintiff can also prove the breach of an "express" covenant contained within an "express contract," as opposed to an inherent and obvious obligation based upon the nature of the agreement. *See, e.g., County of Brevard v. Miorelli Eng'g, Inc.,* 703 So. 2d 1049 (Fla. 1997) [22 Fla. L. Weekly S665a]. Assume, for example, that a city agrees, in writing, to sell a truck for Ten Thousand Dollars ($10,000.00). The one paragraph contract describes the make and model of the truck, contains a VIN number, and sets the price to be paid. The city then accepts the money and delivers the truck without wheels or tires. Would the city be "immune" from a breach of contract suit because the "express contract" did not also contain an "express" obligation to deliver the truck with wheels and tires? The Court doubts it. In any event, until the Court can determine what exactly is the contract, and what it says, it cannot meaningfully address the City's claim of immunity.

[7]For example, a failure to "maintain accurate water meters" and "accurately account" for water used by customers would only amount to an actionable breach if these failures resulted in "overcharging for water services," as a breach of contract is not actionable absent damages. *See, e.g., Deauville Hotel Mgmt., LLC v. Ward,* 219 So. 3d 949 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1219a]. And "overcharging" would, by definition, result in a failure to provide "water for a reasonable cost." These various alleged breaches therefore appear to be one and the same. In contrast, shutting off a customer's water improperly would be a completely distinct breach, as would failing to return deposits the City was contractually obligated to return.

[8]Although its predecessor has certified two classes, that order "may be altered or amended" anytime prior to entry of a judgment on the merits, *see* Rule 1.220(d)(1), and as the matter progresses, and claims, defenses, and evidence become more crystalized, this Court has a continuing obligation to ensure that the case can actually be tried on a class-wide basis. *See, e.g., Liggett Group Inc. v. Engle,* 853 So. 2d 434 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1219a] (decision to certify a class remains conditional and subject to reconsideration until the case is fully resolved, and "a court is required to reassess its class rulings as the case develops"); *Toledo v. Hillsborough County Hosp. Auth.,* 747 So. 2d 958, 960 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D1937a] ("[d]ue to the trial court's broad authority to alter or amend orders determining class certification, the doctrine of law of the case 'applies only sparingly in class certification proceedings,' ") (citing *Fair Housing for Children Coalition, Inc. v. Pornchai Int'l,* 890 F.2d 420, at 421 (9th Cir. 1989)).

[9]Because the Court is requiring that the breach of contract count be re-pled, and because once the contract is attached to the amended pleadings its terms may inform the question of whether Plaintiffs have a viable claim for conversion, the City may re-file its motion to dismiss that claim if it is re-pled. *See, e.g., Gasparini v. Pordomingo,* 972 So. 2d 1053 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D295a]; *Florida Desk, Inc. v. Mitchell Intern., Inc.,* 817 So. 2d 1059 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D1346b]; *Gambolati v. Sarkisian,* 622 So. 2d 47 (Fla. 4th DCA 1993); *Futch v. Head,* 511 So. 2d 314 (Fla. 1st DCA 1987); *Velasquez v. Faroy,* 24 Fla. L. Weekly Supp. 505a (11th Jud. Cir., Sept. 21, 2016) (Hanzman, J.) (granting motion for judgment notwithstanding verdict on claim for conversion, as funds were not required to be segregated and held intact).

* * *

Torts—Theft—Breach of fiduciary duty—Plaintiff and not its former counsel is owner of seventeen limited liability companies, each of which owns an investment property, where it is undisputed that plaintiff solely funded purchase, renovation, and maintenance of properties and that it was intention of plaintiff to own properties—Claim of former counsel that LLCs were gifted to her by plaintiff's owner is fabricated and unsubstantiated—Former counsel breached her fiduciary duty to plaintiff and its owner as attorney and as manager of LLCs where she prepared documents to allow her to exercise ownership and control over properties, wrongfully claimed ownership of properties, fraudulently obtained loan using properties as collateral, and used income from LLCs to pay personal expenses—Unlawful detainer—Former counsel's continued possession of property owned by plaintiff is unlawful where consent for counsel to live at property was revoked upon discovery of counsel's claim to own LLCs—Former counsel is ordered to disgorge $2.5 million that she removed from LLCs through theft and breach of fiduciary duty—Declaratory relief, equitable accounting, and injunction against former counsel acting as manager, owner, or agent for LLCs are appropriate

AGORIVE NV, et al., Plaintiffs, v. SUZANNE DEWITT, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 18-23137 CA 43, Complex Business Division. September 9, 2020. Michael A. Hanzman, Judge. Counsel: Peter F. Valori and Amanda Fernandez, Damian & Valori LLP, Miami, for Plaintiffs. Dyanne Feinberg, Corali Lopez-Castro, Gail M. McQuilkin, John Irving Criste, Jr., and Benjamin Widlanski, for Defendants.

CORRECTED FINAL JUDGMENT*
*Corrects typographical errors

I. INTRODUCTION

This matter came before the Court for trial commencing on August 25, 2020 and concluding on August 27, 2020. While Plaintiff advances—and the Court tried—a number of equitable claims, the largely dispositive factual issue presented is simple: Did Mr. Marc Van Moerbeke ("Van Moerbeke"), the owner/principal of Plaintiff, Agorive NV ("Agorive"), gift seventeen (17) properties located in Coral Gables, Florida to Defendant, Suzanne DeWitt ("DeWitt"), a lawyer and member of the Florida Bar who Van Moerbeke fortuitously met and began a relationship with in February 2008.[1] Having carefully considered the extensive documentary evidence presented, and the testimony of the witnesses offered at trial, taking into account their credibility (or lack thereof), and having weighed that evidence, both qualitatively and quantitatively, the Court finds—without doubt or hesitation—that: (i) Agorive is the legal, beneficial, and exclusive owner of the seventeen (17) properties at issue; (ii) DeWitt has absolutely no legal or beneficial interest in any of these properties (or the LLCs that hold legal title to them); and (iii) her claim to have been "gifted" these properties is a complete fabrication.

II. FINDINGS OF FACT

It is undisputed that Agorive's corporate predecessor fully funded the purchase, through LLCs, of seventeen (17) properties in Coral Gables, Florida.[2] DeWitt, a self-described international tax lawyer, was charged with implementing Agorive's investment plan. Instead, she implemented an almost impenetrable plan of her own, designed to misappropriate all of the properties. Relying on the advanced age, the foreign residence, and the abiding trust of Van Moerbeke, DeWitt embarked on an audacious scheme to defraud him by undertaking a calculated series of surreptitious deceptions intended to give her direct ownership of all of the LLCs, and thus indirect ownership of all the real estate owned by those LLCs, without having to invest a penny. During the five years of this predatory theft, DeWitt lied repeatedly to Van Moerbeke, to her own accountant and his staff, and to the bank which provided a multi-million dollar loan secured by the LLCs' property when DeWitt attempted (unsuccessfully) to pull out Five Million Five Hundred Thousand Dollars ($5,500,000.00) of equity when her scheme began to unravel.

In the end, faced with growing skepticism and a mounting demand for information with which she could not possibly comply without exposing her deceit, DeWitt finally announced that the LLCs had become, somewhat miraculously, a "gift" from Van Moerbeke to her. A thirteen and a half million dollar gift never offered by Van Moerbeke; a thirteen and a half million dollar gift never requested by DeWitt; a thirteen and a half million dollar gift never memorialized for tax purposes by the tax lawyer DeWitt; and a thirteen and a half million dollar gift that finds no mention in the literally hundreds of communications that passed between DeWitt and Van Moerbeke, or between DeWitt and her own accountants, over more than five years.

The evidence in this case overwhelmingly demonstrates, *inter alia,* that: (i) Van Moerbeke did not gift the money used to fund the LLCs or the LLCs themselves to DeWitt; (ii) DeWitt, who holds an LLM in taxation, did not report the supposed "gift" on her gift tax forms; (iii) any idea of DeWitt owning any part of the LLCs **required her to**

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purchase the LLCs (or any portion of an LLC) from Van Moerbeke's companies; (iv) DeWitt was a fiduciary who structured Agorive's investments and provided tax planning advice and explanations to Van Moerbeke concerning the LLCs; (v) DeWitt repeatedly assured Van Moerbeke that the tax planning strategy she employed was for his company's benefit and repeatedly ensured him that his company was at all times the legal and/or beneficial owner of the LLCs; (vi) DeWitt admitted to third parties and acknowledged to Van Moerbeke on multiple occasions that she was **not** the owner of the LLCs; and (vii) DeWitt intended to defraud Van Moerbeke of his investment program from the outset by deceiving him into believing that she was caring for his investments when, in fact, she was attempting to misappropriate them.

A. Initial Meeting and Formation of the Attorney-Client Relationship

Van Moerbeke and DeWitt met by chance at the Waldorf Astoria in New York in February 2008. Van Moerbeke was in New York to meet with a potential buyer of one of his companies ("Agriphar") and DeWitt was in New York to give a presentation for the company that employed her at the time, Bessemer Trust. After Van Moerbeke disclosed to DeWitt that he was in New York for a business meeting concerning the sale of his company, DeWitt advised Van Moerbeke of her extensive educational background and legal practice, including an LLM in taxation with a specialization in international taxation and investment structuring, and of her work at high-end financial firms. DeWitt then offered to assist Van Moerbeke in reviewing and commenting on the purchase and sale agreement for his company and other legal matters; an offer that Van Moerbeke—who was obviously and admittedly attracted to DeWitt—gladly accepted. When Van Moerbeke initially shared the multi-page proposed transaction document, suggesting it would be boring, DeWitt advised: "I am so familiar with these types of documents I know exactly what I am looking for," and provided him with comments. Her review continued after she and her mother—who had accompanied her on the trip were guests of Van Moerbeke for dinner, and upon their being invited to his suite thereafter. The next day, DeWitt briefly joined a meeting between Van Moerbeke and the potential buyer, Milton Steele, Vice President of a company called FMC. At that brief meeting DeWitt was identified as Van Moerbeke's counsel.

Importantly, through these discussions and her review of the proposed purchase price for Agriphar for €140 million, DeWitt became aware of Van Moerbeke's personal financial worth and other confidential information regarding his business.

B. The Ongoing Attorney-Client Relationship

Following the initial meeting, DeWitt and Van Moerbeke enjoyed a continuing attorney-client relationship. That relationship is confirmed by both overwhelming objective evidence and the reasonable subjective view of Van Moerbeke, as the record amply demonstrates that DeWitt regularly offered, and Van Moerbeke regularly accepted, her counsel from 2008 and throughout the years until shortly before the commencement of this litigation. *See, e.g., Mansur v. Podhurst Orseck, P.A.,* 994 So. 2d 435, 438 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D2547b] ("Establishment of the attorney-client relationship—and thus the attachment of the concomitant rights and duties of each side to the relationship—does not require a written agreement or evidence that fees have been paid or agreed upon . . . the test for an attorney-client relationship 'is a subjective one and hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention is to seek professional legal advice.'"); *JBJ Inv. of S. Florida, Inc. v. S. Title Group, Inc.,* 251 So. 3d 173 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D1518a] (whether party had a reasonable subjective belief that attorney-client relationship existed is an issue of fact).

In addition, the record clearly demonstrates that DeWitt repeatedly sought to continue and enhance her relationship of trust and confidence with Van Moerbeke. She attempted to do so by: (i) trumpeting her expertise in international tax planning and investment structuring and experience in sales of large companies; (ii) reviewing documents concerning the sale of Van Moerbeke's company; (iii) repeatedly asserting that she was not interested in money; (iv) persistently urging Van Moerbeke to "trust her"; and (v) initiating the use of friendly/romantic salutations. For all these reasons, as well as others, the Court finds, as a matter of fact, that Van Moerbeke and DeWitt enjoyed an attorney-client relationship, and that Van Moerbeke placed his trust and confidence in DeWitt when he authorized her to implement his investment program.

1. Displaying her Expertise

DeWitt held herself out as an expert in "complex international income tax and estate planning minimization structures" and as an attorney in "the areas of domestic and international taxation for corporate and high net-worth individuals." Pls.' Ex. 4. She also touted her "extensive involvement in developing and implementing creative and effective federal and international tax strategies and restructures for high net-worth individuals." *Id.* For example, in early 2008, DeWitt wrote to Van Moerbeke: "Given I am Bessemer's 'in-house' counsel, I can give you valid, unbiased advice as to foundations and/or investments structuring, (as well as tax planning)." Pls.' Ex. 5. She also wrote: "I want to guide you through the entire process and make sure all of your ideas/values are met, both from a philanthropic and a structuring perspective." *Id.* This is just one of the many times DeWitt held herself out as an expert of legal/financial matters and offered Van Moerbeke her services.

2. Offering to Review Legal Documents

DeWitt also offered, and later insisted, on providing legal services to Van Moerbeke by reviewing legal documents related to offers for the purchase of his company. Specifically, she wrote to him the following:

- "I will review the agreement [for the purchase of Mr. Van Moerbeke's companies] today. . .I shall revert back to you with my comments and/or further questions, if any." Pls.' Ex. 6 at P0000058600 (Feb. 25, 2008).
- "I went through the letter and attach my blue-lined comments [to the proposed agreement for the purchase of Mr. Van Moerbeke's companies] for your consideration." Pls.' Ex. 6 at P00000585999 (Feb. 26, 2008).
- "Do not acquiesce to the Tuesday deadline. They should give you ample time to review their "binding" offer [for the purchase of Mr. Van Moerbeke's companies] . . ." Pls.' Ex. 6 at P00000585999 (Feb. 25, 2008).
- "I will take another look at the agreement [for the purchase of Mr. Van Moerbeke's companies] today and offer my additional comments, if any." Pls.' Ex. 6 at P00000585998 (Feb. 25, 2008).

3. Refusing Compensation

DeWitt also repeatedly refused compensation from Van Moerbeke for the work she was doing and offering to do:

- "There is obviously no "sales" incentive for me to do this—and I would thus be very skeptical of what a "salesman" from JP Morgan has to offer." Pls.' Ex. 6 at the bottom of page P0000058600 (Feb. 25, 2008).
- "Without a doubt I am honored at the prospect of being involved. . . Truly honored. I am sorry but I cannot accept compensation; I really have everything I could ever want." Pls.' Ex. 7 at the center of page P0000058684 (Feb. 26, 2008).

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• "Seeing that happen would be pleasure enough for me. Remember (or did you forget??) I ENJOY doing this and it makes me happy to help you achieve your goals. Nothing is better." Pls.' Ex. 7 at the center of page P0000058684 (Feb. 26, 2008) (emphasis in original).

• "Please don't forget I purely love what I do. There is nothing more satisfying." Pls.' Ex. 7 at the center of page P0000058684 (Feb. 26, 2008).

• "But I love what I do and that's what's important." Pls.' Ex. 7 at the bottom of page P0000058681 (Mar. 12, 2008).

• "Of course, I am happy to help out in any way I can. The reward is the pleasure you get in seeing something implemented in an optimal manner." Pls.' Ex. 7 at the center of page P0000058680 (Mar. 13, 2008).

4. Initiating the Use of Friendly Salutations

DeWitt initiated what has turned out to be a faux romantic engagement on her part with the use of highly personal salutations. An April 2008 email from DeWitt's Bessemer Trust email address began with: "Hello darling!" Pls.' Ex. 7 at the top of page P0000058680 (Apr. 16, 2008). She later routinely signed off her emails with the acronym ILY (I love you), and led Van Moerbeke to believe that she had romantic feelings for him and that she could be trusted. For example, in 2008, after soliciting a Twenty Thousand Dollars ($20,000) loan, DeWitt asked Van Moerbeke to send her an original promissory note stating:

> "I'm sorry I hope I did not offend you by asking to send you the original. I was merely stating that trustworthiness is my personal quality that I am proud of. I did not mean to infer that you did not trust me. :) Thanks again SO MUCH."

Pls.' Ex. 11 at P0000058529 (Dec. 10, 2008). DeWitt also wrote: "Professionalism and friendship are synergetic. Sometimes one causes the other. Other times one is the glue that maintains that bond. You can always trust me 1,000,000%." *See Id.* Van Moerbeke was impressed by her professional approach and moved by her message. *See Id.* DeWitt also offered Van Moerbeke the services of Bessemer Trust, her then employer. *See* Pls.' Ex. 8.

After her Bessemer employment was terminated, DeWitt continued to provide Van Moerbeke with legal advice and acted as his lawyer and confidante related to bids for the purchase of his companies and a variety of other investment matters. *See* Pls.' Ex. 327 (Jul. 13, 2011 email exchange concerning a draft stock option plan for Incitatus and Demettier, both subsidiaries of Percival);[3] Pls.' Ex. 328 (Oct. 23, 2012 email concerning an offer by Montagu to purchase Agriphar, a subsidiary of Percival); Pls.' Ex. 329-331 (Dec. 2013 email exchanges concerning a letter of intent of Quinpario to purchase Agriphar, a subsidiary of Percival); Pls.' Ex. 331 (Jan. 5, 2014 email concerning sale of Agriphar to CVC); Pls.' Ex. 333 (Mar. 11, 2015 email exchange concerning a potential investment in Cardiatis); Pls.' Ex. 334 (Feb. 25, 2015 email Concerning Agorive's potential investment in the Vitamine Project); Pls.' Ex. 335 (Jul. 15, 2015 email exchange concerning Agorive's investment in Opera Gallery); Pls.' Ex. 337-338 (Jun. 12, 2017 email exchanges concerning the PPM and structure of Van Moerbeke's potential investment in Waypoint).

C. The Investment Plan

The relationship between Van Moerbeke and DeWitt escalated from what had, at DeWitt's insistence, been platonic to one that turned romantic, as Van Moerbeke desired. Van Moerbeke then began to shower DeWitt with gifts, watches, jewelry, clothing, vacations, meals, cars, etc.[4]

In late 2011, as things progressed, and his feelings for DeWitt grew stronger, Van Moerbeke proposed a plan for his Company, Percival, to invest in Coral Gables real estate by purchasing single-family residential properties, renovating the properties, and renting them out. Out of his feelings of love, and out of generosity, he gave DeWitt the opportunity to assist him in investing and managing the entities and, more to the point here, gave her the ability to acquire tangible assets and financial security were she to partake in those investments by buying in at cost. *See* Pls.' Ex. 15-21. In other words, Van Moerbeke offered DeWitt the opportunity to benefit from a significant upside in the appreciation of property without assuming *any* downside risk. Rather than accept that proposal DeWitt, acting as counsel to Van Moerbeke, and without complying (or even attempting to comply) with *any* of the Rules Regulating the Florida Bar, put in motion a scheme to secure these assets for herself.

D. Implementation

Percival already had three similar investments in New York real estate and planned to implement a similar investment plan in South Florida. DeWitt immediately displayed her interest in Van Moerbeke's proposal:

> Re: the Coral Gables project, I am very much interested. Let's move to a Jan. start date for planning and implementation soon thereafter. I need to understand what you are proposing, though, as it seems vague. . .I am not sure what you mean by "buy-in" in this type of arrangement. Perhaps you could put together a numerical example? Assume a house at $100, to keep it simple.

Pls.' Ex. 15 (Dec. 16, 2011). Van Moerbeke provided a numerical example, suggesting that DeWitt could build up her own equity in the investment in two ways: "You participate in the initial [equity] if you want" or "with your fees you can, if you want to, buy further into the equity up to the level that suits you . . . if you want to buy it all over time, no problem." Pls.' Ex. 16 (Dec. 16, 2011). DeWitt responded that "your business model is sound overall," but had additional questions. Pls.' Ex. 17 (Dec. 16, 2011). She sent a lengthy email concerning exercise of the buyin, fees, and other points, and a legal analysis of taxation issues that could arise. *See* Pls.' Ex. 20 (Dec. 17, 2011). Van Moerbeke also proposed that DeWitt could later purchase the properties at their original acquisition cost. *See* Pls.' Ex. 21 (Dec. 18, 2011). He stated:

> With what you said about your new status in the Family Office, your income will go up (hopefully, it did last October).[5] With a growing income, you can thus progressively buy the equity, the cost of which will not move, even if the underlying asset becomes more valuable.

Id. Van Moerbeke further clarified concerning her fees:

> As to swEEt or swEAt[6] equity, we could have a value put on your know how, which would then be converted in instant equity. Two points though:
>
> 1. The value would need to be assessed by an outside auditor, not just by us
>
> 2. Your immediate income would significantly decrease since you were prepaid so to speak.

See Id.

From the outset, DeWitt provided advice concerning the structure to acquire and hold title to the properties that she claimed would (a) protect Percival and later, Agorive—the ultimate beneficial owner—from high income tax, and (b) enable Percival, and later Agorive, to ultimately withdraw cash from the entities. In January 2012, she wrote to Van Moerbeke:

> . . .it would make sense (for doc stamps and tax reasons) to put me as 99.8% member of LLC and foreign corp x as 0.2%. The governance, however, will be with your .2% interest, whereas my interest will be inferior to that (non-voting), as a general matter. **I assume you trust me and my reasoning here, which is tax driven and "ability to leverage" driven** (ease of obtaining favorable mortgages etc.). That said, **I structure these things all the time, and under this model, you will have all the protection, as if I was a third party that you did not know/trust etc.** It's a win-win. I will walk you through everything.

Pls.' Ex. 22 (emphasis added) (Jan. 1, 2012). It was understood by both Van Moerbeke and DeWitt that the ultimate owner of the LLCs

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was Percival. Unless and until DeWitt *purchased* the LLCs or any portion of the LLCs from Percival and/or later Agorive, there was no contemplation of DeWitt being a legal or beneficial owner of any of the LLCs.

In September 2012, Percival wired cash to the newly created single-purpose entity SuzMar, LLC for the purchase of the first Coral Gables home located at 7320 Mindello Street. As with the New York properties, Van Moerbeke intended to purchase the first house as a residence for when he was visiting Miami or for use by Percival's business associates and friends, and the remainder of the purchases as rental properties. For that and each ensuing investment, DeWitt directed an outside company to form Delaware LLCs which now hold legal title to the properties. *See* Pls.' Ex. 341. DeWitt also opened bank accounts for each LLC which received the respective wire transfers from Percival.[7] On the account opening documents for each LLC, DeWitt attested that she was the manager, and not a member, of the LLCs. *See* Pls.' Ex. 292. The account opening documents for some of the LLCs show the words "member" and "mgrm" (which stands for manager member) crossed out and "manager" written above her name indicating that the accounts were opened under her authority as manager and not as owner of the LLCs as she now claims. *See Id.*

E. Corporate Formation and Investment Structure

DeWitt embarked on her fraudulent scheme by preparing formal membership certificates reflecting Percival as the owner of the first three Florida-property owning LLCs—SuzMar, LLC, IBRB I, LLC and IBRB II, LLC. *See* Pls.' Ex. 1, Pls.' Ex. 2, and Pls.' Ex. 3.[8] DeWitt sent the share certificates along with other corporate documents reflecting Percival's 100% ownership to Van Moerbeke shortly following their creation, thereby assuring him that his company owned all the equity in the properties. *See* Pls.' Ex. 36, 39, 40, 42, 43. What Van Moerbeke did not know was that DeWitt was also, at the same time, preparing membership certificates indicating that she was the sole member of these LLCs and that her mother was the manager. DeWitt never disclosed to Van Moerbeke that she had done so. Subsequently, and in order to further the scheme and make it even more difficult for Van Moerbeke to understand and pierce it, she used her expertise as a tax lawyer to persuade Van Moerbeke to begin making his investments in the form of loans rather than equity. Specifically, instead of having Van Moerbeke fund the LLCs by way of straight equity and taking ownership in the LLCs that Percival controlled, DeWitt persuaded Van Moerbeke that there was some tax advantage to be had through a portfolio interest exemption if he funded the LLCs by way of convertible loans. The record amply demonstrates that this loan structure DeWitt concocted was completely unnecessary to secure any tax benefit. More damaging still, she continued to place herself in the position as the sole member of the LLCs, without making adequate disclosure of this role, without counseling Van Moerbeke to seek independent legal advice regarding a business relationship with his own lawyer, and by exploiting her relationship with him both as his lawyer and his lover. Van Moerbeke was prepared to (and did) follow DeWitt's advice without the benefit of independent counsel because he placed unwarranted and absolute trust in her his lawyer/lover, and was persuaded by DeWitt that there was some tax benefit that he could achieve, and that he could always "pull the trigger" and convert the loans to equity. A "win-win" scenario.

To execute this change in strategy, DeWitt instructed Van Moerbeke to change the description of the wire transfers from Percival to the LLCs, describing them as loans rather than contributions to equity. She also instructed Van Moerbeke to write "loan" or "convertible loan" in the wire memo to "give more flexibility to planning" for future wires and asked Van Moerbeke to redo the wire memo for prior wires to read "loan," misleadingly claiming that she "want[ed] Mr. Van Moerbeke fully protected and comfortable." *See* Pls.' Ex. 63 and Pls.' Ex. 49. During this time, DeWitt continued to assure Van Moerbeke that the tax structure she was implementing protected and preserved Van Moerbeke's company's ownership of the investments. *See e.g.,* Pls.' Ex. 67 (March 16, 2013 email from DeWitt to Van Moerbeke: "The homes and monies are yours."). *See also* Pls.' Ex. 82, 101. She also represented to him that the investments belonged to his company (often referred to by DeWitt as "BelgianCo" and/or "ForeignCo"); that they were being structured to optimize his Belgian company's taxes; and that any document to the contrary was for purposes of tax planning and did not affect his company's legal ownership of the LLCs. *See, inter alia,* Pls.' Ex. 103-106.

F. DeWitt Continues to Assure Van Moerbeke that the LLCs Belong to his Company

In June 2015, DeWitt disclosed, for the first time ever, that she had been reporting income from some of the LLCs on her personal tax returns. *See* Pls.' Ex. 110. The record incontrovertibly demonstrates this was false and that, as of June 2015, DeWitt had not reported the income of the LLCs on her tax returns. Van Moerbeke was, to say the least, surprised to learn this and informed DeWitt that his Belgian lawyer thought the ownership of the LLCs "should be on the tax return of the Belgian company, not a personal one." *See Id.* Seeking to abandon the loan protocol that he found confusing, Van Moerbeke also instructed DeWitt to properly document the investments so that they had a straight-forward structure reflecting Agorive as the equity owner (regardless of the tax disadvantages of which DeWitt warned).[9] *See* Pls.' Ex. 115 ("I would like to go back to simple straight-forward structures. If I lose a penny here and there on taxes or other stuff that's quite all right."). DeWitt assured Van Moerbeke that she would amend her tax returns and was undertaking to convert all loans to equity to reflect Agorive as the owner. *See* Pls.' Ex. 163, 165, and 167. Consistent with that assurance, in handwritten notes DeWitt made on a May 22, 2015 email, she stated: "Marc, you will have 100% equity, everything." Pls.' Ex. 192. DeWitt also wrote, "OK. I amend my returns and give Agorive 100% equity." *Id.* Throughout these notes, DeWitt shares her insights and advice regarding form of ownership and tax consequences, hoping to retain the loan structure for her own advantage. *See Id.*

Thereafter, on June 23, 2015, DeWitt, acknowledging that the investments were Agorive's, and that she was acting solely as an investment manager, proposed compensation for her services by, *inter alia,* forgiveness of her One Hundred Six Thousand Dollars ($106,000.00) debt to Van Moerbeke. *See* Pls.' Ex. 140. In another June 20, 2015 email, DeWitt again confirmed her obligation/option to "buy in" to the properties: "You had no reservations about internal loans but rather thought of it as a great way to build equity, under our long-term plan that I buy back the houses by repaying the loans at cost plus a small amount of interest (small amount of interest because the latter is taxed)." Pls.' Ex. 138. Correctly sensing growing concern on Van Moerbeke's part, she added, somewhat contritely, "if in fact you will still allow me to buy them back. . ." *Id.*

Further placating him, while secretly clinging to the device to maintain the investments as her own, DeWitt wrote to Van Moerbeke, "From a legal perspective, equity is on BelgianCo side effectively. But please allow me to explain the tax structure that gets you to the legal perspective without being on the IRS radar. Please." Pls.' Ex. 111 (Jun. 19, 2015).

- "Percival enjoyed the primary legal right to ownership (by the conversion to equity mechanism in the loan) . . ." Pls.' Ex. 170 (Jun 23, 2015).
- "Percival never lost control over the asset from a legal perspective as it could convert to equity at any time." Pls.' Ex. 178 (Jun. 23, 2015).

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• "This is all for tax purposes. From a legal perspective, at all times, BelgianCo's legal ownership (or right to ownership) was protected and preserved." Pls.' Ex. 194 (Jun. 25, 2015).

In response, Van Moerbeke confirmed that the investments were exactly that, investments: When we talked about your buying back houses, we basically were referring to two or three of these ' IBRB' places. Now you seem to expect I'll hand over to you 15+ houses for an accumulated value of close to 20 million. I cannot invest 20 million indefinitely without any reasonable return." Pls.' Ex. 139.

G. DeWitt Fabricates Documents to Deceive Van Moerbeke

At some point, DeWitt's scheme risked being unraveled when Van Moerbeke needed information concerning interest rates and payments and other tax matters. Due in large part to his growing concerns about the confusing and uncertain structure and benefit of DeWitt's recommendations, Van Moerbeke requested tax returns and other types of documents that would traditionally be generated in connection with these types of transactions. Instead of just acknowledging that Van Moerbeke's company did not own the LLCs, DeWitt continuously tried to deflect and defer submitting documents. She then, in near panic, recruited her complicit accountants to participate in this fraud.

Specifically, on June 23, 2015 DeWitt emailed to Van Moerbeke corporate documents for Agoraduana, LLC, SuzMar LLC, IBRB I, LLC and IBRB II, LLC, showing Percival as owner. *See* Pls.' Ex. 185, 186, 187, and 188.[10] These emails also contained corporate tax returns for the four foregoing entities wet-signed by the accountant preparer and, according to DeWitt, filed on behalf of the Companies in 2014. The returns had been prepared in 2015 and backdated by DeWitt to create the appearance that they had been previously filed rather than just created, as was the case. *Id.* DeWitt's enclosure emails state that in all cases she signed only as authorized signatory and that Percival is the owner of the respective entities. *Id.* In a follow-up email that same day, DeWitt confirmed once again that four of the LLCs "already have straight equity," and noted that "[f]or the other LLCs on Sch. E, I will convert to equity, such that Agorive NV will be the direct owner." Pls.' Ex. 190.

Agorive later learned that DeWitt had fabricated those documents and had not filed *any* returns with the IRS concerning Agorive's LLCs. Indeed, the evidence shows that in June 2015, when Van Moerbeke requested a copy of historical tax returns that had been filed, DeWitt misleadingly responded she could not send them at that moment because they were not on her laptop but were on an external hard drive. They didn't exist at all. Seven minutes later, DeWitt sent a frantic email to Carlos Ramirez, a founding partner at Bohlmann Accounting Group, PLLC entitled "LLCs that PERCIVAL owns—NEED THE FORM 1120s—URGENT URGENT URGENT" asking him to "create magic (anything)." (emphasis added). Asking him, that is, to create tax returns that did not exist on her hard drive or anywhere else. Tax returns that had never been prepared, let alone filed.

From: Suzanne DeWitt [mailto:suzannedewitt@me.com]
Sent: Tuesday, June 23, 2015 8:29 AM
To: Carlos Ramirez; Jacqueline Osores-Luzzi
Subject: LLCs that PERCIVAL owns - NEED THE FORM 1120s - URGENT URGENT URGENT

Percival, S.A. (a Belgium Company), owns:
SuzMar, LLC
IBRB I, LLC
IBRB II, LLC
It filed a CTB election to be treated as a corp, so I could have signed the returns.
PLEASE create magic (anything). I love you both! !! !
If you could whip these together ASAP this morning (they are six hours ahead), then I will be alive and walking still. . Otherwise I am shot.
THANK YOU THANK YOU

Pls.' Ex. 179.

DeWitt subsequently exchanged emails with other accountants at Bohlmann Accounting Group, PLLC to create the tax returns allegedly filed in 2014. DeWitt asked to have the June 2015 date removed from the tax returns and even inquired as to whether the accounting firm listed in the "preparer" box could be changed to the prior accounting firm to match the time the tax returns would have been due. *See* Pls.' Ex. 181, 182, 183, and 184.

Carlos Ramirez and Adriana Diaz testified that they believed that DeWitt's statements that Percival owned SuzMar LLC, IBRB I, LLC, IBRB II, LLC and Agoraduana LLC were true and that the tax returns were to be filed. DeWitt first testified earlier in the case that the returns were drafts or hypotheticals, but when met with the testimony of the accountants, reversed course entirely and testified that she believed the tax returns had been filed. At the trial, DeWitt had to decide which lie to endorse.

H. DeWitt Confirms that all LLCs have been Converted to Equity to Agorive

Following DeWitt's promises and assurances that all funding previously treated as loans had been converted to equity held by Van Moerbeke's foreign companies, DeWitt forwarded to him a chart of three investment structure alternatives for his investments, all of which resulted in effective ownership by the Belgian company. In her cover email, DeWitt states that it is a moot issue because they are equity. *See* Pls.' Ex. 197 (July 10, 2015) and Pls.' Ex. 198.

I. Mr. Bohlmann, Agorive's Accountant

DeWitt furthered her scheme to deceive Van Moerbeke by employing Mr. Benjamin Bohlmann to "validate" her investment/tax structure and planning to Van Moerbeke. In March 2016, DeWitt arranged for Van Moerbeke to meet directly with Mr. Bohlmann. In advance of that meeting, DeWitt prepared extensive materials for Mr. Bohlmann to review and utilize during his conversations with Van Moerbeke, including Talking Points (both an "abbreviated" set (*see* Pls.' Ex. 206) and a "full view" set (*see* Pls.' Ex. 207)) and a "Timeline" with annotated attachments of documents referred to within the timeline (*see* Pls.' Ex. 208). In her ceaseless efforts to conceal what she had done and to continue concealment of this scheme, DeWitt prepared a bullet-point list of talking points for her accountants which would emphasize that she didn't own these assets and never had and that they all belonged to Percival and Van Moerbeke. She did not want the accountants to say anything that would have alerted Van Moerbeke to the fact that she had placed every single one of these LLCs in her name, something her accountant was well aware of.

The bottom line is that DeWitt prepared a "script" for her accountant to follow so he would not mistakenly disclose the fact that she had usurped ownership of all seventeen (17) LLCs. *See* DeWitt Depo., Aug. 2, 2019 at 87:8-19 and 89:1-13; *see also* Pls.' Ex. 204. In her "script" DeWitt coaches Mr. Bohlmann to emphasize that:

• SdW has NO legal rights over LLCs/properties: SdW is an investment manager/agent.

• SdW is the holder of the obligation (debt) that are tied to the LLCs, which have nil capital.

• HYBRID DEBT STRUCTURE: LLCs may be treated as debt for US tax/Belgium equity purposes.

• MvM has legal ownership for US legal purposes. Can Pull trigger.

Pls.' Ex. 209. These statements were consistent with what DeWitt had been repeatedly telling Van Moerbeke concerning the structure of his investments and his legal ownership over them. *See* Pls.' Ex. 111

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("From a legal perspective, equity is on BelgianCo side effectively. But please allow me to explain the tax structure that gets you to the legal perspective without being on the IRS radar. Please."); Pls.' Ex. 170 ("Percival enjoyed the primary legal right to ownership (by the conversion to equity mechanism in the loan)); Pls.' Ex. 178 ("Percival never lost control over the asset from a legal perspective as it could convert to equity at any time."); Pls.' Ex. 194 ("This is all for tax purposes. From a legal perspective, at all times, BelgianCo's legal ownership (or right to ownership) was protected and preserved.").

In the Timeline document, DeWitt also wrote:

- Dec. 2012 Jan. 2013:
  - Suzmar, LLC—Owned by Percival SA (Belgium)
  - IBRB I LLC—Owned by Percival SA
  - IBRB II LLC—Owned by Percival SA
- Percival ultimately owned 100% by Marc van Moerbeke ("MvM")
- July 2014—SdW made disclosures to BB files that she is investment manager and does not have legal ownership.

Pls.' Ex. 208. DeWitt also handwrote on the Abbreviated Talking Points for Mr. Bohlmann.

At the meeting, Mr. Bohlmann confirmed DeWitt's "tax planning" advice and explained to Van Moerbeke the benefits of the portfolio interest exemption tax structure that DeWitt had proposed. He also offered to draft a comfort letter to Agorive to explain that the investments in the Delaware LLCs for the Coral Gables properties were protected in that structure. *See* Pls.' Ex. 258 (Mar. 22, 2017 email from DeWitt to Van Moerbeke: "The professional (accounting) fees for 2016 do include your meeting with Benjamin last year (and the related work from that) that were for the purposes of validating my tax planning."). In the ensuing months, Van Moerbeke exchanged various emails with Mr. Bohlmann concerning the status of the comfort letter, the financial information of the Delaware LLCs, and Mr. Bohlmann's assessment of the estimated return Agorive would receive on its investments. Mr. Bohlmann provided financial statements and reports for the Delaware LLCs for 2013, 2014, 2015 and 2016. Pls.' Ex. 217, 240, 253-255. In addition, Mr. Bohlmann provided Van Moerbeke with an estimated rate of return for Agorive's investments for 2014. *See* Pls.' Ex. 217.

On October 21, 2016, following DeWitt's review and approval, Mr. Bohlmann sent a "comfort letter" to Mr. Willy Mertens, the accountant (also referred to in Belgium as "auditor") of Agorive explaining the benefits of the portfolio interest exemption and its treatment in the United States and Belgium. *See* email dated Oct. 19, 2016 (P0000013606) and Letter dated Oct. 21, 2016 to Mr. Mertens ("Letter"). The Letter provides Agorive with Mr. Bohlmann's professional explanation as to why Agorive's investments were not seeing a return and why any loans Agorive made had not been paid back.

> . . . During the early years of the investments, **cash flow from rents is expected to be minimal.** Accordingly, **it is standard practice to structure the debt such that interest payments are deferred. . .** In our experience, **investments of this nature typically have an interest forbearance period, or holiday, during which no cash is remitted back to the investor.**

Pls.' Ex. 239 (emphasis added). Mr. Bohlmann also confirms DeWitt's repeated assurances to Van Moerbeke that the investments were at all times under the ultimate control of Agorive. *Id.* ("Interest payments may commence, in the sole discretion of Agorive SA. . ."). What he never disclosed was that his client, DeWitt, owned all of the LLCs "on paper" and claimed them as her own—a disclosure that would have brought her scheme to a crashing halt.

J. DeWitt's Attempts to Purchase the Delaware LLCs

In the early years of the investments, Van Moerbeke and DeWitt considered ways in which DeWitt could buy into the project:

> • June 21, 2015 email from DeWitt to Van Moerbeke: "Over time, as I earn more income at work (income as an attorney), the I would respectfully like to 'buy-in' on the first 10 properties as we had discussed, if you will allow me too." Pls.' Ex. 144.
>
> • June 22, 2015 email from DeWitt to Van Moerbeke: "If you could please consider converting my fee to equity, per the formula/standard in the attached." Pls.' Ex. 173.
>
> • June 22, 2015 email from DeWitt to Van Moerbeke: "I would not receive any return until 100% of that equity is paid in (as the buy in). Oh and I forgot to mention, you set the strike price for the equity to reach before considered 100% bought in, so I by them at a cost you set." Pls.' Ex. 175.

As time passed, Van Moerbeke insisted that DeWitt provide proper documents for Agorive's investments, especially those showing that Agorive's investments were straight equity. DeWitt put off Van Moerbeke's requests with a combination of avoidances, scare tactics regarding the issues, and reassurances that Agorive was the 100% owner of all of the investments.[11]

In December 2017, DeWitt informed Van Moerbeke that she had been attempting to obtain a loan from Bank of America to enable her to purchase the seventeen Delaware LLCs. When Van Moerbeke requested DeWitt present the documentation, DeWitt failed to do so. Later, in January 2018, DeWitt claimed to have set up a fund with Goldman Sachs for the purchase of the seventeen Delaware LLCs. *See* Pls.' Ex. 266. Again, when pressed for more information or documentation, she could not deliver.[12]

Finally, at the end of December 2017, Van Moerbeke told DeWitt that she had to provide the full and proper documentation for Agorive's investments or that he would take action.

K. DeWitt Claims Ownership of the LLCs

As a result of DeWitt's continued refusal to provide the necessary documentation, Van Moerbeke hired independent legal counsel. On June 4, 2018, Agorive, as the owner of the LLCs, through counsel, Ronald Albert, sent a written records request to DeWitt, as manager of the LLCs (by mail and to two of her email addresses) pursuant to section 18-305 of the Delaware Limited Liability Company Act, demanding the inspection and access to copy the books, records, documents and information for each of the LLCs.[13] On June 14, 2018, DeWitt sent an email to Mr. Albert and for the first time claimed that *Agorive's investments belonged to her and she claimed them to be personal gifts made to her by Van Moerbeke*,[14] though she provided ***no documentation*** of any such "*gift*" and she has not done so to this day. There is none because they were not gifts.

L. DeWitt Obtains an Unauthorized Loan Pledging 14 of the LLCs as Collateral

Agorive also discovered that on June 22, 2018, after having received Mr. Albert's letter, Dewitt closed on a Five Million Five Hundred Dollars ($5,500,000.00) loan from First National Bank of South Miami ("FNBSM") secured by the properties and rental income of fourteen (14) of the LLCs without notifying the bank of Mr. Albert's June 4, 2018 letter and without notifying Mr. Albert of the extraordinary transaction. *See* Pls.' (M) Ex. 19. She obtained that loan by falsely representing to FNBSM that she had acquired the properties "with monies earned throughout her career as well as inheritance money from her parents," never mentioning any "gift" from Van Moerbeke. *See* Pls.' Ex. 17.

The purpose of the loan was for DeWitt to siphon off equity in the LLCs, further entrench herself, and threaten Van Moerbeke's investments. Dewitt later asserted in her court papers that the loan was a 'spite loan' taken out in an effort to manipulate Van Moerbeke into proposing marriage to DeWitt, another position that she now under-

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standably appears to have abandoned. *See* Pls.' Ex. 323, Dewitt's Response opposing Agorive's Motion for Injunction and Receiver at p. 5 ("Ms. DeWitt recently formed another company, DTRT Holdings I, LLC, as a holding company for some of the LLCs, to facilitate a loan from First National Bank in order to purchase additional properties (DTRT being an acronym for "Do The Right Thing," in the hopes that Van Moerbeke, like Spike Lee, might do the right thing, *i.e.,* step up and be the husband that he promised to be to Ms. DeWitt).").

Following commencement of the lawsuit, the Bank declared DeWitt in default of the loan for, *inter alia,* not disclosing Mr. Albert's June 4, 2018 letter, her commencement of a lawsuit concerning the ownership of the LLCs, and the instant lawsuit. *See* Pls.' (M) Ex. 19. The Bank then clawed back the loan but the LLCs were collaterally damaged, having been harmed by DeWitt's use of Three Hundred Forty-Four Thousand Six Hundred Forty-One Dollars ($344,641.00) of the LLCs' money to pay interest, loan fees, and costs. *See* Pls.' Ex. 345.

III. CONCLUSIONS OF LAW

A. Agorive owns The LLCs

The Court finds by clear and convincing evidence that Agorive is the legal, beneficial, and exclusive owner of the seventeen (17) LLCs at issue. DeWitt has absolutely no legal or beneficial interest in any of the LLCs whatsoever. Nor has she ever owned any legal or beneficial interest in these assets.

It is undisputed that Agorive solely funded the purchase, renovation, and maintenance of the properties. As such, Agorive is the presumptive owner of the LLCs. *See Abreu v. Amaro,* 534 So. 2d 771, 772 (Fla. 3d DCA 1988) (once a plaintiff "proves that he paid the purchase price for a piece of property, a presumption arises that it was the parties' intention that the [party] holding legal title was to hold the property in trust for the payor"); *see also Wadlington v. Edwards,* 92 So. 2d 629 (Fla. 1957); *Willard Homes, Inc. v. Sanders,* 127 So. 2d 696, 697 (Fla. 2d DCA 1961) ("where the purchase money of land is paid by one person and title is taken in the name of another a resulting trust arises and the party taking the title is presumed to hold it in trust for him [sic] who pays the purchase price"); *Maliski v. Maliski,* 664 So. 2d 341 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D2723a] (finding a resulting trust where plaintiff paid for mobile home despite having placed mobile home in former wife's name). But no presumption is needed here, as the evidence detailed above demonstrates that Percival (and later Agorive) funded the LLCs 100%. And the evidence conclusively demonstrates, leaving not a scintilla of doubt, that it was Van Moerbeke's intention to own them.

B. The LLCs Were Not a Gift to DeWitt

The Court finds DeWitt's recently invented claim that the LLCs were gifts to her to be completely fabricated and supported by absolutely nothing other than her self-serving and false testimony. Indeed, DeWitt's "gift" defense is antithetical to reality and to the volume of her own prior written statements. As purported proof of a gift, DeWitt offered nothing other than vague statements of affection, falling far short of her burden to prove the existence of a gift by demonstrating, *inter alia,* donative intent and to overcome the presumption that because she was in a confidential relationship with the alleged donor, any claimed gift is invalid.

Further, there is a massive amount of evidence which contradicts that any such intent existed. Donative intent has to be "then and there" at the time of delivery, and "a mere intention to give in the future, however well shown, gives rise to no obligation which the law will recognize and enforce." *Siegel v. Siegel,* 967 So. 2d 349, 352 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D2437a]; *Ritter v. Shamas,* 452 So. 2d 1057, 1059 (Fla. 3d DCA 1984) ("In order for there to be a valid gift, there must be a complete and irrevocable surrender of dominion over the res, coupled with an intent ***then and there*** to pass title.") (emphasis added); *United States v. 2001 Chevrolet Suburban SUV,* 2009 U.S. Dist. LEXIS 9251, *14 ("A delivery which does not confer the present right to reduce the res into possession of the donee is insufficient."). Here, the volume of emails and documents presented to the Court clearly show that *Agorive's* investments were just that, investments, not gifts.

Of course, if Van Moerbeke really intended to gift DeWitt the LLCs, and/or the properties, and/or the cash used to fund the LLCs (which, by overwhelming evidence, he did not), DeWitt—a practicing attorney—was required to comply with applicable Florida Bar rules by: (a) insisting that Van Moerbeke consult with independent counsel; and (b) thereafter clearly documenting her client's donative intent in writing. Indeed where, as here, there is an attorney-client relationship, the burden is on the attorney to demonstrate that the donor acted with "full warning and perfect knowledge of the consequences of [his] act." *See Bolles v. O'Brien,* 63 Fla. 342, 343 (Fla. 1912) (invalidating signed agreement purporting to convey property from client to lawyer where lawyer could not meet burden to show, *inter alia,* that client acted with "full warning and perfect knowledge of the consequences of [his] act."). Here, there is not a shred of evidence supporting DeWitt's claim that Agorive's investments were a gift to her. And, DeWitt's own self-serving, after-the-fact statements (her only "evidence" of a gift) are simply not supported by reality or the host of voluminous contemporaneous written evidence in this case, much of it her own.

C. Dewitt Breached her Fiduciary Duty

The Court finds that DeWitt undeniably had an attorney-client relationship with Van Moerbeke and his companies Percival and Agorive, with respect to the LLCs at issue and otherwise, along with the attendant fiduciary duties and obligations. DeWitt's fiduciary duty to Van Moerbeke, Agorive and the LLCs arises from: (i) her role as an attorney with respect to legal, investment, and tax advice she provided to Van Moerbeke; (ii) her role as an attorney and manager in relation to Agorive's investments in the LLCs at issue; (iii) her licensure as an attorney in the Florida Bar; and (iv) the personal relationship she cultivated with Van Moerbeke. The overwhelming evidence shows that DeWitt provided legal and tax advice to Van Moerbeke both in his capacity as agent for Percival and Agorive concerning the LLCs at issue and a variety of other matters.

Regardless of whether DeWitt was acting as a lawyer with respect to the LLCs (and she clearly was) she is still subject to the duty to be honest in her communications and dealings, and even more so because DeWitt was in a confidential relationship with Van Moerbeke. Yet at no time throughout any of the transactions did DeWitt even attempt to comply with any of the governing Rules Regulating the Florida Bar, including, but not limited to:

a. Rule 4-8.4—Misconduct. Prohibiting lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

b. Rule 4-1.8—Conflict of Interest and Prohibited Transactions, prohibiting a lawyer from entering into a business transaction with a client. . .and knowingly acquiring ownership, possessory, security, or other pecuniary interests adverse to a client.

c. Rule 4-4.1—Truthfulness in statements to others—prohibiting a lawyer from knowingly making false statements of material fact or law to a third person or fail to disclose a material fact to a third person.

d. Rule 4-1.1—requiring a lawyer to provide competent representation.

e. Rule 4-1.3—requiring a lawyer to act with reasonable diligence and promptness in representing a client and to act with the commitment and dedication to the interest of the client upon the client's behalf. (Comments).

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f. Rule 4-1.4—requiring a lawyer to reasonably consult with the client about the means by which the client's objectives are to be accomplished, keep the client reasonably informed about the status of the matter, promptly comply with reasonable requests for information, and consult with client about any relevant limitation on the lawyer's conduct when the lawyer knows or reasonably should know that the client expects assistance not permitted by the Rules of Professional Conduct.

g. Rule 4-1.5—Prohibiting lawyers from withholding information to serve the lawyer's own interest or convenience or the interest or convenience of another person. *See* Rules Regulating the Florida Bar 4-1.1, 4-1.3, 4-1.4, 4-1.5, 4-1.8, 4-1.18, 4-4.1, 4-8.4.

The evidence also shows that DeWitt went to great lengths to establish a fiduciary and confidential relationship with Van Moerbeke at the outset and over the years. In addition to DeWitt's 2008 statements set forth above, DeWitt, *inter alia,* made the following statements to Van Moerbeke in connection with her advice, tax planning, and investment structuring concerning the LLCs:

• In January 1, 2012: "I assume you trust me and my reasoning here, which is tax driven and 'ability to leverage' driven (ease of obtaining favorable mortgages etc.). That said, I structure these things all the time, and under this model, you will have all the protection, as if I was a third party that you did not know/trust etc. It's a win win. I will walk you through everything." Pls.' Ex. 22.

• On January 17, 2013 regarding tax planning for the LLCs: "I've been doing this for 14+ years now. . .trust me." Pls.' Ex. 54.

• On January 17, 2013 regarding tax planning for the LLCs: "Tax planning: one dollar can be used for one purpose, then re characterized as being for another. Especially within the same tax year. Please stop micromanaging my job. Have some faith in me, and perhaps I won't be so relentless." Pls.' Ex. 60.

• On February 16, 2013: "When it comes to tax planning, I know what I'm doing, so sometimes it may be 'easier' to just trust me and know that I will explain it to you in person at a later time." Pls.' Ex. 336.

• On June 19, 2015: "I ask that you please have faith and trust me, and allow me to explain this to you. This solution allows you to keep legal ownership to the asset until converted to equity on the US side." Pls.' Ex. 125.

• On June 25, 2015: "I have been practicing tax law for 16 years now. It's a cake walk." Pls.' Ex. 196.

DeWitt also exploited her romantic relationship with Van Moerbeke by assuring him that her tax planning was in his best interests because she loved him. To that end, DeWitt wrote:

• On January 17, 2013 concerning proposed loan with security interest structure for Agorive's investments: "I want you fully protected and comfortable. I want my man happy." Pls.' Ex. 49.

• On March 16, 2013: "I am working for you, simply to make you happy. The homes and monies are yours. . .The houses are yours my love." Pls.' Ex. 67.

• On July 27, 2014 concerning ways to structure Agorive's investments: "My sole purpose is to make YOU happy, comfortable and relaxed. No matter what the subject matter is." Pls.' Ex. 97 (emphasis in original).

• On June 19, 2015 attempting to convince Van Moerbeke of the benefits of structuring Agorive's investments as loans: "I ask that you please stop shutting me down and just listen to me, as I am speaking from a humble, heart-felt perspective." Pls.' Ex. 118.

• June 19, 2015: Remember, I am on YOUR side; what you are proposing is not best FOR YOU. I love and care about you, in case you have forgotten." Pls.' Ex. 134.

• On June 20, 2015: "One day you will see, hopefully sooner rather than later, that I want to make you happy, always." Pls.' Ex. 141.

• On June 20, 2015 concerning the structure for Agorandora and Agoratibidabo: "Like everything else, I will work my ass off to make sure this is amazing. I do it because I love you. No f*ing fee. My mother took care of my father b/c she loved him. He did not pay her to do so." Pls.' Ex. 153.

• On June 21, 2015: "Re tax planning, this is your show, I know, so I am NOT trying to convince you of anything. Bottom line is that I was always sincere in my rationale, from a tax perspective." Pls.' Ex. 145.

• On June 22, 2015 concerning the LLCs: "This is absolutely your show, Marc. I have always had your best interests in mind and working my butt off to that end." Pls.' Ex. 171.

• On June 23, 2015 concerning her tax planning: "I had the best intentions for you." Pls.' Ex. 178.

DeWitt was also the manager of the LLCs. Under Delaware law, DeWitt had a fiduciary duty of care and loyalty to the LLCs. As part of her duty of loyalty, DeWitt was not permitted to amass secret profits from the LLCs. 6 *Del. C.* §18-1104 ("In any case not provided for in this chapter, the rules of law and equity, including the rules of law and equity relating to fiduciary duties and the law merchant, shall govern."); *see also, CSH Theatres, LLC v. Nederlander of San Francisco Assocs.,* 2015 WL 1839684 (same). DeWitt knowingly and intentionally breached that fiduciary duty.

Furthermore, DeWitt was responsible to advise on and to manage Agorive's investments. DeWitt was also trusted with, and was responsible for, the tax planning and structuring of Agorive's investments, the formation of the LLCs which hold Agorive's investments, the management of the LLCs which hold Agorive's investments, the day to day finances and accounting of the LLCs which hold Agorive's investments, as well as the tax filings of the LLCs which hold Agorive's investments. Indeed, she, *inter alia,* issued membership certificates in four of the LLCs to Percival, and as to all of the investments, provided written tax planning advice, and proposed asset structuring in writing. DeWitt also had prepared and signed tax returns showing Percival as the owner of four of the LLCs.

DeWitt repeatedly assured Van Moerbeke in writing that his Belgian companies (often referred to by DeWitt as "BelgianCo.") owned the LLCs and that any document to the contrary was for purposes of tax planning and did not affect his companies' legal ownership of the LLCs. And when Van Moerbeke, neither a United States citizen, a lawyer, nor an expert in U.S. taxes by any means, asked questions about DeWitt's complicated explanations of her tax planning (which often referred to characterizing Percival/Agorive's wire transfers as equity in the LLCs or as loans to the LLCs so as to achieve a particular tax strategy—the portfolio interest exemption), DeWitt used both her confidential relationship with Van Moerbeke and an accountant, Benjamin Bohlmann, to validate her investment/tax structure and planning to Van Moerbeke as further assurances of her purported trustworthiness and good intentions. Also, DeWitt, when questioned, often referenced her purported love for Van Moerbeke as proof that she was only doing what was best for him.

Here, the evidence shows that DeWitt breached her fiduciary duty repeatedly by preparing documents to allow her to exercise ownership and control of properties she was supposed to have purchased for, and managed on behalf of, her client/advisee, by wrongfully claiming ownership of Agorive's investments, by fraudulently obtaining a loan using her client's properties as security, and by using the LLCs' income to pay for personal expenses, including repayment of the fraudulently-obtained loan and her personal attorneys' fees.

D. Unlawful Detainer (Count XI)

The evidence presented also establishes the merit of Plaintiffs' claim against DeWitt for unlawful detainer under Section 82.03, as:

> A person entitled to possession of real property, including constructive possession by a record titleholder, has a cause of action against a person who obtained possession of that real property by forcible entry, unlawful entry, or unlawful detention and may recover possession and damages.

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> If the court finds that the entry or detention by the defendant is willful and knowingly wrongful, the court must award the plaintiff damages equal to double the reasonable rental value of the real property from the beginning of the forcible entry, unlawful entry, or unlawful detention until possession is delivered to the plaintiff. The plaintiff may also recover other damages, including, but not limited to, damages for waste.

Fla. Stat. § 82.03. The property located at 7320 Mindello Street is indisputably owned by SuzMar, LLC. Through Van Moerbeke, Agorive, the ultimate beneficial owner of SuzMar, LLC, allowed DeWitt to live at the Mindello property. After DeWitt's sudden claim in June 2018 that she owned Agorive's investments, including SuzMar, LLC, Van Moerbeke revoked his consent. On July 16, 2018, SuzMar, LLC, through its then-manager Josh Rader, gave notice to DeWitt that she was no longer authorized to reside at the Mindello property.[15] *See* Pls.' Ex. 274. DeWitt has refused to vacate the premises. As such, her possession of the Mindello property is unlawful.

E. Restitution and Disgorgement

The Court finds that as a result of DeWitt's theft and breach of fiduciary duty, she was able to secure and remove from the LLCs at least Two Million Two Hundred Forty Six Thousand Four Hundred Eighty Nine Dollars ($2,246,489.00) to which she had no entitlement and which was spent on her legal fees, personal expenses, including clothing, meals, entertainment and things completely unrelated to the business of the LLCs. That money was stolen and is ordered to be disgorged immediately. *See* Fla. Stat. § 86.031 *et seq.; King Mt. Cndo, Ass'n v. Gundlach,* 425 So. 2d 569 (Fla. 4th DCA 1983) (restitution and disgorgement available for breach of fiduciary duty claim); *Gordon v. Flamingo Holding Partnership,* 624 So. 2d 294, 297 (Fla. 3d DCA 1993) (an equitable lien "may be declared by a court of equity out of general considerations of right and justice as applied to the relations of the parties and the circumstances of their dealings" and may be based upon fraud, misrepresentation, or affirmative deception, or unjust enrichment); *see also Golden v. Woodward,* 15 So. 3d 664, 669 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D1281a]; *F. A. Chastain Constr., Inc. v. Pratt,* 146 So. 2d 910, 913 (Fla. 3d DCA 1962) (equitable accounting appropriate to "balance the equities, adjust the accounts of the parties, and render complete justice between them."). *Decumbe v. Smith,* 196 So. 595 (Fla. 1940) (injunctive relief is guided by principles of equity).

F. Plaintiff's Claims for Declaratory Relief, Equitable Accounting and Injunction

The Court finds that declaratory relief is also warranted. *See* Fla. Stat. §86.011, §86.031 and §86.101 (allowing Florida courts to render judgment on "the existence, or nonexistence: (1) of any immunity, power, privilege, or right; or (2) of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future" in order "to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations."); *see also, May v. Holley,* 59 So. 2d 636 (Fla. 1952); *People's Tr. Ins. Co. v. Franco,* 45 Fla. L. Weekly D879b (Fla. 3d DCA Apr. 15, 2020). The Court also finds that an equitable accounting is appropriate such that any and all funds DeWitt wrongfully appropriated from the LLCs are returned to the LLCs and to Agorive, especially as to the past several months, where the financial information was not available for use at trial. *See, Pratt,* 146 So. 2d at 913 (equitable accounting is warranted where the contract demands between the parties "involve extensive or complicated accounts and it is not clear that the remedy at law is as full, adequate and expeditious as it is in equity.").

Further, the Court finds that injunctive relief is appropriate because Agorive has established a clear legal right to the relief granted herein, an inadequate remedy at law and that irreparable harm will arise absent injunctive relief enjoining DeWitt from acting as manager, owner, or agent for the LLCs in any way. *See, Fla. R. Civ. P. 1.610; see also, K.W. Brown & Co. v. McCutchen,* 819 So. 2d 977 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D1476a]. Indeed, it was in her role as manager, agent, and fiduciary for the LLCs that DeWitt was able to steal millions of dollars from the LLCs for her own personal gain.

G. Affirmative Defenses

Consistent with the foregoing findings, the Court also concludes that Defendants' gift defense and affirmative defenses have no basis in law or fact.

IV. CONCLUSION

As the Court said at the outset, this case turns on a single factual dispute: namely, whether Van Moerbeke gifted seventeen (17) parcels of real estate and the improvements thereon (*i.e.,* houses)—currently valued well in excess of Fifteen Million Dollars ($15,000,000.00)—to his romantic partner/attorney DeWitt. The evidence overwhelmingly confirms that the answer is no. In fact, not a shred of credible evidence supports DeWitt's claim that Van Moerbeke bestowed upon her such largesse.

It is unfortunate that Van Moerbeke was forced to resort to litigation in order to secure "clear title" to property he paid for and clearly owned; that he had to incur substantial expense deciphering DeWitt's "tangled web;"[16] and that—to add insult to injury—he had to endure this contentious litigation for years, in large part because DeWitt was able to use close to One Million Dollars ($1,000,000.00) of ***his*** money—rental income from the houses—to fund her defense. But this litigation will now be brought to its overdue conclusion.

It is hereby **ORDERED:**

1. Agorive NV is the sole legal and beneficial owner of SuzMar LLC, IBRB I, LLC, IBRB II, LLC, IBRB III, LLC, IBRB IV, LLC, IBRB V, LLC, IBRB VI, LLC, Agoraminorca, LLC, Agoraduana, LLC, Agoraschencley, LLC, Agorasolata, LLC, Agoraportillo, LLC, Agorafairchild, LLC, Mantuagora, LLC, Agorasistina, LLC, Agoratibidabo, LLC, and Agorandora, LLC and all properties, rights, and claims thereof;
2. DeWitt has no legal or equitable claim whatsoever in the foregoing seventeen (17) LLCs or any real or personal property owned by those LLCs;
3. DeWitt shall immediately turn over all documentation relating to the foregoing seventeen (17) LLCs including, but not limited to, all books and records, organizational documents, membership certificates, financial books and records, including tax-related materials and filings, correspondence, bank accounts and account related statements and materials, tenant files and any and all documents relating to these LLCs, and all keys and access cards and the like concerning the properties at issue. This Order contemplates the turnover of all documentation required to demonstrate complete ownership of the LLCs by Agorive NV and necessary to the management and control of the LLCs;
4. DeWitt is enjoined from holding herself out as manager, member, agent, or any other representative of any kind of any of the LLCs effective immediately;
5. Within two (2) days of this Order, DeWitt shall provide Agorive NV with a list of all tenants of any of the seventeen (17) LLCs and their current contact information. DeWitt shall countersign any notice to the tenants that Agorive NV is the sole owner of the seventeen (17) LLCs. Henceforth all tenants shall deal exclusively with Agorive NV or its duly appointed representatives, managers, or agents.
6. Agorive NV, or persons or entities designated by it alone, shall be the sole signatory on any and all accounts related to these LLCs;

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7. DeWitt is enjoined from taking any steps in any manner, directly or indirectly, to use or control the use of any funds of the LLCs or conduct any business on behalf of or in the name of the LLCs for any purpose, business or otherwise;

8. DeWitt is ordered to vacate the property owned by SuzMar, LLC located at 7320 Mindello Street, Coral Gables, Florida within ninety (90) days and after that time is otherwise enjoined from occupying such property, and is required to leave behind all furniture and artwork as identified on Plaintiffs' Exhibit 312 - Plaintiffs' Inventory of Furniture and Artwork dated September 4, 2018 submitted pursuant to the Court's Injunction Order dated August 23, 2018. She is also ordered to leave the premises in its current condition;

9. DeWitt shall sign, execute, and complete all documents necessary to effectuate this Order and the purposes of this Order as and when required. DeWitt shall forward immediately to counsel for Agorive NV any communication of any kind which she receives pertaining to any of the LLCs or their operations, without responding to such communication in any way;

10. Final Judgment is entered in favor of Agorive NV whose address is Bartstraat 34, 2560 Nijlen, Belgium and against Suzanne DeWitt, whose address is 600 Brickell Avenue, Suite 2500, Miami FL 33131, in the amount of Two Million Two Hundred Forty Six Thousand Four Hundred Eighty Nine Dollars ($2,246,489.00), together with pre-judgment interest in the amount of Three Hundred Thirty Six Thousand Four Hundred Ninety Two Dollars and Five Cents ($336,492.05), totaling Two Million Five Hundred Eighty Two Thousand Nine Hundred Eighty One Dollars and Five Cents ($2, 582,981.05), which shall bear post judgment interest at the legal rate, for which sum let execution issue forthwith;

11. DeWitt is ordered to complete and return to Agorive NV's counsel a complete, truthful, and accurate Fact Information Sheet, Form 1.977, within thirty (30) days of the date of this Order;

12. The Court orders an equitable accounting and reserves jurisdiction to enter further orders as necessary to oversee and implement the equitable accounting;

13. The Court reserves jurisdiction to grant any supplemental relief pursuant to the Section 86.061, Florida Statutes. *See also, Popular Bank v. R.C. Asesores Financieros, C.A.,* 797 So. 2d 614 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D2433a]; *Miami Beach v. Fein,* 263 So. 2d 258 (Fla. 3d DCA 1972);

14. The Court reserves jurisdiction as to the issues of entitlement and amount of attorneys' fees and costs and any matters related thereto. 15. The Court reserves jurisdiction to enforce compliance with this Final Judgment.

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[1]A relationship that, undisputedly, started out as platonic and eventually became intimate.

[2]Agorive is the ultimate owner of all rights to the LLCs.

[3]As to her review of the draft stock option plans, DeWitt wrote to Van Moerbeke: "I'm thrilled you are involving me in this (*i.e.*, I analyze and give my opinions, which I know you value)."

[4]While DeWitt was initially disinclined to have a romantic relationship, at or around the time these investments began, she had a "change of heart" and began a physical relationship with Van Moerbeke.

[5]DeWitt later confirmed this on June 21, 2015 when she wrote to Van Moerbeke: "Over time, as I earn more income at work (income as an attorney), I would respectfully like to 'buy-in' on the first 10 properties as we had discussed, if you will allow me to." Pls.' Ex. 33.

[6]Email refers to "sweet" or sweat equity. Though Dewitt has attempted to construe that as a sexual inuendo of some sort, the Court believes the plain meaning of the email and Van Moerbeke's testimony was that he intended to refer to the business meanings of the terms meaning: the option or the right of management to be issued shares depending on the success of the investment, and equity earned through in-kind services, respectively.

[7]In two instances, the wires inadvertently were made from Van Moerbeke's personal account. Van Moerbeke transferred the interests in those LLCs he inadvertently funded personally to Agorive by written contract. *See* Pls.' Ex. 277.

[8]In forming the first LLC, DeWitt asked Van Moerbeke to "please let me know the name of shareholder company." Pls.' Ex. 24. Van Moerbeke responded, "Shareholder is Percival SA." Pls.' Ex. 25.

[9]By this time, Percival had been acquired by Agorive.

[10]In reliance upon this documentation, Agorive removed DeWitt and her mother as managers of the four LLCs and installed Josh Rader as manager and listed the four LLCs as plaintiffs in the Agorive Lawsuit. In subsequent court filings, including DeWitt's sworn affidavit, DeWitt disclosed, for the first time ever, an alternate version of the same corporate documents displaying her own name as owner rather than Percival SA.

[11]In addition, DeWitt also became irritable and aggressive concerning the repayment of certain loans that Van Moerbeke had personally made to DeWitt's brother, directly and through their mother, totaling One Million Seventy Thousand Dollars ($1,070,000) to buy and renovate a new home. *See* Pls.' Ex. 263.

[12]There were no such applications.

[13]Specifically, the request was for documents demonstrating the status of the businesses and their financial condition, financial statements, federal income tax returns for each year, a current list of the name and address of each member and manager, a copy of the limited liability company formation documents, including amendments thereto, written consents, minutes of meetings and records of actions of members, and loan documents, rental agreements and management agreements to which any Delaware LLC is a party. *See* Pls.' Ex. 272.

[14]Interestingly, Dewitt disclaimed *ownership* of two of the entities, Agorandora LLC and Agoratibidabo LLC, a position she now also contradicts.

[15]Agorive appointed Josh Rader to be the manager of SuzMar, LLC.

[16]"Oh, what a tangled web we weave, when first we practice to deceive!" (Sir Walter Scott, 1808)

* * *

Torts—Attorneys—Legal malpractice—Limitation of actions—Cause of action for transactional legal malpractice, based on attorney's drafting of documents that left plaintiffs completely unprotected in development transaction and gave business partner and his girlfriend ability to defraud plaintiffs, accrued and two-year statute of limitations began to run when plaintiffs first suffered injury caused by alleged malpractice—Malpractice suit initiated more than two years after plaintiffs learned that partner and girlfriend had stolen partnership interest, had improperly issued substantial capital call, and had used authority provided by documents that attorney prepared to defraud, is barred by statute of limitations—Fact that plaintiffs are in bankruptcy litigation with partner such that amount of damages plaintiffs will be left with after litigation is concluded remains uncertain does not alter or extend statute of limitations—Application of finality-accrual rule, providing that transactional malpractice claim does not accrue until underlying or related litigation is concluded, is limited to cases in which outcome of underlying or related litigation would determine whether any malpractice occurred at all or whether client ever suffered damages, which is not true of present claim—Motion to dismiss is granted

IGOR MIKHAYLOV, et al., Plaintiffs, v. BILZIN SUMBERG BAENA PRICE & AXELROD LLP, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-002762-CA-01, Section CA43. October 7, 2020. Michael A. Hanzman, Judge. Counsel: William L. Petros, Coral Gables, for Plaintiffs. Matthew Weinshall, Alissa Del Riego, and Peter Prieto, Podhurst Orseck, P.A., Miami, for Defendant.

FINAL JUDGMENT OF DISMISSAL

I. INTRODUCTION

Plaintiffs, Igor Mikhaylov individually, and Artem Zhgun, as Trustee of the Igor Mikhaylov 2015 Irrevocable Trust (collectively "Plaintiffs" or "Mikhaylov"), bring this action advancing claims for transactional legal malpractice and breach of fiduciary duty against their former counsel, Defendant Bilzin Sumberg Baena Price and Axelrod LLP ("Defendant" or "Bilzin"). Bilzin moves for dismissal, insisting that Plaintiffs' claims are time barred because they "accrued more than two years before this suit was filed . . ." and, as a result, "should be dismissed with prejudice . . . under the two year statute of limitations as set forth in § 95.11(4)(a) Fla. Stat." Defendant's Supp. Brief p. 1. Despite having filed the case, Plaintiffs insist that their claims have yet to accrue because they are currently involved in "related" litigation against third parties, and their damages cannot be ascertained with finality until that "related" litigation is concluded.

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Plaintiffs' Supp. Brief p. 1.

As our Supreme Court pointed out earlier this month:

> [d]isputes over the timeliness of a claim can present three distinct issues. The first is to determine the statutory limitations period applicable to a given cause of action. The second is to determine the event that started the running of the statute of limitations—in other words, to determine when the cause of action *accrued* for purposes of starting the limitations period. And the third is to determine whether a statutory tolling provision existed that suspended the running of the limitations period for any length of time.

R.R. v. New Life Community Church Of CMA, Inc., 45 Fla. L. Weekly S261a (Fla. Oct. 1, 2020). Here, there is no dispute that Plaintiffs' claims are governed by the two-year statute of limitations set forth in § 95.11(4)(a), Fla. Stat. It is also undisputed that no "statutory tolling provision exist[s] that suspended the running" of this two-year limitation period. *Id.* The only dispute is over when Plaintiffs' cause of action accrued (or will accrue).

In Bilzin's view, Plaintiffs' cause of action accrued when they first suffered a redressable injury, however slight, as a consequence of its alleged malpractice, and "the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date." *City of Miami v. Brooks*, 70 So. 2d 306, 308 (Fla. 1954). This is referred to as the so-called "first injury rule." Plaintiffs disagree and say that the Court must apply what has been described as the "finality-accrual rule" which, in the legal malpractice context, recognizes that in *certain circumstances* a cause of action does not accrue "until the client incurs damages at the conclusion of the **related or underlying judicial proceedings** or, if there are no related or underlying judicial proceedings, when the client's right to sue in the related or underlying proceeding expires." *Perez-Abreu, Zamora & De La Fe, P.A. v. Taracido,* 790 So. 2d 1051, 1054 (Fla. 2001) [26 Fla. L. Weekly S492a] (quoting *Blumberg v. USAA Cas. Ins. Co.,* 790 So. 2d 1061, 1065 (Fla. 2001) [26 Fla. L. Weekly S473a]).

For the reasons explained herein, the Court unhesitatingly concludes that Plaintiffs' causes of action accrued when they first suffered injury caused by Bilzin's alleged malpractice; something Plaintiffs do not deny occurred more than two (2) years prior to filing this lawsuit. And the fact that Plaintiffs may (or may not) recover from third parties some (or all) of the damages they have *already* suffered does not defer/delay accrual of their claims against Bilzin. These claims are therefore irremediably time barred.[1]

II. **FACTS AS ALLEGED**

A. **Plaintiffs' Investment and Bilzin's Alleged Malpratice**

The facts alleged in Plaintiffs' complaint, which at this stage of the proceedings must be presumed true, *see, e.g., Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc.*, 842 So. 2d 204 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D847a], are as follows. In or about 2010, Mikhaylov, a Russian national residing in Russia, met Anatoly Zinoviev ("Zinoviev"), a Russian national residing in South Florida. After forming a "business relationship upon trust," Zinoviev convinced Mikhaylov to "invest more than $16 million in a real estate development project in Broward County referred to as the Seneca Town Center project." Compl. ¶¶ 9, 10. Between "2012 and 2017, Mikhaylov—directly and through his Trust—loaned or invested over $5 million that was used to purchase the Seneca Project land, and approximately $11 million that was intended to be used to develop the project." Compl. ¶ 10. "Eventually, Mikhaylov entrusted Zinoviev not only with substantial control over the Seneca Project (as managing partner), but also provided Zinoviev access to certain of Mikhaylov's bank accounts, including a checkbook with pre-signed checks for Zinoviev to use in emergencies related to the Seneca Project when Mikhaylov was in Russia." Compl. ¶ 11.

After acquiring Mikhaylov's confidence, and access to his funds, "Zinoviev, his co-conspirators, and sham entities created by them, conspired to steal the millions of dollars that Mikhaylov and the Trust invested and loaned to develop the Seneca Project." Compl. ¶ 12. They were able to steal the funds by, among other things, "syphoning money from the development companies using fake invoices from sham entities, kickbacks, bribes, and unauthorized salaries and personal expenditures," and convincing "Mikhaylov to give them power over Mikhaylov's Trust, and then [acting] against the interests of the Trust to personally benefit themselves." Compl. ¶¶ 12, 13.

To acquire the Seneca Project, Mikhaylov initially "loaned $5 million to East Coast Invest, Corp., the predecessor to East Coast Invest, LLC, ("East Coast Invest") under a "Loan Agreement with Security Interest" dated Sept. 17, 2013. That $5 million was used by the company to purchase land for the project. Over the next few years, Mikhaylov contributed another $11 million to develop the retail center on the land. Compl. ¶19. In late 2015, "Zinoviev convinced Mikhaylov to restructure his investment in a manner that Mikhaylov understood was designed to be better for him than the existing structure. Mikhaylov then retained Bilzin to provide competent legal advice and prepare agreements necessary to protect Mikhaylov's financial interests and investments." Compl. ¶ 20.

While the Complaint alleges that Mikhaylov hired Bilzin to "to protect [his] financial interests and investments," Compl. ¶ 20, the firm was first retained by Zinoviev "to represent East Coast Invest regarding 'Corporate Advice and Consultation Regarding Construction Contract.' " Compl. ¶ 20. Specifically, Bilzin, through a February 19, 2015 "Engagement Agreement," agreed to represent East Coast Invest in connection with the preparation of "an Operating Agreement or Shareholders' Agreement," consultation regarding a "Cost Plus Percentage Construction Contract," and "the preparation of a mortgage to secure payment of multiple promissory notes to owners of the Client" (presumably Mikhaylov and his Trust). Compl. ¶ 22.

Later in 2015, Mikhaylov also "engaged Bilzin to provide legal advice regarding, inter alia, the 'Preparation of a Trust Agreement.' " and through its September 3, 2015 retainer agreement with Mikhaylov, Bilzin agreed to represent him in connection with "(i) the preparation of a trust agreement, (ii) acting as a scrivener in connection with the restructuring and documentation of certain loans between [Mikhaylov] and East Coast Invest LLC (the "Loans") and (iii) following the restructuring of the Loans, preparing documentation in connection with the transfer of the Loans between [Mikhaylov], an entity affiliated with [Mikhaylov] and the newly created trust (the "Matter")." Compl. ¶ 24.

Creation of the Trust was necessary because at the time "ECI Partnership" was first created, "Zinoviev suggested that Mikhaylov settle a trust to hold [his] entire 50% limited partnership interest for the future benefit of Mikhaylov's children." Compl. ¶ 27. Though Bilzin was aware that "the purpose of the Trust was to protect Mikhaylov's investment," the Trust Agreement Bilzin prepared "granted Zinoviev, and not Mikhaylov, the sole power to remove and replace any trustee for any reason," and Zinoviev used that power to appoint his domestic partner, Genna Demircan ("Demircan"), as trustee. Zinoviev nevertheless assured Mikhaylov that "the Trust gave [him] the power to remove and replace Demircan as trustee with someone else at any time Mikhaylov desired, which was untrue." Compl. ¶ 28. "The Trust provisions for removal were crucial because the same day the Trust was created (November 30, 2015), a Secured Promissory Note was executed pursuant to which Mikhaylov and the Trust loaned $16,550,000 to East Coast Invest, the entity that holds title to the Seneca Town Center land purchased with Mikhaylov's money." Compl. ¶ 29.

Aside from drafting a Trust Agreement granting Zinoviev the

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unfettered right to select the Trustee, in December 2015 Bilzin created the "ECI Partnership" through an "Agreement" that "named Zinoviev as both Limited and General Partner." Compl. ¶ 30. The Trust and an individual named Alex Grinberg were also limited partners and an individual named Elliot Steiner was designated as "Approval General Partner." The Trust held a "50% interest, Zinoviev a 34% interest, and Alex Grinberg a 14% interest." Two general partners, Zinoviev and Steiner, also held a "1% interest." Compl. ¶ 30.

Zinoviev eventually obtained Steiner's 1% Approval General Partner interest and "Demircan, who by that time had been named Trustee, executed the ECI Partnership on behalf of the Trust." Compl. ¶ 30. So when all was said and done, the ECI Partnership became the sole member of East Coast Invest, and Zinoviev, together with his domestic partner Demircan, had corporate control over "the financial affairs of both the lender (Mikhaylov through the Trust) and the borrower (East Coast Invest)." Compl. ¶ 31.

As part of the restructuring, Bilzin also drafted an "Amended and Restated Secured Promissory Note and Loan Agreement" dated November 30, 2015, "through which the borrower, East Coast Invest, agreed to pay Mikhaylov an amount up to $25,000,000, including the sum of $8,075,000 for which it was already indebted." Compl. ¶ 32. Simultaneously with its execution "Mikhaylov assigned the Secured Promissory Note to the newly created Trust, so the Trust is now the lender." Compl. ¶ 36. But unbeknownst to Mikhaylov, instead of having the Note secured by a mortgage encumbering the real estate, "the Secured Promissory Note" drafted by Bilzin "merely gave the lender the right in the future to require East Coast Invest to secure the loan with a mortgage on the Seneca Project land," a right that Demircan—Zinoviev's paramour who was then the trustee—"never exercised." Compl. ¶ 37. Thus, as a consequence of Bilzin's alleged malpractice, the Trust failed to obtain collateral (*i.e.*, a mortgage on the real estate) securing repayment of this debt.

The bottom line is that Mikhaylov alleges that Bilzin negligently placed him in a position where he was completely unprotected and at the mercy of his "partner" Zinoviev and his girlfriend Demircan. The Complaint then alleges how Zinoviev and Demircan used the "power" the documents drafted by Bilzin gave them to defraud Mikhaylov and the Trust.

B. **The Fraud and Plaintiffs' Damages**

Zinoviev and Demircan's "scheme began in March 2017 when Zinoviev suggested to Mikhaylov that Mikhaylov assign his 1% GPI to Demircan," and in order to persuade Mikhaylov to do so, Zinoviev represented that "it was important for the person holding that interest be a U.S. citizen." Compl, ¶ 40. That 1% GPI "gave Mikhaylov power over the ECI Partnership by giving him approval authority over all 'major decisions.' " Compl. ¶ 39. When Mikhaylov expressed reservations, "Zinoviev suggested that Mikhaylov execute an option agreement ("Option Agreement") giving Mikhaylov the power to take back the 1% GPI from Demircan whenever Mikhaylov wished." Compl. ¶ 40. "Based on Zinoviev's representations, on March 25, 2017, Mikhaylov executed both an assignment agreement ("Assignment Agreement") of the 1% GPI and the Option Agreement to get it back at will" which "effectively gave Demircan and Zinoviev full management authority in the ECI Partnership. . . ." Compl. ¶ 41.

Shortly after Mikhaylov executed the "Assignment Agreement and Option Agreement," Zinoviev asked Bilzin to prepare a new "purchase agreement," and "misrepresented to the attorneys that the parties on their own accord had decided to use a different form of agreement than the Assignment Agreement that had been executed a few days earlier." Compl. ¶ 42. "Without performing any further investigation," Bilzin proceeded to prepare a "purchase agreement" and sent it to Zinoviev who in turn "changed the language of the draft document" by including a sentence "purporting to cancel the Option Agreement that Demircan had signed giving Mikhaylov the right to take back the 1% GPI whenever he wished." Compl. ¶¶ 42, 43. Zinoviev then "misrepresented to Mikhaylov that there had been a problem with the original Assignment Agreement," and that the "lawyers wanted Mikhaylov and Demircan to sign a new agreement to fix the issues." Compl. ¶ 44. "Trusting in Zinoviev, including that Zinoviev would accurately translate the English document into Russian, and based on the explanation Zinoviev provided Mikhaylov of what the document was, Mikhaylov signed the fraudulent purchase agreement ('Fake Purchase Agreement')." Compl. ¶ 44.

"Later, around the Fall of 2017, Mikhaylov, frustrated with the lack of progress with the Seneca Project and unaware of Zinoviev and Demircan's deception with the Fake Purchase Agreement, decided to exercise [the] right he had under the Option Agreement to take back the 1% GPI." Compl. ¶ 45. "Specifically, on or about November 17, 2017, Mikhaylov requested that Demircan provide him with a copy of the Option Agreement so he could begin the process of exercising the Option to take back his 1% GPI." Compl. ¶ 45. Neither Demircan nor Zinoviev ever delivered a copy of the agreement, so "Mikhaylov requested and received a copy directly from Bilzin." Compl. ¶ 47. On November 20, 2017, Mikhaylov sent written notice to Demircan (with a copy to Zinoviev) of his decision "to exercise his. . . option to take back the 1% GPI from Demircan. . . ." Compl. ¶ 48.

Instead of responding to Mikhaylov's notice, Demircan immediately (on the same day) "surreptitiously deposited $1,000.00 directly into Mikhaylov's checking account in an attempt to comply with the provision in the Fake Purchase Agreement" which again granted Demircan the right to purchase Mikhaylov's 1% GIP for a "a mere $1,000 when he had invested more than $16 million in the project." Compl. ¶¶ 49, 50. "Mikhaylov first noticed the unauthorized deposit on November 30, 2017, and immediately emailed Zinoviev to ask him what it was for." Compl. ¶ 50. "Zinoviev told Mikhaylov that the $1,000 money order was Demircan's payment for the 1% GPI under the agreement Mikhaylov had signed back in March" and "Mikhaylov responded to Zinoviev that he never agreed to give up his Option to retake his 1% GPI." Compl. ¶ 50. "Zinoviev and Demircan nevertheless persisted in maintaining that Demircan [held] the 1% GPI . . . by virtue of the Fake Purchase Agreement," and the $1,000.00 payment. Compl. ¶ 51. In other words, in November 2017 Demircan refused to return to Mikhaylov his 1% GPI.

Shortly thereafter, Zinoviev and Demircan, exploiting their power as the two general partners, issued a "capital call" requiring that the Trust—which Demircan was serving as Trustee—contribute "nearly $1 million" to the project. Compl. ¶ 52. "By the terms of the ECI Partnership's Limited Partnership Agreement, a failure to meet that capital call would permit the two general partners to acquire "the Trust's full interest in the partnership at half its fair market value, thereby placing the Trust property at a substantial risk of loss." Compl. ¶ 52. As trustee, "Demircan was "duty-bound to protect the Trust property (the 50% limited partnership interest the Trust holds) and to manage the Trust property solely for the benefit of Mikhaylov's children. . ." and "[i]nstead, Demircan used her dual positions as trustee of Mikhaylov's Trust and purported General Partner of the ECI Partnership in an effort to further enrich herself," and insisted that Mikhaylov had "no right to resist the capital call because he is no longer the owner of the 1% GPI and cannot repurchase the 1% GPI to regain the power to halt the capital call because the Fake Purchase Agreement revoked the repurchase right." Compl. ¶¶ 53, 54.

These allegations clearly demonstrate that as of November 2017, Mikhaylov was aware of the fact that: (a) Zinoviev and Demircan had stolen his 1% GPI; (b) Zinoviev and Demircan had improperly issued a substantial capital call; and (c) Zinoviev and Demircan had used the authority provided by the documents Bilzin allegedly prepared to

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defraud him. He also was aware that due to Bilzin's alleged negligence the Trust had no collateral securing its debt. Recognizing that he had been severely injured as a result of these actions, and that Bilzin had failed to protect his interests, in November 2017 Mikhaylov attempted to remove "Demircan as trustee." Compl. ¶ 55. Demircan, however, refused to step down and, "[w]ithout other recourse, on March 21, 2018, Mikhaylov and his children initiated an action in the Probate Division to remove Demircan as trustee and to modify the Trust to remove Zinoviev as the person with the power to remove and replace any trustee for any reason." Compl. ¶ 56.[2]

The Probate court scheduled a hearing for April 23, 2018, and Zinoviev knew that if his hand-picked "trustee" were removed "the replacement trustee would require East Coast Invest to secure the Secured Promissory Note with a mortgage on the Seneca Town Center property." Compl. ¶ 58. So, on April 20, 2018, just two days before the emergency hearing, Zinoviev, through his company AZ Service Miami, LLC, purported to loan East Coast Invest $500,000.00, and secure that loan with a mortgage encumbering Seneca Town Center property. Compl. ¶ 59. Three days later, on April 26, 2018, the Probate Division entered an Agreed Order compelling Demircan's resignation as trustee, enjoining Rincon from acting in the capacity of trustee, and prohibiting Zinoviev from exercising the power to appoint and remove trustees. Compl. ¶ 60. "Then, on July 16, 2018, the Probate Division entered a Final Order modifying the Trust to remove Zinoviev as the one with power to appoint and remove trustees and placing Mikhaylov's nephew Artem Zhgun ('Zhgun') in that position." Compl. ¶ 60.[3]

The Complaint goes on to allege that Zinoviev, using the Seneca Project as a pretext, took funds by, among other things, creating fake invoices to cover up improper personal expenditures and fraudulent transfers, and that on November 5, 2018, in a separate legal proceeding, the court appointed Barry Mukamal, CPA as an independent receiver charged with, among other things, conducting a "forensic accounting investigation." Compl. ¶ 63. That investigation uncovered a "vast amount" of fraudulent activity undertaken by Zinoviev in order to "to funnel money out of East Coast Invest." Compl. ¶¶ 63-65. Mukamal also discovered that Zinoviev secretly entered into a loan agreement with a third party, CrossGen Finance, LLC ("CrossGen")—whereby East Coast was able to borrow $1,767,540.87 secured by "yet another mortgage on the property." Compl. ¶ 67. To secure that loan, Zineviev fraudulently represented that the property was unencumbered, never disclosing the right of the Trust to secure its debt. Compl. ¶¶ 69, 70.

On August 6, 2019, the Receiver "filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the Southern District of Florida on behalf of the debtor, East Coast Invest." Compl. ¶ 73. On November 14, 2019, the "Bankruptcy Court entered an Order converting the case under Chapter 11 to a case under Chapter 7." Compl. ¶ 74. The court later entered an order granting the "Trustee's application to enter into a listing agreement and establish bidding procedures to sell the property held by the estate. The property has not yet been sold." Compl. ¶ 75. Because the bankruptcy proceedings are ongoing, Plaintiffs do not at this point know the precise amount that will be returned on their investment. In other words, the amount of damages Plaintiffs will be left with after the bankruptcy is concluded remains uncertain.

Plaintiffs' Complaint filed February 5, 2020, advances two claims: Legal Malpractice (Count I) and Breach of Fiduciary Duty (Count II). Both claims allege that Bilzin, as counsel for Mikhaylov and the Trust, owed these clients "the duty to exercise the degree of care, skill and competence that reasonable competent attorneys would exercise under similar circumstances," and that Bilzin breached that duty by, among other things, failing to properly counsel these clients with respect to various agreements/transactions at issue, and failing to properly draft those agreements in a manner consistent with the clients' best interest.

III. **ANALYSIS**

A. **The "First Injury Rule"**

Plaintiffs' claims are governed by the two-year statute of limitations contained in Florida Statute § 95.11(4)(a). The Statute provides:

> An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.

Id. Section 95.031 provides that: "[e]xcept as provided in subsection (2) and in s. 95.051 and elsewhere in these statutes, the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues." Section 95.031(1) further provides that: "[a] cause of action accrues when the last element constituting the cause of action occurs." And as our Supreme Court recently noted in *R.R.*, claims founded on negligence generally "accrue at the time of injury." *R.R.*, 45 Fla. L. Weekly S261a.

Applying this statutory provision, as plainly written, our Supreme Court has repeatedly held that:

> where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date.

Brooks, 70 So. 2d at 308; *Seaboard Air Line R. Co. v. Ford*, 92 So. 2d 160 (Fla. 1955). Put another way, "the cause of action accrues, and the statute begins to run from the time when the injury was first inflicted, and not from the time when the full extent of the damages sustained have been ascertained." *Larson & Larson, P.A. v. TSE Indus., Inc.*, 22 So. 3d 36, 42 (Fla. 2009) [34 Fla. L. Weekly S591a]. *See also Med. Jet, S.A. v. Signature Flight Support-Palm Beach, Inc.*, 941 So. 2d 576 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D2904a] (cause of action for breach of contract accrued when plaintiff first suffered economic harm, even though subsequent, consequential damages later resulted); *Abbott Labs., Inc. v. Gen. Elec. Capital*, 765 So. 2d 737 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D1230c] (statute began to run at time of initial breach even though damages were nominal and increased thereafter); *Woodward v. Olson*, 107 So. 3d 540 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D422a] (fact that injuries were progressively worsening did not extend accrual date in malpractice claim). This so-called "first injury rule" is widely accepted. *See, e.g., Highland Indus. Park, Inc. v. BEI Def. Sys. Co.*, 357 F. 3d 794, 797 (8th Cir. 2004) (". . . we know of no state whatever in which an injured party must know the full extent of the damages that it may recover before the statute of limitations begins to run on its claim. Indeed, the cases on this issue are legion.").

Application of the "first injury rule" is mandated by the plain meaning of § 95.031(1), as the statute says, in no uncertain terms, that a cause of action accrues when the last element "occurs," meaning when damages "occur"—not when they finish occurring. That plain meaning ends the inquiry. *See Florida Dept. of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So. 2d 954, 960 (Fla. 2005) [30 Fla. L. Weekly S109a] ("[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning. . . the statute must be given its plain and obvious meaning"); *DMB Inv. Tr. v. Islamorada, Vill. of Islands*, 225 So. 3d 312, 317 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1615a] ("[t]he Legislature must be understood

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to mean what it has plainly expressed" and when a statute is clear and "unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms"). And § 95.031(1) contains no exception for legal malpractice claims. Those claims are, and must be, treated like any other. *See Kellermeyer v. Miller*, 427 So. 2d 343, 347 (Fla. 1st DCA 1983) (legal malpractice claims accrued when "damage actually occurred, although the amount remained uncertain, and the aggrieved parties possessed a mere possibility that their damages might have been mitigated.").

Aside from being faithful to statutory text, the "first injury rule" also promotes the primary policy underlying statutes of limitation; that being to protect defendants "from unfair surprise and stale claims." *Raymond James Fin. Services, Inc. v. Phillips*, 126 So. 3d 186, 192 (Fla. 2013) [38 Fla. L. Weekly S809a]. As our Supreme Court explained in *Nardone v. Reynolds*, 333 So. 2d 25 (Fla. 1976), statutes of limitations:

> afford parties needed protection against the necessity of defending claims which, because of their antiquity, would place the defendant at a grave disadvantage. In such cases how resolutely unfair it would be to award one who has willfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim against a party who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses. Indeed, in such circumstances, the quest for truth might elude even the wisest court.

Id. at 36. *See also Major League Baseball v. Morsani*, 790 So. 2d 1071 (Fla. 2001) [26 Fla. L. Weekly S465a].

Any judicially created rule that delays accrual until a plaintiff has suffered all damages that might arise, *or* until a plaintiff is finished trying to collect damages from third parties, is contrary to, and foreclosed by, the plain meaning of § 95.031(1). *See R.R.,* 45 Fla. L. Weekly S261a ("[t]he statutory framework leaves no room for supplemental common law accrual rules."). And any judicial tweaking of the statutory accrual provisions also would be inimical to the policy furthered by limitation periods. A wrong can cause a plaintiff to suffer ongoing damages for years, if not decades, and a plaintiff often has a remedy against more than one party for damages suffered. But a rule delaying accrual until after all damages are realized, *or* until after a plaintiff proceeds against others who may also be liable for those damages, deprives a defendant of the ability to secure evidence and mount a defense. That is why § 95.03(1) says that a cause of action accrues not when a plaintiff's injuries have been settled with finality, *or* when a plaintiff is done trying to collect damages from third parties, but rather when injury first "occurs." The statute must be followed. *See, e.g., Davis v. Monahan*, 832 So. 2d 708 (Fla. 2002) [27 Fla. L. Weekly S930a] (refusing to adopt a delayed discovery accrual rule in cases where the Legislature had not done so). Or, put another way, courts may not deviate from the "statutory framework for accrual." *R.R.,* 45 Fla. L. Weekly S261a ; *Bankston v. Brennan*, 507 So. 2d 1385, 1387 (Fla. 1987) ("... when the legislature has actively entered a particular field and has clearly indicated its ability to deal with such a policy question, the more prudent course is for this Court to defer to the legislative branch").

B. **The "Finality Accrual Rule"**

Despite the fact that they admittedly suffered damages as a consequence of Bilzin's alleged malpractice more than two years prior to filing, Plaintiffs insist that their claims have in fact not yet accrued because they are in litigation with Zinoviev, etc. and, as a result, they may recover part (or all) of the damages they have suffered through that case. Plaintiffs are incorrect.

The so-called "finality accrual rule" began with *Peat, Marwick, Mitchell & Co. v. Lane*, 565 So. 2d 1323 (Fla. 1990), at least at the Supreme Court level. In *Peat Marwick*, the Third District had held that the limitations period for a cause of action for accounting malpractice commenced when the United States Tax Court entered a judgment against the client for unpaid taxes, "rather than when the Internal Revenue Service ninety day deficiency notice was received by them." *Id.* at 1324. The client's former accountants had allegedly advised them to invest in a limited partnership and that certain deductions taken based upon that investment "were proper"—a position the accountants maintained even after the IRS had sent the client a deficiency letter.

Based upon the accountant's ongoing advice, the client's challenged the "IRS' deficiency determination in the United States Tax Court." *Id.* They later settled the case via entry of a stipulated order dated May 9, 1983, "which required them to pay a tax deficiency amount agreed to by them and the IRS." *Id.* On February 22, 1985, less than two years after entry of the Tax Court's order based upon the stipulation, the clients sued Peat, Marwick, Mitchell & Co., for accounting malpractice. The firm then asserted that the claim was barred by the two year statute of limitations governing "professional malpractice" because the cause of action accrued "when the IRS sent the "Ninety-Day Letter" to the Lanes, almost four years prior to the filing of [the] complaint." *Id.* at 1325. After the circuit court granted summary judgment, the Third District Court of Appeal reversed, holding that "[t]he Lanes did not suffer redressable harm until the tax court entered judgment against them." *Id.* That was so, according to the Third District, because until that time the client "knew only that Peat Marwick might have been negligent; however, if the tax court did not uphold the deficiency, the Lanes would not have a cause of action against Peat Marwick for accounting malpractice." *Id.*

Agreeing with the Third District, our Supreme Court found persuasive intermediate appellate decisions holding that "a cause of action for legal malpractice does not accrue until the underlying legal proceeding has been completed on appellate review because, until that time, one cannot determine if there was *any* actionable error by the attorney." *Id.* at 1325, 1326 (emphasis added). Each of these cases, like *Peat Marwick,* presented a situation where the outcome of the underlying case would determine either: (a) whether any malpractice occurred at all; or (b) whether the client would *ever* suffer any injury as a result of the alleged malpractice. *See Adams v. Sommers,* 475 So. 2d 279, 281 (Fla. 5th DCA 1985) (legal malpractice case did not accrue until conclusion of underlying litigation because client would not have had a "legal malpractice claim if in fact the satisfaction of mortgage had been upheld" by court and "[t]hus she did not suffer any damage until 1981 when the appeal was finally resolved"); *Diaz v. Piquette,* 496 So. 2d 239, 240 (Fla. 3d DCA 1986) (client's legal malpractice case did not accrue until the adverse judgment allegedly caused by counsel's negligence "was affirmed on appeal" because "it is plain that no claim would even have existed if the temporary results of the attorney's conduct had been reversed on appeal . . ."); *Haghayegh v. Clark*, 520 So. 2d 58 (Fla. 3d DCA 1988) (legal malpractice claim did not accrue until appellate court affirmed finding that client's option lapsed due to court's late recording); *Zakak v. Broida & Napier, P.A.*, 545 So. 2d 380 (Fla. 2d DCA 1989) (cause of action for legal malpractice did not accrue until client's liability was established by final judgment); *Richards Enters., Inc. v. Swofford,* 495 So. 2d 1210, 1211 (Fla. 5th DCA 1986) (client's cause of action for litigation malpractice did not accrue until adverse decision in underlying case was final, because had that adverse judgment been reversed the client would "not have had a malpractice action" at all).

Peat Marwick, like *all* the decisions it cites, makes perfect sense in a case where the result of an "underlying" or "related" proceeding may moot the malpractice claim altogether, because that result will establish either the absence of any malpractice, *or* the fact that the

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alleged malpractice resulted in no injury at all. Had the tax court in *Peat Marwick* concluded that the deduction taken by the clients was appropriate, the firm's advice would have been vindicated or, in other words, it would have been determined that no malpractice occurred. And *Peat Marwick*, like all the cases it relied upon, is consistent with the "first injury rule" because until and unless the clients lost the tax case, and were required to pay a deficiency, they suffered *no* injury at all as a proximate cause of the firm's advice. The decision, therefore, does not "delay accrual" until a client's damages are fully settled. *Peat Marwick* merely (and correctly) holds that accrual did not occur at all until the client suffered some harm proximately caused by the alleged malpractice; harm that did not "occur" until the case with the IRS was settled. § 95.031(1), Fla. Stat. ("[a] cause of action accrues when the last element constituting the case of action occurs.").

Eleven years later, the Supreme Court applied *Peat Marwick* in both *Blumberg*, 790 So. 2d 1061 and *Perez-Abreu*, 790 So. 2d 1051—two opinions released on the same day. In *Blumberg,* an insured brought a negligence claim against his insurance agent alleging a failure to procure coverage. Before bringing that case, the insured had made a claim against the insurer for the loss and, when the insurer denied the claim, the insured brought suit seeking to establish coverage. That case went to trial and the insured's contract claim was dismissed based upon a finding that the policy did not cover the loss. *Blumberg*, 790 So. 2d at 1063.

Within two years of that adverse result the insured sued his agent for negligently failing to procure insurance that would have covered the loss, alleging that "he believed that there was coverage until the trial court ruled adversely to him in the prior suit. . . ." *Id.* He therefore alleged that he had not been damaged by his agent's negligence until he received that adverse coverage decision. The trial court, however, concluded that the insured suffered damages, and the statute of limitations began to run, when the carrier first denied coverage. *Id.* On appeal, the Fourth District affirmed.

Reversing, the Supreme Court found that the case was controlled by *Peat Marwick,* and that "the limitations period for the negligence action against the agent did not accrue until" the coverage dispute with the carrier "was final." *Id.* at 1065. The court emphasized that the denial of coverage "merely represented the insurer's position on the matter and did not resolve whether damages were incurred. . . ." *Id.* In other words, the *Blumberg* court recognized that if the insurer's position had been rejected, and coverage was found to exist, the agent committed no negligence at all, and the client would have suffered no injury proximately caused by any negligence. And, as was the case in *Peat Marwick*, a finding that the cause of action accrued before the underlying litigation was concluded would force the client to file the malpractice/negligence claim "during the same time" he advanced a "directly contrary" position (*i.e.*, defended the professional's work) in the underlying case. In the court's view, requiring "a party to assert these two legally inconsistent positions in order to maintain a cause of action for professional malpractice is illogical and unjustified." *Id.* at 1064 (citing *Peat Marwick*, 565 So. 2d at 1326).

In Perez-Abreu, the court employed the same reasoning in the legal malpractice context. The client, Taracido, had sold stock in two medical centers to Childers. The defendant law firm, Perez-Abreu, Zamora & De la Fe, represented Taracido and his company, MCA, in the transaction and "drafted the agreements used in the sale." Perez-Abreu, 790 So. 2d at 1053. After Childers "became dissatisfied with the medical centers' diminished profits and threatened to sue, the parties "negotiated for return of the stock, with the clients depositing $20,000 in the attorneys' escrow account." Id. The clients subsequently refused to repurchase the shares and a dispute developed over the funds held in escrow. Id. The attorneys interpleaded the funds, naming MCA, Taracido, and Childers as defendants. Childers then filed a cross-claim and third-party complaint against the clients, asserting claims for fraud, negligence, violations of sections 517.301 and 517.211, Florida Statutes, civil theft, breach of fiduciary duty, and breach of the settlement agreement. Childers alleged that the clients had misrepresented the centers' net worth, the profitability of third-party contracts, and the use for the funds received in the stock sale." *Id.*

After being sued the clients met with a litigation attorney who advised them that the agreements drafted by the Perez-Abreu firm "violated the Florida Securities and Investor Protection Act and that the agreements were defective because they failed to include disclosure provisions." 790 So. 2d at 1053. Put bluntly, the litigation attorney advised the clients that their former transactional counsel had committed malpractice in connection with the drafting of the agreements used in the sale. Two years later the clients settled the case with Childers, recognizing that he [Childers] "may prevail" in the case "by virtue of an asserted violation of the provisions of Chapter 517, Florida Statutes." *Id.*

Within two years of reaching the settlement with Childers, the clients filed their malpractice action, alleging that the law firm had failed to advise them of the need to disclose their financial condition, claiming as damages "the amount of their settlement with Childers and the expense of defending the shareholder litigation." *Id.* The law firm moved for summary judgment claiming that the statue of limitations had expired. The trial court agreed and entered summary judgment in the law firm's favor. The Third District reversed, finding that "the statute of limitations in prior transactional legal malpractice actions begins to run when related third party litigation is concluded." *Taracido v. Perez-Abreu, Zamora & De La Fe, P.A.*, 705 So. 2d 41 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D2752e].

The Supreme Court agreed, concluding the case presented the same circumstance addressed in *Blumberg* and *Peat Marwick*, and that the clients' claim for transactional malpractice did not accrue "until the related or underlying judicial proceeding involving Childers and the Clients settled." 790 So. 2d at 1054. The case, like *Blumberg* and *Peat Marwick,* presented a situation where had the client prevailed in the underlying/related case, it would have cut-off the malpractice claim altogether because either (a) it would have been determined that no malpractice/negligence occurred at all, or (b) the clients, had they prevailed, would have suffered *no* damages at all as a proximate cause of the professionals malpractice/negligence.[4]

Peat Marwick, *Blumberg* and *Perez-Abreu* each involved circumstances where a favorable outcome in the underlying/related litigation would have conclusively established the lack of any malpractice/negligence at all, or the absence of any injury caused the potential malpractice/negligence. Had the clients in *Peat Marwick* prevailed in the tax action, the advice defendants gave would have been found correct, no malpractice would have occurred, and *no* damages would have been suffered as a result of any malpractice. Had the insurance policy in *Blumberg* been found to cover the client's loss, by definition the agent would not have negligently failed to procure coverage and the clients would have suffered no loss as a result of any failure on the part of the agent. And had the client in *Perez-Abreu* prevailed in the action against Childers, a finding in their favor would have established that the agreements used in the transaction were not deficient (*i.e.*, that no malpractice occurred), or would have eliminated any resulting injury. As a result, the conclusion that the malpractice/negligence claims in these cases did not accrue until the underlying/related litigation was finished makes perfect sense, because it could not "be known with sufficient certainty that the client [had] suffered *any loss* caused by the lawyer's negligence until the finality of a judgment adverse to the client." *Larson,* 22 So.3d at 42. But these decisions do

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"not require that there be a determination of the *full extent* of all losses suffered by the client" in order for the malpractice claim to accrue. *Id.*

All the other cases relied upon by Plaintiffs also involved circumstances where the outcome of the underlying/related litigation would determine whether any malpractice/negligence occurred at all, or whether the client *ever* suffered damages. In *Glucksman v. Persol N. Am., Inc.*, 813 So. 2d 122 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D492b], another decision relied upon by Plaintiffs, two companies—Persol North America and Persol Italy—entered into an exclusive distribution agreement. Contrary to Persol North America's insistence, the contract contained a clause allowing Persol Italy to unilaterally terminate the relationship if the company were sold or transferred. Persol Italy was sold and, pursuant to that clause, it terminated the agreement. The companies then settled an ensuing dispute, and Persol North America brought a claim for legal malpractice alleging that "it had instructed [counsel] to insert a clause in the agreement that would prohibit termination of the agreement in the event Persol Italy was transferred or sold. *Id.* at 123. The malpractice case, however, was filed over two years after the client received notice of termination, and the defendant argued that the claim was time barred because it accrued when the client first received that notice. The Fourth District disagreed, pointing out that the client suffered "no injury" at all until the "Persol North America and Persol Italy dispute was resolved." *Id.* at 126.

The same circumstances were present in *Fremont Indem. Co. v. Carey, Dwyer, Eckhart, Mason & Spring, P.A.*, 796 So. 2d 504 (Fla. 2001) [26 Fla. L. Weekly S546a]. There, a liability insurer hired the law firm to represent itself and its insured architectural firm against a claim brought by a developer of a construction project. It was acknowledged that the law firm had rejected settlement offers without advising or consulting with either of its clients. In other words, the negligence/malpractice was admitted. Ultimately, the insurer—with the assistance of new counsel—settled the underlying litigation and later brought a malpractice claim.

Addressing when the malpractice claim accrued, the Supreme Court rejected the law firm's argument that the carrier "began sustaining damages" in the form of attorney's fees and costs that it had paid because it lost the opportunity to settle within policy limits. The court reasoned that "prior to the conclusion of the litigation, there was the potential of a lower settlement or judgment. Hence, even including the additional costs and fees, the possibility existed that Fremont would not suffer any redressable harm." *Id.* at 506. *Fremont,* therefore, is yet another case where the plaintiff might have suffered no harm *at all*, depending upon the outcome of related/underlying litigation, and where the existence of any "redressable harm" could not be "determined until the conclusion of the [underlying] litigation," *Id.* at 500.

The common denominator in all these cases is obvious: the result of the underlying/related case would determine whether malpractice occurred at all, or whether the client suffered any injury proximately caused by the alleged malpractice. That is why the malpractice claim in these cases did not accrue until those related proceedings were completed. For this reason, these cases are nothing more than specific applications of the "first injury rule," and each are faithful to, and consistent with, Florida Statute § 95.031(1). *See also Robbat v. Gordon*, 771 So. 2d 631, 636-37 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2795a] ("[s]ince [plaintiff's] harm exists, if at all, solely because of the invalidity of the postnuptial agreement [that defendant drafted], then, as in *Peat, Marwick*, since the client was defending the advice given him, the statute of limitations did not begin to run until after this court rendered its decision [on the validity of the postnuptial agreement] on appeal; until that time, there was no redressable harm."); *Throneburg v. Boose, Casey, Ciklin, Lubitz, Martens, McBane & O'Connell, P.A.*, 659 So. 2d 1134, 1137 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1776a] ("[t]he statute of limitations did not begin to run until the court invalidated the amendment [that the attorney drafted]."); *Bierman v. Miller*, 639 So. 2d 627, 628 (Fla. 3d DCA 1994) ("[u]ntil the validity of the agreement is decided in federal court there can be no determination in the malpractice action as to whether [the defendant] was negligent in negotiating and drafting that agreement."); *Zuckerman v. Ruden, Barnett, McCloskey, Smith, Schuster & Russell, P.A.*, 670 So. 2d 1050, 1051 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D615a] ("[u]nless [the plaintiff] is unable to foreclose on the mortgage [that defendant drafted], he will not have suffered damages proximately caused by [defendant'] alleged failure to obtain the wife's signature on the mortgage.").

In this case, Plaintiffs are not defending Bilzin's work in litigation with third parties and, more importantly, the outcome of that litigation (*i.e.*, the bankruptcy proceeding) will not in any way inform—let alone decide—the question of whether Bilzin committed malpractice. Nor is this a case where depending upon the outcome of the related litigation Plaintiffs may not suffer *any* harm caused by Bilzin's malpractice. Plaintiffs' injuries have already occurred even if their damages may still be escalating. The only thing the outcome of the related bankruptcy may do is compensate Plaintiffs for some, or maybe even all, of those damages. But Plaintiffs suffered economic loss due to Bilzin's alleged negligence more than two years before commencing this case. And the fact that they may (or may not) recover some (or all) of those losses via third party litigation does not alter an analysis of when this malpractice claim accrued. It accrued when Plaintiffs first suffered a concrete loss (*i.e.*, injury) as a proximate cause of Bilzin's malpractice. Not a day later. *See, e.g., Kellermeyer*, 427 So. 2d 343 (legal malpractice claim accrued when client suffered a diminutive in value of its property proximately caused by attorney's negligence); *Llano Fin. Group, LLC v. Petit*, 230 So. 3d 141, 144 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D2071a] (relying on *Kellermeyer* and distinguishing *Peat Marwick* on the grounds that "[i]t wasn't that damages were uncertain; it was that the parties had to wait for the tax-court ruling to determine whether the accountant was negligent in the first place"); *Kelly v. Lodwick*, 82 So. 3d 855, 859 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1119a] (distinguishing *Blumberg* and following *Kellermeyer* as there was no underlying proceeding to determine whether coverage existed because it is undisputed that coverage did not exist for the plaintiffs' underlying claim").

The fact is that *Peat Marwick* and its progeny do not depart from the "first injury rule" at all. These decisions apply that rule, recognizing that in the circumstances presented the malpractice claim did not accrue until the related litigation was completed because it could not "be known with sufficient certainty" whether the client suffered *any* loss prior to that occurrence. But no case holds, or even suggests, that a legal malpractice case does not accrue until a client finishes litigation against third parties in an effort to collect the damages actually suffered as a result of *both* their lawyer's negligence and the third parties' conduct. And a rule deferring/delaying accrual until after such third-party litigation is exhausted would: (a) be contrary to the plain language of § 95.031(1); (b) frustrate the legislative policy underlying statutes of limitation; and (c) make the accrual date a moving target that could never be accurately hit.

What Plaintiffs are really arguing here is that a legal malpractice claim does not accrue until a client exhausts all third-party litigation and knows, with certainty, the amount of damages, if any, remaining after collecting from other culpable parties. In other words, Plaintiffs say that a client should be able to pursue all third-party claims that may eliminate/reduce their damages, and then bring a legal malpractice claim if—and only if—they have not been made whole. That is

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not the law, nor should it be. There are countless scenarios where an injured party may be able to recover damages from third parties for injuries caused by a professional's negligence/malpractice and by conduct of those other parties. Anytime a lawyer commits transactional malpractice, and causes a client harm, it is possible that the client may be able to mitigate that harm by suing third parties who were able to injure them because of lawyer's malpractice. But a client is not required to exhaust claims against third parties when they are injured by counsel's malpractice. And a lawyer who is timely sued for malpractice does not have the right to demand that the client exhaust remedies against third parties prior to bringing the malpractice claim.

Conversely, a client is not permitted to interminably delay bringing a legal malpractice claim merely because he is suing third parties who might be found liable for, and pay, some or all of the damages that were caused by the legal malpractice. Rather, the client is required to bring the legal malpractice claim within two years of suffering injury. That is when the claim accrues. § 95.031(1), Fla. Stat. ("[a] cause of action accrues when the last element constituting the case of action occurs."); *R.R.*, 45 Fla. L. Weekly S261a. And if the client is pursuing claims against third parties in an attempt to eliminate and/or mitigate the damages caused by their lawyer's malpractice, the court in the malpractice case can always stay/abate the claim, or not try it, until the third party litigation is concluded and the client's damages are firmly fixed.

In this case, the result of the third-party litigation (*i.e.*, the pending bankruptcy) will *not* determine whether Bilzin committed malpractice at all, or whether Bilzin's alleged malpractice caused *any* harm. The alleged malpractice occurred, and damages were undeniably suffered as a proximate cause of that alleged malpractice. The only thing the related litigation may do is reduce, or possibly eliminate, the damages already suffered by Plaintiffs. But the fact that one or more third parties may also be liable for harm that was caused as a proximate result of legal malpractice does not affect when the claim for legal malpractice accrued. In this case, Plaintiffs' claims accrued when they first suffered redressable harm as a proximate cause of Defendant's legal malpractice. That was admittedly more than two years prior to the date this suit was filed.

IV. **CONCLUSION**

A cause of action for legal malpractice, like any other cause of action, accrues once and only once: when the client first suffers injury resulting from the attorney's deficient performance. And in a situation where related/underlying third party litigation will determine whether malpractice occurred at all, or whether the alleged malpractice caused any damages whatsoever, the legal malpractice claim does not accrue until that third-party litigation is concluded. That is because the plaintiff is not injured *at all* prior to that time. Rather, the injury is first caused by "virtue of [the] enforceable court judgment" entered against the client. *Kipnis v. Bayerische Hypo-Und Vereinsbank, AG*, 202 So. 3d 859 (Fla. 2016) [41 Fla. L. Weekly S490a]. This case does not present that scenario, and none of the factors discussed in *Kipnis,* which underly the holdings in *Peat Marwick* and its progeny, are present here.

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

1. Defendant's Motion to Dismiss is **GRANTED**.

2. Final Judgment is hereby entered in favor of Defendant, Bilzin Sumberg, Baena Price & Axelrod LLP. Plaintiffs shall take nothing from this action and Defendant shall go hence without day.[5]

3. The Court retains jurisdiction to entertain all authorized post-judgment matters including, but not limited to, any timely motions for attorney's fees and costs.

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[1]In opposition to Bilzin's motion, Plaintiffs do not claim that they *first* suffered compensable injury within two (2) years prior to the March 5, 2020 filing of this lawsuit. And as will be discussed *infra*, the Complaint, on its face, makes it clear that they did in fact suffer harm caused by Bilzin's alleged malpractice prior to March 5, 2018. Plaintiffs also acknowledge that no facts exist which could support an "avoidance" of the limitations defense. The issue may therefore be decided on a motion to dismiss. *See Alexander v. Suncoast Builders, Inc.*, 837 So. 2d 1056 (Fla. 3d DCA 2002) [28 Fla. L. Weekly D13a] (case may be dismissed based upon statute of limitations if the defense is apparent from the "face of the complaint").

[2]On April 12, 2018, Mikhaylov first learned that Zinoviev had also appointed an additional trustee—Rincon—so Mikhaylov then had to amend to include a claim seeking "the removal of Rincon as trustee." Compl. ¶ 57.

[3]"On August 29, 2018, pursuant to Section 13 of the Secured Promissory Note, the Trustee, through its attorneys, made a demand on East Coast Invest to execute a mortgage on the property. Neither Zinoviev or anyone else purportedly on behalf of East Coast Invest ever replied. . . ." Compl. ¶ 61.

[4]On that point, the *Perez-Abreu* court rejected the argument that the attorney's fees/costs incurred in the related litigation constituted "redressable harm" (*i.e.*, injury) that caused the malpractice/negligence claim to accrue. The court pointed out that in some instances if the client prevails in the underlying/related case, they may be able to "collect the attorney's fees from the losing party pursuant to a statutory or contractual provision." 790 So. 2d at 1054. And if fees/costs alone were deemed sufficient "injury" to cause the claim to accrue, it would require clients to "take directly contrary positions in the two actions." *Id.* Moreover, transactional lawyers are not guarantors against possible third-party litigation, and disputes can—and often do—arise even absent malpractice. Having to spend attorney's fees/costs in litigation is therefore not necessarily "injury" caused by legal malpractice.

[5]While Plaintiffs have requested leave to amend, it is apparent that the untimeliness of this claim cannot be cured by further pleading, and Plaintiffs have acknowledged that there are no facts that could possibly support an avoidance of this dispositive defense. *See, e g., Saltponds Condo. Ass'n, Inc. v. McCoy*, 972 So. 2d 230 (Fla. 3d DCA 2007) [33 Fla. L. Weekly D26a].

* * *

Attorney's fees—Offer of judgment—Prevailing attorney in legal malpractice action is entitled to recover attorney's fees under offer of judgment statute despite fact that all attorney's fees for his defense were paid by his law firm pursuant to indemnity agreement—Fees incurred by law firm on behalf of attorney are recoverable—No merit to argument that attorney's fees incurred in case should be apportioned between attorney who made offer of judgment and law firm that did not make offer of judgment where claims against attorney and firm were identical and their defenses were identical

AVRA JAIN, Plaintiff, v. BUCHANAN INGERSOLL & ROONEY PC, a foreign profit corporation, and RICHARD A. MORGAN, an individual, Defendants. BUCHANAN INGERSOLL & ROONEY PC, a foreign profit corporation, Counter-Plaintiff, v. AVRA JAIN, an individual, Counter-Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Complex Litigation Division. Case No. 2017-026857-CA-43. September 18, 2020. Michael A. Hanzman, Judge. Counsel: Bruce Weil and Steven Davis, Boies Schiller Flexner LLP, Miami; and Bruce S. Rogow and Tara Ann Campion, Co-Counsel, Ft. Lauderdale, for Plaintiff. James N. Robinson and Zachary B. Dickens, White & Case LLP, Miami; and Robert A. Stok, Joshua R. Kon, Marko Ilich, Gabriel Mandler, and Michael Bonner, Stok Kon + Braverman, Fort Lauderdale, for Defendants.

FINAL JUDGMENT FOR ATTORNEY'S FEES

I. INTRODUCTION

Plaintiff, Avra Jain ("Jain"), brought this action alleging that her former counsel, Richard Morgan ("Morgan"), committed legal malpractice while defending her in a lawsuit brought to enforce a personal guarantee. Morgan's employer, Buchanan Ingersoll & Rooney, PC ("BI"), was also named as a Defendant, though no independent claim against the firm was pled (*i.e.,* negligent retention, negligent supervision, etc.). Rather, BI was sued *only* in its capacity as Morgan's employer (*i.e.,* under a theory of respondeat superior/vicarious liability). During the pendency of the litigation, Morgan served an offer of judgment pursuant to Florida Statute § 768.79. BI did not join in that offer nor serve one of its own. Eventually, the Court entered Final Judgment in favor of both Defendants, finding that the alleged acts of malpractice did not proximately cause Jain to suffer any harm. The Court then found that Morgan was entitled to fees and costs and set an evidentiary hearing to determine the amount reasonably spent on his defense.[1]

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At the September 21, 2020 evidentiary hearing Jain advanced two reasons why, in her view, Morgan is not entitled to an award of fees. Jain first points out that pursuant to an indemnity agreement with co-defendant BI, and the terms of his engagement letter with common counsel, White & Case, Morgan was neither obligated to nor in fact paid any of the attorney's fees incurred in the defense of this action. According to Jain, this negates his ability to recover fees pursuant to section 768.79. Second, and alternatively, Jain argues that any award should be "apportioned" because the fees were incurred defending both Morgan and BI. The Court requested further briefing on these questions.

The Court, having carefully reviewed the evidence and the parties' initial and supplemental briefs, and having entertained argument, now enters this Final Judgment.

II. ANALYSIS

A. The Fee Arrangement

It is undisputed that BI, via its bylaws, was contractually obligated to indemnify Morgan in any action brought against him for work performed as a shareholder. Def.'s Supp. Memo Ex. B. ("The Corporation shall indemnify . . . any person made, or threatened to be made, a party to or otherwise involved in . . . an action, suit or proceeding . . . by reason of the fact that he or she is or was a director or officer or shareholder or attorney employee of the Corporation . . . ."). It is also undisputed that BI did, in fact, indemnify Morgan by obligating itself to pay *all* of the attorney's fees and costs incurred in the defense of this action. The Engagement Letter between Morgan and White & Case states, in relevant part, that White & Case "will invoice [Morgan] monthly for its services," that Morgan "will be billed monthly," and that White & Case reserved the right to cease representation of Morgan should [Morgan] "deliberately disregard [his] obligations under this agreement including timely payment of our fees." Def.'s Supp. Memo Ex. C. Consistent with BI's obligation to pay Morgan's fees, the Engagement Letter further provides that, "[w]hile [White & Case] is engaged to represent you and Buchanan Ingersoll & Rooney PC, you [Morgan] will not be obligated to pay the Firm's fees and costs." *Id.*

As required by the terms of its indemnification provision, BI paid all defense costs, and Morgan did not pay any of the attorney's fees or costs incurred on his behalf. For this reason, Jain again claims that Morgan is not entitled to recover any fees pursuant to section 768.79. Alternatively, Jain insists that any recovery should be reduced (*i.e.,* apportioned) because the fees were incurred defending both BI and Morgan. The Court disagrees on both counts.

B. Morgan's Entitlement Despite Not Having Actually Paid Fees/Costs

The parties do not dispute that an offer of judgment was made, nor do they ask the Court to revisit whether that offer of judgment complied with § 768.79 (it did). This triggered an absolute right to entitlement to fees. *See, e.g., Anderson v. Hilton Hotels Corp.,* 202 So. 3d 846, 856 (Fla. 2016) [41 Fla. L. Weekly S500a] (an offer of judgment under § 768.79 "automatically creates" an "entitlement to attorneys' fees when the statutory and procedural requirements have been satisfied"). Jain nevertheless asks this Court to limit Morgan's recoverable fees to those he *actually* paid—which is undisputedly $0.00. The Rule Jain relies upon, however, has nothing to do with whether a party actually has to pay the fees/costs in order to recover them pursuant to the offer of judgment statute.

The language of the statute giving rise to Morgan's claim for attorney's fees is clear and unambiguous:

> . . . if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him **or on the defendant's behalf** pursuant to a policy of liability insurance or other contract . . .

Fla. Stat. § 768.79 (emphasis added). "When the language of the statute is clear and unambiguous and conveys a clear and definite meaning the statute must be given its plain and obvious meaning." *Fla. Dep't of Revenue v. New Sea Escape Cruises, Ltd.,* 894 So. 2d 954, 960 (Fla. 2005) [30 Fla. L. Weekly S109a] (quoting *A.R. Douglass, Inc. v. McRainey,* 102 Fla. 1141, 137 So. 157, 159 (1931)); *Spence-Jones v. Dunn,* 118 So. 3d 261, 262 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D1575b] (The plain meaning of the statute is always the starting point in statutory interpretation.); *GTC, Inc. v. Edgar,* 967 So.2d 781, 785 (Fla. 2007) [32 Fla. L. Weekly S546a] ("[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.").

The statute, by its plain language, permits recovery for fees incurred **on behalf of** a defendant who otherwise complies with the requirements of the section (*i.e.* the judgment is one of no liability or the plaintiff obtains a judgment which is at least 25% less than the offer, the offer is made in good faith, in writing, etc.). The parties do not dispute that at least some of the fees incurred in defending this action were attributable to the defense of Morgan.[2] But, because Morgan was never obligated to pay those fees, Jain argues that pursuant to *Florida Patient's Comp. Fund v. Rowe,* 472 So. 2d 1145 (Fla. 1985) they are not recoverable as any award of fees would necessarily exceed those actually paid by Morgan (here, $0.00).

In *Rowe* the court addressed, among other things, whether in a prevailing party fee-shifting context a party may recover from its opponent an amount that exceeds what they were obligated to pay pursuant to "the fee agreement reached" with their attorney, holding that the fee award is in fact capped by the terms of the fee agreement. *Rowe,* 472 So. 2d at 1151. This "cap" serves an obvious purpose: preventing a windfall that would result if a party could recover from its adversary, as a "reasonable fee," more than she was required to—and did—actually pay for legal services. So in this case *Rowe* would preclude the Court from awarding Morgan more than BI was actually obligated to pay on his behalf. *See, e.g., Fleet Services Corp. v. Reise,* 857 So. 2d 273 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D2154a]. But *Rowe* does not hold, nor suggest, that a party serving a proposal under § 768.79 must actually pay the fees.

To apply the *Rowe* "cap" in the present context in order to deny fees altogether would be inimical to § 768.79, as the statute undeniably contemplates a scenario in which the fees are incurred by a third party on behalf of the defendant filing the offer of judgment and not by the defendant himself, and its plain language expressly provides fees are recoverable in that precise scenario. This cannot reasonably be questioned, as the language "incurred by her or him or ***on the defendant's behalf*** pursuant to a policy of liability insurance or other contract" can be ascribed no other meaning. (Emphasis added). *See, S.R.G. Corp. v. Department of Revenue,* 365 So.2d 687, 689 (Fla.1978) ("[l]egislative intent must be determined primarily from the language of the statute . . . the legislature must be assumed to know the meaning of the words and to have expressed its intent by the use of the words found in the statute.").

In sum, whether Morgan was ultimately obligated to pay, or did pay, any attorney's fees is of no moment, and the fees incurred by BI in defending Morgan are recoverable pursuant to both the plain language of the statute and binding case law. *See, e.g., Key W. Seaside, LLC v. Certified Lower Keys Plumbing, Inc.,* 208 So. 3d 718, 721 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2052b] ("[t]he fact that another party or a nonparty may have paid the offeror's attorney's fees

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is of no consequence to the question of whether the offeror is entitled to fees and costs pursuant to the offer of judgment statute or rule"). *Aspen v. Bayless,* 564 So. 2d 1081, 1083 (Fla. 1990) (". . . the costs were properly recoverable by Aspen even though they had been advanced by her insurance company"); *Forthuber v. First Liberty Ins. Corp.,* 229 So. 3d 896 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D2459b] ("[w]hen a party is not contractually obligated to pay her lawyer or is obligated to pay the lawyer less than market rate, the party may still recover a reasonable fee using the *Rowe* formula under a fee shifting statute.").

C. Apportionment of Fees.

In arguing for apportionment Jain attempts to draw a distinction between the defense of BI and the defense of Morgan, insisting that the defense of Morgan was completely enveloped by the defense of BI. In other words, she says that White & Case were predominantly representing BI and very minimal (if any) additional work was required to represent Morgan. To support this theory Jain's expert witness, Mark Raymond, testified:

> My opinion is that there was virtually no additional work required in order to represent Mr. Morgan individually. It's a very common scenario in complex commercial litigation that an individual be he or she a partner in a law firm, an officer or director is also named as a co-defendant and the amount of work attributable to that additional defendant is nominal. That has been my life experience and I believe it is borne out by the time sheets here of White & Case.

Tr. at 83:14-22. But as this Court pointed out at the hearing, if this is true then so is the reverse—if BI were not a defendant then the work done in defending Morgan would have been the same. And it is undisputed that BI was sued only under a theory of respondeat superior/vicarious liability; liability that would attach *solely* due to Morgan's allegedly defective work, meaning that the "primary" defendant was Morgan. Tr. at 85:24-86:2. But regardless of whether either Defendant was "primary" or "secondary," all of the claims were exactly the same, the theories of liability were the same, the damages sought against both Defendants were the same, and the evidence was the same. There is no work in this case attributable BI and not Morgan, or attributable to Morgan and not BI.

Notwithstanding this obvious reality, Jain again argues that fees incurred in defending Morgan were never billed to *anybody—i.e.* that White & Case represented Morgan as a consequence of representing BI and did so altruistically; and seeks to draw a comparison between this case and *Bystrom v. Mut. of Omaha Ins.,* 566 So. 351 (Fla. 3d DCA 1990). In *Bystrom,* fees were not recoverable for an expert witness because the expert was an employee of the party seeking to collect the fees, he was testifying regarding matters for which he had a "direct and continuing responsibility," and no fees or costs associated with his testimony were incurred at all. According to Jain, Morgan is in the same position as the expert witness in *Bystrom*: "[White & Case] never billed him or anybody else for its services to Morgan because under their agreement he incurred no fees. There is nothing to recover." Pl.'s Supp. Memo. p. 10. This argument is a stretch, to put it mildly.

First, unlike the expert witness on attorney's fees in *Bystrom,* Morgan is a named Defendant. Second, it appears that Jain is again equating incurring fees with the actual payment of fees. In other words, Jain believes that where fees are not "paid" by Morgan they are not "incurred." This re-imagining of the parties' relationship and contractual agreements flies in the face of the actual evidence: (1) White & Case appeared for and represented Morgan as a Defendant in this action; (2) White & Case had a separate engagement letter with Morgan individually; (3) BI had a contractual duty to indemnify Morgan and, in this vein, obligated themselves to pay the attorney's fees and costs incurred in defending him against Jain's lawsuit; and (4) fees were incurred in the defense of Morgan and those fees were paid by BI. Nothing in the record would lead this Court or a reasonable person to believe that White & Case essentially gave BI a "buy-one-get-one free" defense.

As for whether Jain is entitled to have the fees "apportioned," the argument is foreclosed by *Isaias v. H.T. Hackney Co.,* 159 So. 3d 1002 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D753a]. In *Isaias,* three (3) defendants were represented by the same counsel, each put forth the same defense, and each ultimately prevailed in the action. The trial court made a fmding as to reasonable attorney's fees and then awarded only one third (1/3) of the total amount because it concluded that only one of the three defendants (Isaias) had made a good faith offer of judgment. The Third District, however, concluded that Isaias was still entitled to the full fee for the joint defense because the "theory of defense was shared by all three [defendants]," the "same legal services benefited all three," and "all three [defendants] . . . employed a single law firm to represent them based on the same theory of defense." *Id.* at 1005. That is exactly the scenario here. The joint defense against Jain's malpractice claims for BI and Morgan was identical and, as Jain's own expert confirmed, "there was virtually no additional work required in order to represent Mr. Morgan individually." Tr. at 83:14-16.

Prior to the benefit of a thorough review of *Isaias,* the Court and the parties suggested that the Third District's discussion of the apportionment issue was *dicta,* because the court had concluded that the offer made by the other two defendants was, in fact, extended in good faith. Morgan, however, now says that this discussion in fact led to the decision to award Isaias himself all attorney's fees, and is in fact part of the holding. *See Pedroza v. State,* 291 So. 3d 541, 547 (Fla. 2020) [45 Fla. L. Weekly S93a] (explaining that "[a] holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment"). This Court agrees. But even if *Isaias* is not binding, but merely persuasive, the Fourth District in *Current Builders of Florida, Inc. v. First Sealord Sur., Inc.,* 984 So. 2d 526 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D911c] reached the same conclusion.

In *Current Builders,* only one of two codefendants (First Sealord) who were represented by the same attorney was entitled to a post-judgment award of attorney's fees under a fee-shifting statute. *Id.* at 533. The entitled defendant sought over $130,000 in fees, which represented the full amount of fees incurred for representing both defendants. *Id.* Plaintiffs' fees expert testified, as Jain's expert did here, that First Sealord was entitled to only the fees that could be directly attributed to representation of them, which the expert calculated to be slightly over $5,000. *Id.*; Tr. at 92:24-93:1 (Mark Raymond testifying that it was his "good faith belief is that there's about $80,000 to $120,000 in fees relates solely to the representation of Rick Morgan"). The trial court awarded First Sealord a one-half portion of the total fee amount and both sides appealed. The Fourth District concluded that the "trial court erred in making an arbitrary division of the fees" and reversed, ordering the trial court to award First Sealord the entire fee amount. *Id.* at 534 ("We agree with First Sealord that the issues tried regarding its liability were inextricably intertwined with [Plaintiff's] . . . claim against [codefendant]. They involved a common core of facts . . . It could not defend one without defending the other. The attorneys could not separate the fees, and the trial court erred in making an arbitrary division of the fees. First Sealord is entitled to its full fees . . . ."). The holding in *Current Builders* is entirely consistent with the Third District's opinion in *Isaias* and is clearly binding upon this Court.[3] And as an aside, the Court agrees with both *Isaias* and *Current Builders.*

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Because the claims against Morgan and BI were identical, and the defense of Morgan and BI was identical, the fees incurred in representing Morgan and BI cannot be separated/apportioned between the parties, and Morgan is entitled to the full fees incurred in defending this action.

III. CONCLUSION

Florida Statute § 768.79 makes clear that a party who delivers a good faith offer of judgment which is rejected is entitled to collect attorney's fees not only incurred by him but further "incurred . . . on [his] behalf."[4] Although Morgan did not actually remit payment to his attorneys, fees were incurred on his behalf and those fees are recoverable. As for apportionment, the claims against both BI and Morgan were predicated on the same common core of facts, and the defense of both BI and Morgan was also the same. If Jain had elected to sue one without the other, the work performed in defending either BI or Morgan would identical. The attorney's fees cannot, and should not, be apportioned. Based upon the foregoing, it is hereby **ORDERED**:

1. Morgan is entitled to the reasonable fees incurred by BI on his behalf. The Court accepts Defendant's expert, Israel U. Reyes,' Declaration (the "Reyes Declaration") and finds that counsel reasonably devoted 4353 hours to Morgan's defense.

2. The Reyes Declaration provided sworn testimony that he "considered and evaluated each of the factors set forth in section 768.89(7)(b), Florida Statutes, Florida Rule of Civil Procedure 1.442 (H)(2), Rule 4-1.5(b) of the Rules regulating the Florida Bar, and the factors outlined in *Standard Guar. Ins. Co. v. Quanstrom,* 555 So. 2d 828 (Fla. 1990), and *Florida Patient's Compensation v. Rowe,* 472 So.2d 1145, 1150 (Fla. 1985)." He then testified that a reasonable fee for the work defending this action was Two Million Four Hundred Forty-Two Thousand, Four Hundred Twenty-Two Dollars and Fifty Cents ($2,442,422.50).

3. The Courts accepts Reyes' testimony, and having independently considered the factors set forth in section 768.79(7)(b), Florida Statutes, Florida Rule of Civil Procedure 1.442 (H)(2), Rule 4-1.5(b) of the Rules regulating the Florida Bar, *Standard Guar. Ins. Co. v. Quanstrom,* 555 So. 2d 828 (Fla. 1990), and *Florida Patient's Compensation v. Rowe,* 472 So.2d 1145, 1150 (Fla. 1985), finds that 4353 hours of work expended by the White & Case attorneys is a reasonable amount of time which, when applied to the stipulated reasonable rates of those attorneys, equals an award of reasonable attorneys' fees in the amount of Two Million Four Hundred Forty-Two Thousand, Four Hundred Twenty Two Dollars and Fifty Cents ($2,442,422.50).

4. Defendant, Richard Morgan, shall recover from Plaintiff, Avra Jain, the sum of Two Million Four Hundred Forty-Two Thousand, Four Hundred Twenty Two Dollars and Fifty Cents ($2,442,422.50), that shall bear interest at the rate of 6.03% per annum until satisfied, for which let Execution issue.

5. Jurisdiction is reserved for all purposes, including, without limitation, post-judgment and execution issues, and for all other matters appropriately brought before this Court.

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[1]Costs have been resolved via Agreed Order entered on August 28, 2020.

[2]Discussed further in the "Apportionment of Fees" section.

[3]"[I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts." *Pardo v. State,* 596 So. 2d 665, 666 (Fla. 1992).

[4]The Court has previously determined Morgan's offer of settlement to have complied with Florida Statute § 768.79. *See* Order Granting Entitlement, July 15, 2020.

* * *

Attorney's fees—Sanction for discovery violation—Amount

DEBRA MUGNAINI, Plaintiff, v. JAMES PSALTIS, Defendants. Circuit Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2016 CA 004039 NC. March 18, 2019. Maria Ruhl, Judge. Magistrate, Deborah Bailey. Counsel: Michael S. Bendell, Law Office of Michael Bendell, P.A., Boca Raton, for Plaintiff. Kyle Pennington, Kevin Korth & Associates, St. Peterburg, for Defendants.

ORDER ADOPTING RECOMMENDED ORDER

THIS CAUSE came before the Court on the Recommended Order of Magistrate, filed by Magistrate Deborah A. Bailey, and the undersigned, having considered the findings and recommendation contained therein, it is hereby,

ORDERED AND ADJUDGED that:

1. The Recommended Order of Magistrate, entered on FEBRUARY 25, 2019 a copy of which is attached hereto, is ratified and approved.

2. The parties are ordered to abide by all of the findings and recommendations contained in the Recommended Order of Magistrate, and the Court hereby adopts each and every finding and recommendation therein as the Order of this Court.

RECOMMENDED ORDER OF MAGISTRATE

This matter came on for hearing on February 25, 2019, on the **Plaintiff's Motion for Additional Attorney's Fees Incurred in Defending Exceptions and Motion to Vacate and Plaintiff's Supplement to Motion for Additional Attorney's Fees**. The Magistrate has jurisdiction pursuant to Fla. R. Civ. P. 1.490. The Court already granted entitlement to attorney's fees in its Order dated December 20, 2018. This hearing is solely to determine the amount of the attorney's fee award.

The history of this attorney's fee dispute began with certain discovery motions the Magistrate heard in July 2018. After hearing on July 3, 2018, the Magistrate directed Defendant to provide better responses to Plaintiff's discovery requests by July 13, 2018. After Defendant failed to comply, Plaintiff moved to compel and for further sanctions. After hearing on July 30, 2018, the Magistrate directed Defendant to comply by no later than August 3, 2018, and directed that Defendant pay four hours of attorneys' fees incurred by Plaintiff as a sanction, reserving jurisdiction to establish the dollar amount of the fees and to impose further sanctions if warranted. The Court adopted the recommendation on August 16, 2018.

On October 5, 2018, the Magistrate heard Plaintiff's amended motion to determine the amount of the fee award. The Magistrate recommended the Court grant it, award two additional hours of fees, establish counsel's reasonable hourly rate at $500.00 per hour, and enter an award of $3,000.00 to be paid by the Defendant. On October 17, 2018, Defendant filed exceptions to the Magistrate's October 5 Recommended Order, coupled with a motion to vacate the prior Order dated August 16, 2018. Plaintiff responded to Defendant's exceptions and subsequently filed a motion for additional attorney's fees incurred in defending against these exceptions.

On December 20, 2018, the Court entered an Order overruling Defendant's exceptions and adopting the Magistrate's October 5 Recommended Order. The Judge also entered an Order finding Plaintiff was entitled to additional attorney's fees for defending the exceptions and referring the matter back to the Magistrate for determination of the amount of the award.

Plaintiff seeks compensation for 31.75 additional hours as detailed in his affidavit of fees filed and served on November 16, 2018, and his supplemental affidavit filed February 21, 2019. Defendant does not dispute that a reasonable hourly rate for Plaintiff's counsel is $500.00 per hour. However, Defendant argues the amount of hours Plaintiff seeks is not reasonable. Accordingly, the Magistrate makes the following findings.

1. The factors set forth in Rule 4-1.5(b) of the Florida Rules Regulating the Florida Bar guide the Magistrate in calculating the amount of fees to be awarded.

2. Defendant counsel agrees, and the Magistrate finds that $500.00 is a reasonable hourly rate for Mr. Bendell, a Board certified civil trial attorney.

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3. The Magistrate reviewed the Defendant's Exceptions/Motion to Vacate, Plaintiff's Response to Defendant's Exceptions, Plaintiff's Motion for Additional Attorney's Fees and Plaintiff's Supplemental Response to Defendant's Exceptions in arriving at a reasonable amount of hours expended by Plaintiff's counsel in defending the exceptions/motion to vacate.

4. Mr. Bendell's time to review, research and draft Plaintiff's initial response[1] to Defendant's exceptions and motion[2] for additional attorney's fees encompasses 10.75 hours on October 17, 18, 20 and 21, 2018. Mr. Bendell filed the response and the motion on October 21.

5. Mr. Bendell filed a three-page supplemental response on November 16, 2018, along with his two-page affidavit of attorney's fees. He seeks 4.0 additional hours[3] in connection with these filings, and review and preparation of Plaintiff's exceptions hearing package.

6. After review of these filings and comparison to the descriptions contained on Mr. Bedell's affidavit, the Magistrate finds the 14.75 hours on Mr. Bedell's affidavit for the period of October 17 through November 16 reasonable. Although disputing the reasonableness of the hours billed, Defendant's counsel did not question Mr. Bedell about any of his billings, nor did he point to or argue any particular billings he felt were inappropriate.[4]

7. The Magistrate also finds reasonable the 1.0 hour included on Mr. Bedell's supplemental affidavit of February 21, 2019 for services billed on February 8 and 15, 2019.

8. The Magistrate does not find it appropriate to include the 16.0 hours of travel time from Boca Raton to Sarasota and back for the exceptions hearing on December 19, 2018 and the hearing on February 25, 2019. *See e.g., Hahamovitch v. Hahamovitch,* 133 So. 3d 1062, 1063 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D107a]. The Magistrate reduces this time to 2.0 hours, or one hour for each date to reflect counsel's preparation and argument time.

9. Based on the above findings, the Magistrate determines the total of reasonable hours attributable to Plaintiff's defense of the exceptions is 17.75 hours. Multiplied by Mr. Bedell's hourly rate of $500.00, the total amount of fees recoverable shall be $8,875.00.

10.Accordingly, the Magistrate recommends the Defendant pay to Plaintiff's counsel the sum of $8,875.00 within 30 days of the date the Court adopts this Recommended Order as final.

IF YOU WISH TO SEEK REVIEW OF THE REPORT AND RECOMMENDATION MADE BY THE MAGISTRATE, YOU MUST FILE EXCEPTIONS IN ACCORDANCE WITH FLORIDA RULE OF CIVIL PROCEDURE 1.490(i). YOU WILL BE REQUIRED TO PROVIDE THE COURT WITH A RECORD SUFFICIENT TO SUPPORT YOUR EXCEPTIONS OR YOUR EXCEPTIONS WILL BE DENIED. A RECORD ORIDINARILY INCLUDES A WRITTEN TRANSCRIPT OF ALL RELEVANT PROCEEDINGS. THE PERSON SEEKING REVIEW MUST HAVE THE TRANSCRIPT PREPARED IF NECESSARY FOR THE COURT'S REVIEW.

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[1]The 54-page response consisted of an eight-page legal argument and attached prior orders, recommended orders, correspondence with defense counsel, and the transcript of the July 30 hearing before the Magistrate.

[2]The motion for additional attorney's fees for defending the exceptions was two pages consisting primarily of excerpts from the Magistrate's prior rulings. It attached copies of those rulings and *Lopez v. Dept. of Revenue,* 201 So. 3d 119 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2229a].

[3]These four hours are for services rendered on October 24, November 5 and November 16, 2018.

[4]At the hearing, Defendant's counsel proffered the *Sims* case in support of his position on fees. *See Federal Express Corp. v. Sims,* 2019 WL 719159 (Fla. 4th DCA Feb. 20, 2019) [44 Fla. L. Weekly D506a]. The case holds that a trial court improvidently entered a fee award against a defendant under Rule 1.380(a)(4) without considering whether the defendant's objections to discovery were substantially justified. The case is readily distinguishable from the facts of this matter. First, the Magistrate did not recommend an award of fees until the Defendant had first failed to comply with a deadline for providing discovery. Second, the recommendation imposing the award notes that the Defendant failed to move to extend the time for compliance, move to stay, or move to abate the action. Instead, the Magistrate extended the deadline for the Defendant but, as a sanction for noncompliance, recommended an award of four hours of attorney's fees. Ultimately, she recommended an increase in the award to six hours of fees.

* * *

Insurance—Automobile—Application—Misrepresentations—Failure to disclose employee—Where insurer would not have issued policy at same premium if insured had disclosed additional employee of company, failure to disclose additional employee was material misrepresentation entitling insurer to rescind policy and deny coverage for loss

INTEGON PREFERRED INSURANCE COMPANY, Plaintiff, v. ACTION PLUMBING SERVICES, INC., TIMOTHY NEIL SMITH, AUSTIN TIMOTHY SMITH, PHILLIP PAUL JOINER, KATTY CHOIS, MARITZA DEZIREE ACOSTA, CATHERINE GRACE MCNEASE, LYDIA J. DEBONA, AND MATTHEW RONALD DEBONA, Defendants. Circuit Court, 6th Judicial Circuit in and for Pasco County. Case No. 19-CA-248-ES. September 22, 2020. Susan G. Barthle, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Matthew E. Maggard, Maggard & Burgess, P.A., Dade City, for Defendants.

ORDER ON PLAINTIFF, INTEGON PREFERRED INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AS TO DEFENDNANTS, ACTION PLUMBING SERVICES, INC. AND TIMOTHY NEIL SMITH

THIS CAUSE having come before this Court at the hearing on September 1, 2020, on the Plaintiff, INTEGON PREFERRED INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendants, ACTION PLUMBING SERVICES, INC. and TIMOTHY NEIL SMITH, and the Court having considered the same, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby **GRANTED**, as follows:

Factual Background

Plaintiff, Integon Preferred Insurance Company brought the instant Declaratory Action against the insureds, Action Plumbing Services, Inc. and Timothy Neil Smith, and the ancillary Defendants, regarding the policy rescission as a result of the insured's material misrepresentation on the application for insurance dated August 22, 2017. Plaintiff rescinded the policy of insurance on the basis that Timothy Neil Smith, as manager/President of Action Plumbing Services, Inc. failed to disclose that Austin Timothy Smith was an additional employee at the time of the policy inception. Had Timothy Neil Smith, as manager/President of Action Plumbing Services, Inc. disclosed this information the Plaintiff would have required Timothy Neil Smith, as manager/President of Action Plumbing Services, Inc. to exclude Austin Timothy Smith on the policy because he would have been considered to be an unacceptable risk, which would have resulted in an increase to the policy premium.

Timothy Neil Smith, as manager/President of Action Plumbing Services, Inc. completed an application for a policy of automobile insurance from Integon Preferred Insurance Company on August 22, 2017. Timothy Neil Smith, as manager/President of Action Plumbing Services, Inc. failed to disclose that Austin Timothy Smith was an additional employee at the time of the policy inception, when completing the application for insurance. Specifically, Timothy Neil Smith, as manager/President of Action Plumbing Services, Inc. signed and dated the application for insurance on page 4 of 5, which provides in pertinent part as follows:

> By your signature below, you acknowledge and agree that ALL persons of driver permit age or older who: (1) live with you, (2) are your employees or (3) operate or have access to your vehicle(s) are listed in the Application.

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In addition, Timothy Neil Smith, as manager/President of Action Plumbing Services, Inc. signed the application for insurance on page 5, which provides in pertinent part as follows:

> I agree all answers to all questions in this Application are true and correct. I understand, recognize, and agree said answers are given and made for the purpose of inducing the Company to issue the policy for which I have applied. I also agree to pay for any surcharges applicable under the Company rules which are necessitated by inaccurate statements. I further agree that ALL persons of eligible driving age or permit age who live with me, or who are employed in my business, as well as ALL operators who regularly operate my vehicles and do not reside in my household, are shown above. I Agree that my principal residence and place of vehicle garaging is correctly shown above and is in the state for which I am applying for insurance at least 10 months each year. I understand the Company may declare that no coverage will be provided or afforded if said answers on this application are false or misleading, and materially affect the risk which the Company assumes by issuing this policy. In addition, I understand that I have a continuing duty to notify the Company of any changes of: (1) address; (2) location of vehicles; (3) members of my household of eligible driving age or permit age; (4) operators of any vehicles listed on the policy; or (5) use of any vehicles listed on the policy. I understand the Company may declare that no coverage will be provided or afforded if I do not comply with my continuing duty of advising the Company of any changes as noted above which materially affect the risk the Company assumes by issuing this policy.

The subject insurance policy issued to Action Plumbing Services, Inc. by Integon Preferred Insurance Company, provides a definition for the term "Employee" which as follows:

> "Employee" means anyone for which the employer will pay for his or her services and has the authority to direct performance. This includes direct staff, independent contractors, leased workers and temporary workers.

Following the April 5, 2018 motor vehicle accident in which Austin Timothy Smith was the operator of the insured vehicle, an Examination Under Oath (EUO) was taken of the Defendants, Timothy Neil Smith and Austin Timothy Smith, on September 18, 2018, wherein both Timothy Neil Smith and Austin Timothy Smith disclosed under oath to Plaintiff that Austin Timothy Smith was working for Action Plumbing Services Inc. since the business was created in August 2017. Specifically, Timothy Neil Smith testified on September 18, 2018 as follows:

> **Q:** And how long have you been operating the business?
> **A:** I believe it's August of '17.
> ---
> **Q:** What's your actual title position, what are you as far as the corporation's concerned?
> **A:** President.
> **Q:** What's the number of employees that you have working for you?
> **A:** Including myself?
> **Q:** Yes.
> **A:** Four.
> **Q:** And those are your actual employees of Action Plumbing, or are they independent contractors?
> **A:** Independent until October, then everybody goes full employee on the books.
> **Q:** Until October of this year?
> **A:** Yeah, start of the new quarter.
> **Q:** Now, is Austin Smith, is her your son?
> **A:** Yes.
> **Q:** And is he an employee of—on of those four employees that you're referring to?
> **A:** Yes.
> **Q:** And how long has he worked for you?
> **A:** Since day one.
> **Q:** So, since August of 2017?
> **A:** Yes, sir.
>
> *See pages 7-8 of the transcript from the Examination Under Oath of Timothy Neil Smith, filed with this Court under separate cover on December 23, 2019.*

In addition, Austin Timothy Smith testified at his Examination Under Oath (EUO) on September 18, 2018 as follows:

> **Q:** And your occupation, you work for Action Pluming Services, Inc.?
> **A:** Yes, sir.
> **Q:** That's your dad's company?
> **A:** That is correct.
> **Q:** And your dad's Timothy Smith?
> **A:** Yes, sir.
> **Q:** And how long have you been working for your dad?
> **A:** It's been about a year now since the day we opened.
> **Q:** So, like since August/September of 2017?
> **A:** I believe it was August of '17 when we first officially were open.
>
> *See page 7 of the transcript from the Examination Under Oath of Austin Timothy Smith, filed with this Court under separate cover on December 23, 2019.*

Plaintiff determined that had Timothy Neil Smith as manager/President of Action Plumbing Services, Inc., provided the proper information at the time of the insurance application dated August 22, 2017, then Plaintiff would not have issued the insurance policy at the same premium. Had Timothy Neil Smith as manager/President of Action Plumbing Services, Inc. disclosed his son, Austin Timothy Smith, as an additional employee at the time of the application, the Plaintiff would have required Action Plumbing Services, Inc. to exclude Austin Timothy Smith on the policy because he would have been considered to be an unacceptable risk. Excluding Austin Timothy Smith on the policy at inception would have resulted in an increase to the policy premium. Therefore, Integon Preferred Insurance Company declared the policy void *ab initio* due to material misrepresentation and returned the paid premiums to Action Plumbing Services, Inc. Due to the policy being declared void *ab initio* the Plaintiff denied coverage for the subject motor vehicle accident.

Plaintiff, Integon Preferred Insurance Company, argued in their summary judgment that, as both the statute and the appellate decisions state, materiality of the risk is determined by the insurer, not the insured. *See Fla. Stat. 627.409.* Therefore, the insurer determines materiality. Additionally, as an insurer rates risks based on the likelihood of a future event, such as an accident, then the insurer may treat any employee, driver, household member, etc. as a potential risk. It was the Plaintiff's position that Plaintiff properly rescinded the policy at issue based on the failure to disclose that Austin Timothy Smith was an additional employee at the time of the policy inception, as the terms were unambiguous within the application and insurance policy.

Pursuant to the policy of insurance issued to Action Plumbing Services, Inc., Integon Preferred Insurance Company may void the insurance policy as follows:

> **MISREPRESENTATION AND FRAUD**
>
> This policy was issued in reliance on the information provided on **your** written or verbal insurance Application. **We** reserve the right, at **our** sole discretion, to void from inception or rescind this Policy if **you** or a **family member**:
>
> 1. Made any false statements or representations to us with respect to any material fact or circumstance; or
> 2. Concealed, omitted or misrepresented any material fact or circumstance or engaged in any fraudulent conduct;

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in the Application for this insurance or when renewing this Policy, requesting reinstatement of this Policy or applying for any coverage under this Policy

A fact or circumstance will be deemed material if **we** would not have:

1. Written this Policy;
2. Agreed to insure the risk assumed; or
3. Assumed the risk at the premium charged

This includes, but is not limited to, failing to disclose in the verbal or written Application all persons **residing** in **your** household or regular operators of a **covered auto**

B. This Policy shall be void if **you** fail to notify **us** of any change to the Policy that materially affects **our** acceptance or rating of this risk.

C. If **we** void this Policy, the Policy will be void from its inception, and **we** will not be liable for any claims or damages that would otherwise be covered

D. **We** may cancel this Policy and/or may not provide coverage under this Policy if **you,** a **family member,** or anyone else seeking coverage under this Policy concealed or misrepresented any material fact or circumstance or engaged in fraudulent conduct in connection with the presentation or settlement of a claim. This includes, but is not limited to, misrepresentation concerning a **covered auto** or **your** interest in a **covered auto**

E. **We** may, at **our** sole discretion, void or rescind this Policy for fraud or misrepresentation even after the occurrence of an **accident** or **loss.** This means that we will not be liable for any claims or damages which would otherwise be covered

F. If **we** make a payment under this Policy for a **loss** or **accident** to **you** or to a person seeking coverage under this Policy which **we** later discover was obtained through fraud, concealment or misrepresentation by **you** or the person seeking coverage under this Policy, **we** reserve the right, at **our** sole discretion, to recover such payment made or incurred.

See pages 37-38 of the lntegon Preferred Insurance Company insurance policy.

Further, Florida Statute § 627.409(1) provides:

(1) Any statement or description made by or on behalf of an insured or annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and not a warranty. Except as provided in subsection (3), ***a misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only if any of the following apply***:

(a) The misrepresentation, omission, concealment, or statement is fraudulent or is material to the acceptance of the risk or to the hazard assumed by the insurer.

(b) ***If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith*** would not have issued the policy or contract, ***would not have issued it at the same premium rate,*** would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.

Counsel for the Defendants, Timothy Neil Smith and Action Plumbing Services, Inc., represented to the Court that based on the Affidavit of Timothy Neil Smith filed on August 26, 2020, that Timothy Neil Smith's son, Austin Timothy Smith, was an independent contractor at the time of the application for insurance. Further, counsel for the Defendants represented that Timothy Neil Smith did not understand the definition of "Employee" at the time of the application for insurance. In addition, counsel for the ancillary Defendants, Katty Chois, Maritza Deziree Acosta and Catherine Grace McNease, opposed the Plaintiff's Motion for Final Summary Judgment at the hearing.

Counsel for the Plaintiff opposed the Defendants' position set forth in the Affidavit filed six (6) days prior to the hearing on Summary Judgment. Counsel for the Plaintiff argued that the insurance policy clearly defines the term "Employee" and the application for insurance becomes part of the insurance policy contract once executed. The insured is bound by his signature on the application for insurance. Here, Timothy Neil Smith did not ask any questions about the application or the word "Employee" to the particular agent at Insurance Den, Inc. Further, Timothy Neil Smith's testimony provided at his Examination Under Oath on September 18, 2018 clearly demonstrates that Timothy Neil Smith understood the term "Employee." In addition, counsel for the Plaintiff represented to the Court that after the policy inception, Timothy Neil Smith and/or Action Plumbing Services, Inc. attempted to add Austin Timothy Smith to the policy and requested a quote from Insurance Den.

Specifically, it was determined through discovery that the agent's file (Insurance Den, Inc.) contained an e-mail correspondence between Action Plumbing Services, Inc. and the independent insurance agency, Insurance Den, Inc. The insured had contacted Insurance Den, Inc., to obtain quotes for adding two employees/drivers (Austin Timothy Smith and Larry Fuller). On October 3, 2017, Insurance Den, Inc. informed the insured, Action Plumbing Services, Inc., that it would cost $22.00 to add Larry Fuller to the policy and that it would cost approximately $2,583 to add Austin Timothy Smith to the policy. Immediately thereafter, on October 3, 2017, Action Pluming Services, Inc. responded to the e-mail to Insurance Den, Inc. stating that after discussing it with Tim and Nathan, they have decided to add only Larry Fuller at this time.

Specifically, the independent insurance agent, Mr. Dennis Allen Dewees, recalled the interaction on August 22, 2017 with Timothy Neil Smith, and provided the following testimony at this deposition:

Q: On the day of the application when the two principals, Jimmy and Timothy, came into your office—I think I asked you this—did you go through all of the questions on the application with the two individuals?

A: Yes. I handed them the application and said for them to verify all the information on it.

Q: Did either Timothy or Jimmy have any questions at that time?

A: No.

See page 20 from the transcript of the Deposition of Dennis Allen Dewees.

The Court ruled that based on the testimony provided at the Examination Under Oath (EUO) of Timothy Neil Smith, the e-mail communication between Action Plumbing Services, Inc. and the independent insurance agency, Insurance Den Inc., as well as the testimony provided at the deposition of the producing agent, Mr. Dennis Allen Dewees, it is clear that the Defendant, Timothy Neil Smith's son, Austin Timothy Smith, was an employee (which includes an independent contractor pursuant to the terms and definitions of the insurance policy) of Action Plumbing Services, Inc., since the inception of the business, Action Plumbing Services, Inc. Importantly, the subject insurance policy defines "Employee" to include "Independent Contractor."

In addition, pursuant to the policy declarations pages, the insured, Timothy Neil Smith, as manager of Action Plumbing Services, Inc., added an "employee", Larry Fuller, to the subject insurance policy. Further, additional "employees" were added to the subject insurance policy (such as Phillip Paul Joiner) prior to the policy rescission.

Analysis Regarding Whether the Undisclosed Employee was Material

The Court ruled that the question of materiality is considered from

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the perspective of the insurer. The Court found that "[a] material misrepresentation in an application for insurance, whether or not made with knowledge of its correctness or untruth, will nullify *any policy* issued and is an absolute defense to enforcement of the policy." *United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (3rd DCA 2009) [34 Fla. L. Weekly D1578a]. The Court ruled that the failure to disclose that Austin Timothy Smith was an additional employee at the time of the policy inception, that would have resulted in an increase to the policy premium is sufficient to support a rescission. *See Privilege Underwriters Reciprocal Exch. v. Clark,* 174 So. 3d 1028, 1031 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1810a]. Additionally, the Court found that as the Defendants failed to provide testimony to contradict Plaintiff's claim that the disclosure would have caused Plaintiff to not issue the policy at the same premium, then Plaintiff was entitled to rescind. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen,* 999 F.2d 1532 (1993). Plaintiff established without contrary evidence that the misrepresentation was material, as set forth in the Affidavit of Michael Pearce and deposition of Michael Pearce.

Conclusion

This Court finds that the Plaintiff, Integon Preferred Insurance Company's application for insurance unambiguously required Defendant, Timothy Neil Smith, as manager/President of Action Plumbing Services, Inc., to disclose that Austin Timothy Smith was an additional employee at the time of the policy inception, that Plaintiff provided the required testimony to establish said that Defendant, Timothy Neil Smith, as manager/President of Action Plumbing Services, Inc.'s failure to disclose that Austin Timothy Smith was an additional employee at the time of the policy inception was a material misrepresentation because Plaintiff would not have issued the policy at the same premium, and thus Plaintiff properly rescinded the subject policy of insurance. Consequently, Plaintiff properly denied coverage for the loss at issue.

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

a. Plaintiff, INTEGON PREFERRED INSURANCE COMPANY's Motion for Final Summary Judgment is hereby **GRANTED**;

b. This Court ***hereby enters final judgment*** for Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, and against the Defendants, ACTION PLUMBING SERVICES, INC. and TIMOTHY NEIL SMITH;

c. This Court hereby reserves jurisdiction to consider any claims for attorney's fees and costs;

d. The Court finds that the facts alleged by the Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, in its Complaint for Declaratory Judgment and in the Affidavit of Michael Pearce, are not in dispute, which are as follows:

i. The Defendant, TIMOTHY NEIL SMITH as manager of ACTION PLUMBING SERVICES, INC. failed to disclose his son, AUSTIN TIMOTHY SMITH, as an additional employee on the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # XXXXXX4343, issued by INTEGON PREFERRED INSURANCE COMPANY;

ii. There is no insurance coverage for the named insured, ACTION PLUMBING SERVICES, INC. for any bodily injury liability, property damage liability, comprehensive coverage, collision coverage, custom equipment coverage, hired auto coverage, non-ownership liability coverage or personal injury protection coverage, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

iii. There is no insurance coverage for TIMOTHY NEIL SMITH for any bodily injury liability, property damage liability, comprehensive coverage, collision coverage, custom equipment coverage, hired auto coverage, non-ownership liability coverage or personal injury protection coverage, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

iv. There is no insurance coverage for AUSTIN TIMOTHY SMITH for any bodily injury liability, property damage liability, comprehensive coverage, collision coverage, custom equipment coverage, hired auto coverage, non-ownership liability coverage or personal injury protection coverage, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

v. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify ACTION PLUMBING SERVICES, INC. for any claims made under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

vi. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify TIMOTHY NEIL SMITH for any claims made under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

vii. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify AUSTIN TIMOTHY SMITH for any claims made under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

viii. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify ACTION PLUMBING SERVICES, INC. for the bodily injury claim for PHILLIP PAUL JOINER arising from the motor vehicle accident of April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

ix. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify TIMOTHY NEIL SMITH for the bodily injury claim for PHILLIP PAUL JOINER arising from the motor vehicle accident of April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

x. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify AUSTIN TIMOTHY SMITH for the bodily injury claim for PHILLIP PAUL JOINER arising from the motor vehicle accident of April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xi. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify ACTION PLUMBING SERVICES, INC. for the bodily injury claim for MARITZA DEZIREE ACOSTA arising from the motor vehicle accident of April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xii. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify TIMOTHY NEIL SMITH for the bodily injury claim for MARITZA DEZIREE ACOSTA arising from the motor vehicle accident of April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

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xiii. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify AUSTIN TIMOTHY SMITH for the bodily injury claim for MARITZA DEZIREE ACOSTA arising from the motor vehicle accident of April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xiv. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify ACTION PLUMBING SERVICES, INC. for the bodily injury claim for CATHERINE GRACE MCNEASE arising from the motor vehicle accident of April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xv. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify TIMOTHY NEIL SMITH for the bodily injury claim for CATHERINE GRACE MCNEASE arising from the motor vehicle accident of April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xvi. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify AUSTIN TIMOTHY SMITH for the bodily injury claim for CATHERINE GRACE MCNEASE arising from the motor vehicle accident of April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xvii. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify ACTION PLUMBING SERVICES, INC. for the bodily injury claim for LYDIA J. DEBONA arising from the motor vehicle accident of April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xviii. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify TIMOTHY NEIL SMITH for the bodily injury claim for LYDIA J. DEBONA arising from the motor vehicle accident of April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xix. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify AUSTIN TIMOTHY SMITH for the bodily injury claim for LYDIA J. DEBONA arising from the motor vehicle accident of April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xx. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify ACTION PLUMBING SERVICES, INC. for the bodily injury claim for MATTHEW RONALD DEBONA arising from the motor vehicle accident of April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xxi. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify TIMOTHY NEIL SMITH for the bodily injury claim for MATTHEW RONALD DEBONA arising from the motor vehicle accident of April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xxii. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify AUSTIN TIMOTHY SMITH for the bodily injury claim for MATTHEW RONALD DEBONA arising from the motor vehicle accident of April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xxiii. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify ACTION PLUMBING SERVICES, INC. for the property damage claim for MATTHEW RONALD DEBONA arising from the motor vehicle accident of April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xxiv. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify TIMOTHY NEIL SMITH for the property damage claim for MATTHEW RONALD DEBONA arising from the motor vehicle accident of April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xxv. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify AUSTIN TIMOTHY SMITH for the property damage claim for MATTHEW RONALD DEBONA arising from the motor vehicle accident of April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xxvi. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify ACTION PLUMBING SERVICES, INC. for the property damage claim for KATTY CHOIS arising from the motor vehicle accident of April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xxvii. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify TIMOTHY NEIL SMITH for the property damage claim for KATTY CHOIS arising from the motor vehicle accident of April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xxviii. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, has no duty to defend and/or indemnify AUSTIN TIMOTHY SMITH for the property damage claim for KATTY CHOIS arising from the motor vehicle accident of April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xxix. There is no collision insurance coverage for ACTION PLUMBING SERVICES, INC. for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xxx. There is no custom equipment insurance coverage for ACTION PLUMBING SERVICES, INC. for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xxxi. There is no hired auto insurance coverage for ACTION PLUMBING SERVICES, INC. for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

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xxxii. There is no non-ownership liability insurance coverage for ACTION PLUMBING SERVICES, INC. for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xxxiii. There is no collision insurance coverage for TIMOTHY NEIL SMITH for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xxxiv. There is no custom equipment insurance coverage for TIMOTHY NEIL SMITH for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xxxv. There is no personal injury protection ("PIP") insurance coverage for AUSTIN TIMOTHY SMITH for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xxxvi. There is no personal injury protection ("PIP") insurance coverage for PHILLIP PAUL JOINER for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xxxvii. There is no bodily injury liability insurance coverage for PHILLIP PAUL JOINER for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xxxviii. There is no bodily injury liability insurance coverage for MARITZA DEZIREE ACOSTA for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xxxix. There is no bodily injury liability insurance coverage for CATHERINE GRACE MCNEASE for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xl. There is no bodily injury liability insurance coverage for LYDIA J. DEBONA for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xli. There is no bodily injury liability insurance coverage for MATTHEW RONALD DEBONA for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xlii. There is no property damage liability insurance coverage for MATTHEW RONALD DEBONA for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xliii. There is no property damage liability insurance coverage for KATTY CHOIS for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xliv. The Defendant, ACTION PLUMBING SERVICES, INC., is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xlv. The Defendant, TIMOTHY NEIL SMITH, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xlvi. The Defendant, AUSTIN TIMOTHY SMITH, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xlvii. The Defendant, MATTHEW RONALD DEBONA, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xlviii. The Defendant, KATTY CHOIS, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

xlix. The Defendant, MARITZA DEZIREE ACOSTA, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

l. The Defendant, CATHERINE GRACE MCNEASE, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, under policy #)00000(4343;

li. The Defendant, PHILLIP PAUL JOINER, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

lii. The Defendant, LYDIA J. DEBONA, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

liii. There is no insurance coverage for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

liv. There is no personal injury protection ("PIP") insurance coverage for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

lv. There is no bodily injury liability insurance coverage for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

lvi. There is no property damage liability coverage for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

lvii. There is no comprehensive insurance coverage for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

lviii. There is no collision insurance coverage for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

lix. There is no hired auto insurance coverage for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

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lx. There is no non-ownership insurance coverage for the motor vehicle accident which occurred on April 5, 2018, under the policy of insurance issued by INTEGON PREFERRED INSURANCE COMPANY, under policy # XXXXXX4343;

lxi. The INTEGON PREFERRED INSURANCE COMPANY Policy of Insurance, bearing policy # XXXXXX4343, is rescinded and is void ab initio.

*   *   *

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COUNTY COURTS

Insurance—Personal injury protection—Claims—Professional license number of physician must be included on claim form—However, because insurer did not raise license number defense presuit, case is stayed to allow medical provider to resubmit claim form with license number

HEALTHSOURCE OF NORTHWEST FLORIDA, LLC., a/a/o Paul Forte, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 1st Judicial Circuit in and for Escambia County. Case No. 2019 SC 001628. Division 5. July 22, 2020. Pat Kinsey, Judge. Counsel: Adam Saben, Shuster & Saben, LLC, Jacksonville, for Plaintiff. James C. Rinaman, Dutton Law Group, Jacksonville, for Defendant.

ORDER ON COMPETING MOTIONS FOR SUMMARY JUDGMENT

At a ZOOM hearing on July 7, 2020, the parties appeared through counsel. At issue were competing Motions for Summary Judgment in this Small Claims PIP case. The court finds the defendant's motion asking that the court find that the failure of the physician to indicate his professional license number in Box 31 is dispositive. The court acknowledges that the CMS-1500 form need only be "substantially complete, and substantially accurate." However, the plain and unambiguous language of the statute, which was changed in 2012, indicates that the professional license number ***must*** be included on the claim form. Because this should have been resolved at the time the claim was submitted, and because the defendant did not raise this "defense" until filing their Answer to this Small Claims lawsuit, it is

ORDERED AND ADJUDGED that this case is stayed for a period of sixty days to permit the plaintiff to re-submit the CMS-1500 forms to the defendant which include the professional license number of the physician. If the forms are not re-submitted within sixty days of the date of this Order, the defendant's Motion for Summary Judgment shall be granted.

*   *   *

Criminal law—Driving under influence—Refusal to submit to breath test—Search and seizure—Vehicle stop—Officer who observed defendant driving vehicle whose owner had suspended license had reasonable suspicion for stop—Officer's observations that defendant had odor of alcohol and glassy bloodshot eyes were insufficient to establish reasonable suspicion to request performance of field sobriety exercises—Even if there was reasonable suspicion to request performance of exercises, there was insufficient probable cause for DUI arrest based solely on odor of alcohol, glassy bloodshot eyes, and refusal to submit to exercises—Request to submit to breath test was not authorized where DUI arrest was not lawful—Stop and arrest for driving while license suspended or revoked is lawful—All evidence obtained from unlawful DUI arrest is suppressed

STATE OF FLORIDA, v. JEREMY LANE JOHNSON, Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 2020-CT-59, Division B. September 23, 2020. Roberto A. Arias, Judge. Counsel: Gabriel T. Roberts, Assistant State Attorney, for State. Malcolm Anthony, Malcolm Anthony, P.A., Ponte Vedra Beach, for Defendant.

ORDER SUPPRESSING EVIDENCE

This cause came before the Court on Defendant's Motion to Suppress Evidence, and the Court having heard testimony, argument of counsel, and being otherwise been fully advised in the premises, hereby finds as follows:

1. At approximately 11:46 p.m. on December 31, 2019, Officer J. J. Dzamko of the Neptune Beach Police Dept. observed a vehicle southbound on A1A with a tag due to expire at midnight. A check through FCIC/NCIC also revealed the registered *owner* of the vehicle had a license suspension for "Refusal to Submit to Breath Test" and for "DUI." Based thereon, Dzamko conducted a traffic stop of the vehicle. After the stop, Dzamko discovered the defendant/driver was the registered owner. Defendant was subject to arrest for Driving While License Suspended or Revoked (DWLSR). Officer Dzamko detected an odor of an alcoholic beverage on defendant's breath and observed defendant had bloodshot, watery eyes. He requested defendant to perform field sobriety exercises. Defendant declined to perform field sobriety exercises. Defendant was arrested for DWLSR and DUI and transported to the detention facility where he refused a breath test. The State filed an information charging him with DWLSR, DUI and Criminal Refusal.

2. Defendant filed a motion to suppress evidence alleging

a. an illegal stop,

b. a request for field sobriety exercises not supported by reasonable suspicion,

c. and an arrest not based upon sufficient probable cause.

3. The stop was lawful. *Bratcher v. State,* 727 So.2d 1114 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D676b], *Kansas v. Glover* 140 S.Ct. 1183 (2020) [28 Fla. L. Weekly Fed. S111a]; a "commonsense inference that the owner of a vehicle was likely the vehicles driver provide[s] more than reasonable suspicion to initiate the stop."

4. There was insufficient reasonable suspicion to warrant the request for field sobriety exercises. Officer Dzamko observed no driving pattern to indicate impairment. He observed no sign of balance impairment. He observed no sign of speech impairment. He observed no sign of confusion. All he detected was an odor of alcohol on defendant's breath and glassy and bloodshot eyes. These observations are insufficient to warrant a request for field sobriety exercises.

5. *State v. Taylor,* 648 So.2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b] established that an officer's request to perform FSEs must be based upon reasonable suspicion that a [DUI] was occurring, see *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), codified in section 901.151 (2), Fla. Stat. 2012. In *Taylor,* when Mr. Taylor exited his car, he 1) staggered and 2) exhibited slurred speech, 3) watery, bloodshot eyes, and a 4) strong odor of alcohol.

> "This, combined with a high rate of speed on the highway, was enough to provide the officer with reasonable suspicion that a crime was being committed, i.e., DUI. The officer was entitled under section 901.151, F. S. to conduct a reasonable inquiry to confirm or deny that probable cause existed to make an arrest." *Taylor,* at 703.

6. An odor of alcohol and bloodshot eyes alone are insufficient to request field sobriety exercises. *State v. Longacre,* 2 Fla. L. Weekly Supp. 441a (11th Cir. 1994); *State v. Scully,* 4 Fla. L. Weekly Supp. 296a (11th Cir. 1996); *State v. Marshall,* 36 Fla. L. Weekly Supp. 34 (4th Cir. 1989); *Davis v. State,* 40 Fla. L. Weekly Supp. 35 (15th Cir. 1989); *State v. Woodard,* supra; *Chait v. Slate,* 27 Fla. L. Weekly Supp. 115 (11th Cir. 1988); *State v. Leach,* 11 Fla. L. Weekly Supp. 669c (17th Cir. 2004); *State v. Hancock,* 13 Fla. L. Weekly Supp. 224a (6th Cir. 2005); *State v. Battle,* 6 Fla. L. Weekly Supp. 139b (4th Cir. 1998).

7. Although Officer Dzamko detected defendant had an odor of an alcoholic beverage, it is well settled law that "the mere odor of alcohol only shows that alcohol was relatively recently imbibed by the defendant." *State v. Kliphouse,* 771 So.2d 16 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f]. See also, *State v. Floyd,* 510 So.2d 1180 (Fla. 4th DCA 1987), *Dorman v. State,* 492 So.2d 1160 (Fla. 1st DCA 1986). Although Dzamko observed the condition of defendant's eyes *as* glassy and bloodshot, such is not necessarily an indicator of

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impairment.

8. Even assuming there was reasonable suspicion to request the defendant to perform field sobriety exercises, there was insufficient probable cause for the DUI arrest.

9. Sufficient probable cause to justify an arrest exists where the facts and circumstances allow a reasonable officer to conclude that an offense has been committed. *State v. Riehl,* 504 So.2d 798, 800 (Fla. 2d DCA 1987); *Mailly v. Jenne,* 867 So.2d 1250, 1251 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D657a]. The existence of probable cause requires an examination of the totality of the circumstances. *City of Clearwater v. Williamson,* 938 So.2d at 989. The facts are to be analyzed from the officer's knowledge, practical experience, special training, and other trustworthy information. *City ofJacksonville v. Alexander,* 487 So.2d 1144, 1146 (Fla. 1st DCA 1986).

> Many factors contribute to a finding of probable cause for a DUI arrest. David A. Demers, "Probable Cause for DUI Arrest," in DUI Handbook § 4.6(c) (II West's Fla. Practice Series 2008-2009 ed.). For example, although an odor of alcohol is significant, it may not be dispositive. *State v. Kliphouse,* 771 So.2d 16, 23 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f]. Other factors "may include the defendant's reckless or dangerous operation of a vehicle, slurred speech, lack of balance or dexterity, flushed face, bloodshot eyes, admissions, and poor performance on field sobriety exercises." *Id.* (footnotes omitted); see also *Ingram v. State,* 928 So.2d 423 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D1164c] (determining that law enforcement had probable cause to arrest defendant for DUI where defendant drove erratically, drove completely off the road, and had watery and bloodshot eyes and impeded speech); *Whitley,* 846 So.2d at 1166 (holding that there was probable cause to arrest defendant for DUI where, among other factors, the officer observed defendant driving erratically and defendant's eyes were glassy); *McNall v. Dept of Highway Safety & Motor Vehicles,* 13 Fla. L. Weekly Supp. 1163a (Fla. 20th Cir.Ct.2006) (determining there was probable cause for a DUI arrest where a vehicle made a sudden jerk movement to the right and then back to the left while going eastbound, during that movement both left tires crossed the white line into the center eastbound lane, vehicle slowed down and sped up suddenly and made several drifting movements within the right lane, defendant's eyes were red and watery, and defendant had problems with the field sobriety tests). *Mathis v. Coats,* 24 So.2d 1284 (Fla.2nd DCA 2010) [35 Fla. L. Weekly D142b].

10. Insufficient probable cause existed for the DUI arrest. The sum of the factors present in this case were: 1) a smell of alcohol, 2) bloodshot watery eyes and a 3) refusal to submit to field sobriety exercises. These alone are insufficient to establish probable cause for a DUI arrest. There must exist some indicia of *impairment* by alcohol rather than only signs of ingestion, *e.g.,* poor driving, balance unsteadiness, speech problems, signs of confusion, etc.

11. After the arrest, defendant was requested to provide a breath sample pursuant to section 316.1932, Fla. Stat., the implied consent law. This section provides that a licensed driver is "deemed to have given his or her consent to submit to a [breath test] if the person is lawfully arrested for [DUI]." 316.1932(1)(a)1.a., Fla Stat. The request for a breath test must be incident to a *lawful arrest for DUI. DHSMV v. Hernandez,* 74 So.3d 1070 (2011) [36 Fla. L. Weekly S243a] (Emphasis added). Since the arrest for DUI was unlawful, the request for a breath test was not authorized. Defendant was not compelled by law to provide a breath sample; he was authorized by law to refuse the same with impunity.

ORDERED AND AJUDGED:

12. The stop and arrest for Driving While License Suspended is lawful.

13. The request for field sobriety exercises was not supported by reasonable suspicion; refusal to submit to same is **SUPPRESSED**.

14. The arrest for DUI was not supported by sufficient probable cause. All evidence obtained from the unlawful arrest, including the refusal to submit to a breath test, is **SUPPRESSED**.

* * *

Insurance—Personal injury protection—Attorney's fees—Where insurer confessed judgment by paying statutory penalty and postage after lawsuit for those payments was initiated, prevailing medical provider is entitled to award of attorney's fees and costs under section 627.428(1)—No merit to argument that provider did not have standing to pursue action for penalty and postage because those monies were owed to provider's attorney

NEUROLOGY PARTNERS, P.A., as assignee of Sarah Bryan, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 4th Judicial Circuit in and for Duval County, Small Claims Court. Case No. 16-2018-SC-010506, Division CC-J. September 21, 2020. Eleni Elia Derke, Judge. Counsel: Ashley-Britt Hansen, Law Office of D. Scott Craig, LLC, Jacksonville, for Plaintiff. Mark J. Kupcinskas, Jr., for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION AND MOTION TO ESTABLISH ENTITLEMENT TO REASONABLE ATTORNEYS' FEES AND COSTS AS PREVAILING PARTY IN THIS LITIGATION

THIS CAUSE came to be heard upon Plaintiff's Motion for Summary Disposition and Motion to Establish Entitlement to Reasonable Attorneys' Fees and Costs as Prevailing Party in this Litigation. Both parties were represented by counsel. The Court, having heard arguments of the parties, find as follows:

1. This is an action for breach of contract for unpaid penalty and postage related to payment of underlying No-Fault benefits pursuant to Florida Statutes 627.736.

2. On August 10, 2018, Plaintiff sent to Defendant a presuit demand letter ("demand letter") in compliance with §627.736(10), Fla. Stat which included a valid Assignment of Benefits executed by Plaintiff's patient to provide Plaintiff standing to pursue the unpaid monies.

3. The demand letter requested payment of No-Fault Benefits, interest, penalty and postage. Soon thereafter, and in direct response to Plaintiff's demand letter on August 22, 2018, Defendant only submitted payment for the unpaid No-Fault benefits and interest demanded directly to Plaintiff.

4. At that time, Defendant failed to pay the statutory penalty and postage pursuant to, and required by, §627.736(10), Fla. Stat.

5. On September 27, 2018, Plaintiff filed the instant action due to Defendant's failure to comply with the Florida No-Fault Law and for its failure to tender all sums owed to avoid litigation.

6. On August 12, 2019, Defendant submitted payment to Plaintiff for the penalty and postage it failed to pay with the submission of No-Fault benefits demanded in Plaintiff's demand letter.

7. It is undisputed that the demand letter was sent, that the insurer paid the underlying No-Fault benefits within thirty (30) days without tendering the required penalty and postage, that the initial Complaint was subsequently filed, and then Defendant tendered the penalty and postage post-suit.

8. Defendant argued that Plaintiff did not have standing to pursue the penalty and postage because the monies were allegedly owed to Plaintiff's attorney.

ORDERED and ADJUDGED that:

6. Plaintiff's Motion is GRANTED.

7. The demand letter provision of the Florida No-Fault Law states, in pertinent part:

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(c) Each notice required by this subsection must be delivered to the insurer by United States certified or registered mail, return receipt requested. *Such postal costs shall be reimbursed by the insurer* if requested by the claimant in the notice, when the insurer pays the claim.

(d) If, within 30 days after receipt of notice by the insurer, the overdue claim specified in the notice is paid by the insurer *together with applicable interest and a penalty of 10 percent of the overdue amount paid by the insurer,* subject to a maximum penalty of $250, *no action may be brought against the insurer.*

Fla. Stat. 627.736(10)(c) & (d) (2013) (emphasis added).

8. When Defendant responded to Plaintiff's demand letter by tendering payment for the No-Fault benefits, sections 627.736(c) and 627.736(d)'s entitlement to the penalty, postage and interest were triggered. It was only by virtue of this lawsuit that Defendant ultimately paid the penalty and statutory postage, thereby confessing judgment for the statutory damages sought by Plaintiff

9. This Court finds Defendant was obligated to pay the statutory penalty and postage when it decided to tender the unpaid No-Fault benefits in response to Plaintiff's demand letter.

10. The Attorney Fees provision of §627.428, Fla. Stat entitles every insured who prevails against an insurer an ability to recover attorney's fees which states, in pertinent part:

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

Fla. Stat. 627.428(1) (emphasis added).

11. Defendant's payment of the statutory penalty and postage after the lawsuit was initiated operates as a confession of judgment making Plaintiff the prevailing party and entitling it to attorneys' fees and costs. The provision says nothing about the recovery of insurance benefits *only* as the basis for an award of attorney's fees and costs.

12. Most notably, the Florida No-Fault Law allows an insured to recover its postage and penalty if the insurer pays any portion of the benefits demanded during the thirty (30) days after a demand letter is received by the insurer. If a plaintiff is required to file suit because the postage and penalty were not tendered then attorney's fees incurred as a result are recoverable pursuant to §627.428, Fla. Stat.

13. This Court also fmds that §627.428, Fla. Stat. is applicable and requires a fording of entitlement to Plaintiff's attorneys' fees and costs.

14. This Court also finds Plaintiff has standing to pursue this action contrary to Defendant's argument that the cause of action lies with Plaintiff's Counsel.

* * *

Insurance—Personal injury protection—Standing—Assignment that lacks date, policy number, or name of insurer is insufficient—In absence of valid assignment, demand letter did not satisfy condition precedent to suit, and medical provider lacks standing

DR. KELLY J. HUBER, INC. a/a/o Edwin Ramirez, Plaintiff, v. PEAK PROPERTY AND CASUALTY INSURANCE CORPORATION, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2019-SC-037069-O. October 6, 2020. Evellen H. Jewett, Judge. Counsel: Samuel Korab, Sunrise, for Plaintiff. Daniella Mogg, Stevens Point, WI, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE having come before this Honorable Court for hearing on October 5, 2020 on Defendant's Motion for Final Summary Judgment and the Court having reviewed the Motion and supporting affidavit, the entire Court file, and the relevant legal authorities as raised by the parties, and having heard arguments by Counsel, and having been otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED: **GRANTED**

Background

This is an action by Plaintiff as the purported assignee of Edwin Ramirez to recover alleged overdue Personal Injury Protection ("PIP") benefits from Defendant. Defendant has raised the issues of failure to comply with conditions precedent to filing and lack of standing as affirmative defenses in this action. Defendant maintains that an Assignment of Benefits was not attached to Plaintiff's pre-suit demand letter. Plaintiff maintains that the Assignment of Benefits executed by Edwin Ramirez was attached to the pre-suit demand letter. The document titled "Release of Records/Payment Agreement & Assignment of Benefits" attached to the Affidavit of Gregory E. Gudin, Esq. and filed by Plaintiff on September 17, 2020 is not dated and contains no indication of who is signing over the benefits. On October 5, 2020, the Court heard arguments from Counsel on Defendant's Motion for Final Summary Judgment and hereby makes the following findings of fact and law.

Findings of Fact

Defendant issued a policy of insurance to Maria Em Aguirre De Ramirez which inured to her benefit, and to listed driver Edwin Ramirez's benefit, and provided PIP benefits up to $10,000.00 subject to the terms, conditions, limitation and exclusions of said policy and Florida law.

On June 19, 2020, Defendant filed its Motion for Final Summary Judgment. In support of same, Defendant submitted a sworn affidavit from Laurie Latimer, who testified that an Assignment of Benefits was not included with the pre-suit demand letter.

On July 31, 2020, following a hearing on Defendant's Motion for Leave to File Second Amended Answer, this Court deemed Defendant's Second Amended Answer, Affirmative Defenses, and Demand for Jury Trial as filed. In Defendant's Second Amended Answer, Defendant raised the defenses of failure to comply with conditions precedent to filing and lack of standing based upon Plaintiff's failure to attach an Assignment of Benefits to its pre-suit demand letter.

On September 17, 2020, Defendant was served with the Affidavit of Gregory E. Gudin, Esq. which attached a document entitled "Release of Records/Payment Agreement & Assignment of Benefits" which purportedly contained the signature of Edwin Ramirez. However, said document is not dated and does not contain any other written information regarding the insurance policy number or insurance carrier. The signature at the bottom of said document is illegible and does not contain a printed patient name.

Findings of Law

At the inception of suit, a Plaintiff must have standing to bring a cause of action. A Plaintiff's lack of standing at the inception of a case is not a defect that may be cured by the acquisition of standing after the case is filed. *Progressive Express Ins. Co. v. McGrath,* 913 So. 2d 1281 (Fla. 2nd DCA 2005) [30 Fla. L. Weekly D2622b].

Under the Florida No-Fault/PIP Statute, Section 627.736, Fla. Stat. (2016), a written Assignment of Benefits is a condition precedent to filing an action for PIP benefits and serves as the basis for standing to invoke the process of the court. *Progressive Express Ins. Co. v. McGrath,* 913 So.2d 1281 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2622b] (citing *Oglesby v. State Farm,* 781 So.2d 469 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D702a]).

The Court finds as a matter of law that Plaintiff, Dr. Kelly J. Huber,

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Inc. lacks a valid and enforceable Assignment of Benefits, and consequently lacks standing to bring this matter and has failed to satisfy a condition precedent in maintaining this cause of action. Specifically, the Court finds that the pre-suit demand letter sent by Plaintiff in this matter does not substantially comply with the requirements set forth in Section 627.736(10), Fla. Stat. (2016). Further, the Assignment of Benefits is insufficient as it lacks a date, along with other pertinent information in order to confer standing to sue Defendant on behalf of Edwin Ramirez.

Final Judgment

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion for Final Summary Judgment is hereby granted, and Final Judgment is hereby entered on behalf of Defendant, Peak Property and Casualty Insurance Corporation. Plaintiff, Dr. Kelly J. Huber, Inc. a/a/o Edwin Ramirez shall take nothing by this action and Defendant shall go hence without a day. The Court retains jurisdiction for the purpose of determining any motion by the Defendant to determine entitlement to and tax attorney's fees and costs.

*   *   *

Insurance—Personal injury protection—Affirmative defenses—Accord and satisfaction—"Full and final" language on check in same size as surrounding text and not distinguished by contrasting type, font, or color does not amount to conspicuous statement—Medical provider's motion for summary judgment on defense is granted

NEW MEDICAL GROUP INC., a/a/o Karen Amaya, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMP., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County, Civil Division. Case No. 2011-002939-CC-21, Section HI 01. January 23, 2020. Milena Abreu, Judge. Counsel: Majid Vossoughi and David J. Mannering, Majid Vossoughi, P.A., Miami, for Plaintiff. Paula Elkea Ferris, House Counsel United Auto Ins. Co., Miami Gardens, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S ACCORD AND SATISFACTION AFFIRMATIVE DEFENSE AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON ACCORD AND SATISFACTION

FACTUAL BACKGROUND:

1. This case stems from an alleged car accident that occurred on 08/05/09.

2. The claimant, Karen Amaya received treatment from the Plaintiff from November 17, 2009 through July 26, 2010.

3. On or about April 4, 2010, Defendant tendered drafts to Plaintiff for the services rendered between December 8, 2009 and December 29 , 2009.

4. The benefits draft tendered by Defendant contained the following language on the payee line of the check:

"NEW MEDICAL GROUP, INC.
F/A/O KAREN AMAYA FOR DOS: 12/8-12/29/09 AS FULL & FINAL PAYMENT OF PIP BENEFITS"

5. Attached to the check was the Defendant's Explanation of Review.

6. Payment was accepted by Plaintiff and the check cashed.

7. As a result, Defendant asserts Plaintiff accepted and negotiated the draft in accord and satisfaction of its bills.

8. Plaintiff subsequently filed the intent lawsuit against Defendant.

LEGAL ANALYSIS:

Pursuant to Florida Stat. 673.311, accord and satisfaction requires the Defendant to prove:

(i) That its tender was in good faith;

(ii) That the amount of the claim was "unliquidated" or "subject to a bonafide dispute"; and

(iii) That the instrument (check) or an accompanying written communication contained a "conspicuous statement" to the effect that the instrument was tendered in full satisfaction of the claim.

During the hearing of January 15, 2020, the Court made factual findings the Defendant met the first two elements of accord and satisfaction; Specifically the Court found that the check was in fact tendered in good faith and the amount of the claim subject to a bonafide dispute. Thereafter, the Court focused its inquiry on the third element of the statute—whether the check in fact contains a "conspicuous statement" tendered in full satisfaction of the claim.

The Court finds the Defendant's tender of payment does not meet the statutory requirement that it be "conspicuous" as defined by Florida Statute, 671.201(10). Specifically, 671.201(10) states:

> (10) "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" is a decision for the court. Conspicuous terms include the following:
>
> (a) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
>
> (b) Language in the body of a record or display in larger type than the surrounding text or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

The Court first notes of importance that the record evidence is a black and white copy of an original check. The Court was not provided with the original check. Defense counsel did advise and the parties agreed the color of the typesetting on the entirety of the check was black.

In this case the Court finds no "heading" other than the preprinted name of the Defendant Insurance Company on the top of the check. The focus therefore is on the language in the *body of the payee line on the draft*; Specifically the Court finds with regards to the specific language/text on the draft:

1) The text is *not* in capital letters equal to or greater in size than any other writing on the payee line; here the text is all the same size in capital lettering;

2) There appears to be *no* difference in font size;

3) No differentiating color to highlight the language;

4) No set off of the text by symbol or marks of any kind from any of the surrounding text;

Plaintiff relies on the case of *Gonzalez v. Associates Life Ins., Co.*, 641 So.2d 895 (Fla. 3d DCA 1994) to support its own Motion for Summary Judgment on the issue of accord and satisfaction. The *Gonzalez* court found the language in the body of a policy was not "conspicuous" because "the language in question is in no way distinguished from the reminder of the data page provisions. The fact that this language is not highlighted, set apart, or emphasized in any way, renders it not conspicuous."

While the Defendant asserted the *Gonzalez* case was distinguishable in that the case dealt with a specific clause contained within a policy and not a check, this Court finds that argument of no consequence. As the *Gonzalez* case noted that while the language was clearly legible and not buried in the midst of dense language or fine print, the applicable statute in that case required the language to be "conspicuous."

Similarly, while the text in the payee line of the check in the instant case may be discernible, it is not *conspicuous* as defined by Florida Statute 671.201. *See also United Auto Ins. Co. v. Gables Ins. Recovery, Inc., a/a/o Laraine Marques*, 26 Fla. L. Weekly Supp. 460a (Fla. 11th Cir. Appellate, July 30, 2018); *Michael J. Delesparra, D.C., P.A., v. United Auto Ins. Co.*, 19 Fla. L. Weekly Supp. 214a (Fla. 17th Cir.Cty., Judge Lee, December 8, 2011); *Atlantic Acu-Medical Center Corp., a/a/o Guillaume Baptiste v. United Auto. Ins. Co.*, 16 Fla. L. Weekly Supp. 781a (Fla. 17th Cir. City., Judge Merrigan, May 26, 2009); *MRI Services I, Inc., a/a/o Kevin Henderson v. United Auto*

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Ins. Co., 22 Fla. L. Weekly Supp. 856a (Fla. 17th Cir. Cty., Judge Lee, January 14, 2015); *Progressive Rehab. And Orthopedic Services, LLC a/a/o Victor Bure-Figueroa v. United Auto. Ins. Co.*, 20 Fla. L. Weekly Supp. 438a (Fla. 11th Cir. Cty., Judge King, August 31, 2015).

The Defendant also asserts accord and satisfaction under common law that requires: 1) mutual intent to effect a settlement of an existing dispute by entering into a superseding agreement; and 2) actual performance in accordance with the new agreement." Defendant argues the cashing of the check was the superseding agreement. The Court disagrees. Furthermore, accord and satisfaction has been codified in Florida pursuant to statute, 673.311, thereby eliminating the common law "meeting of the minds" and instead requiring "conspicuousness."

SUMMARY JUDGMENT

Pursuant to Fla. R. Civ. P. 1.150(c), summary judgment is warranted "if the pleadings, and summary judgment evidence on file show that there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law." *See also State Farm Mut. Auto. Co. v. Gonzalez*, 178 So.3d 448, 450 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2352a], citing *State Farm Mut. Auto. Ins. Co. v. Pressley*, 28 So.3d 105, 107 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D150b]. The party moving for summary judgment must present evidence supporting its claim and once it does, the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue." *R. Plants, Inc. v. Dome Enters.*, 221 So.3d 752, 753-54 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1319a] citing *Landers v. Milton*, 370 So.2d 368, 370 (Fla. 1979). Moreover, because the issue of "conspicuousness" is a question of law for this Court's determination, from the plain and unambiguous language of the applicable statutes in this case, the Court finds the defense of accord satisfaction fails as a matter of law.

Accordingly, Defendant's Motion for Summary Judgment as to the Defense of Accord and Satisfaction is respectfully ***denied*** and the Plaintiff's Motion for Summary Judgment on Defendant's Affirmative Defense of Accord and Satisfaction is ***granted***.

* * *

Insurance—Personal injury protection—Discovery—Motion for protective order is granted—Testimony of litigation adjuster sought through discovery will not lead to admissible evidence as to purely legal issue of sufficiency of demand letter

FIRST HEALTH CHIROPRACTIC, a/a/o Tatiana Guerrero, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-023706-SP-25, Section CG02. July 27, 2020. Elijah A. Levitt, Judge. Counsel: Aimee A. Gunnells, Pacin Levine, P.A., Miami, for Plaintiff. Matthew J. Hier, Shutts & Bowen LLP, Miami, for Defendant.

ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENDANT'S MOTION FOR PROTECTIVE ORDER AND PLAINTIFF'S MOTION TO COMPEL DEPOSITION OF DEFENDANT'S ADJUSTER WITH THE MOST KNOWLEDGE

THIS CAUSE came before the Court on July 20, 2020, on Defendant's Motion for Protective Order and Plaintiff's Motion to Compel Deposition of Defendant's Adjuster with the Most Knowledge, and, the Court, having reviewed the motions and supplemental authority, having heard the arguments of counsel, and being otherwise fully advised in the premises, does hereby order and make the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff filed this breach of contract action for personal injury protection ("PIP") benefits on August 01, 2019.

2. On December 26, 2019, Allstate answered Plaintiff's Complaint, and asserted, *inter alia*, four affirmative defenses related to the deficiencies of Plaintiff's pre-suit demand.

3. On January 17, 2020, Allstate filed its Motion for Summary Judgment as to Plaintiff's Deficient Pre-Suit Demand.

4. On January 22, 2020, Allstate filed its Notice of Filing Affidavit in Support of its Motion for Summary Judgment. Defendant attached Plaintiff's pre-suit demand, drafted on June 13, 2019, as an exhibit.

Conclusions of Law

Under Rule 1.280(c), Florida Rules of Civil Procedure, the Court may render a protective order to protect a party "from annoyance, embarrassment, oppression or undue burden or expense."

In the instant case, a protective order is warranted to protect Allstate from undue burden or expense because the Court must decide a purely legal issue of whether First Health Chiropractic failed to comply with a condition precedent to filing suit, to wit: the provision of a legally sufficient pre-suit demand.

The Court does not find, as it pertains to this action, that the testimony of the litigation adjuster, Shawna Diamond, is reasonably calculated to lead to the discovery of admissible evidence as it relates to a hearing on Defendant's January 17, 2020, Motion for Summary Judgment. Accordingly, a deposition of Defendant's adjuster on Plaintiff's allegedly deficient demand is irrelevant as to this threshold legal issue.

Based on the foregoing findings of fact and conclusions of law, it is hereby **ORDERED AND ADJUDGED**:

1. Defendant's Motion for Protective Order is **GRANTED**.

2. Plaintiff's Amended Motion to Compel Deposition is **DENIED**.

* * *

Torts—Tortious interference with contract—Conspiracy—Florida Deceptive and Unfair Trade Practices Act—Out-of-state acts—Defendant's motion to dismiss with prejudice is denied—Court rejects defendant's argument that tortious interference and conspiracy claims should be dismissed because contract was in breach before alleged tortious acts took place—Breach, standing alone, does not extinguish a contract—Plaintiff sufficiently pled intent to interfere—Even if intent was not sufficiently pled, it would not be grounds for dismissal with prejudice—With regard to FDUPTA claim, the court rejects argument that the statute does not and cannot encompass actions that did not take place in Florida—A trade practice outside Florida that targets business interests within the state falls within the scope of FDUPTA assuming the practice is otherwise unfair, unconscionable, or deceptive trade practice

LANDO RESORTS CORPORATION, Plaintiff, v. TINA M. CABRERA, et al., Defendants. County Court, 17th Judicial Circuit in and for Broward County. Case No. 19-29054. November 6, 2020. Robert W. Lee, Judge. Counsel: Ronald A. Charlot-Aviles, Fort Lauderdale, for Plaintiff. Tyson J. Pulsifer, St. Petersburg, for Defendant.

ORDER DENYING DEFENDANT REED HEIN & ASSOCIATES LLC'S MOTION TO DISMISS COUNTS III-V OF AMENDED COMPLAINT

This cause came before the Court on October 21, 2020 for hearing of the Motion to Dismiss Counts III-V of the Amended Complaint filed by the Defendant Reed Hein & Associates, LLC, and the Court's having reviewed the Motion and relevant legal authorities, heard argument, and been sufficiently advised the premises, finds as follows:

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Background. The Plaintiff has brought this action against the Defendant Reed Hein & Associates LLC d/b/a Time Share Exit Team, seeking damages based on several legal theories. The three at issue in this Motion are Counts III, IV and V of the Amended Complaint, for which the Defendant is seeking dismissal with prejudice. Count III is based on Tortious Interference with Contract; Count IV is based on Civil Conspiracy; and Count V is based on Violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).

In Count III, the Plaintiff alleges that Reed Hein tortiously interfered with the contract between the Plaintiff and the Defendants Tina and Ronald Cabrera. In Count IV, the Plaintiff alleges that Reed Hein conspired with the Defendant Privett Law to tortiously interfere with the Cabrera contract. In Count V, the Plaintiff alleges that Reed Hein engaged in unfair, unconscionable, and deceptive trade practices and acts which induced the Cabrera defendants to breach their contract with the Plaintiff. (The parties agree that the legal arguments to Count III and IV rise or fall together.)

The Defendant's legal argument on the tortious interference and civil conspiracy claims is that the four corners of the complaint indicate that the Cabrera defendants breached their contract, if at all, before Reed Hein was ever in the picture. Moreover, even if Reed Hein had been involved prior to any breach, the Defendant argues that the Plaintiff has failed to allege that Reed Hein acted with the intent to interfere in the contract. Finally, the Defendant argues that any of its actions were as agent for the Cabrera defendants, and therefore are not within the scope of a tortious interference claim. The Plaintiff argues in response that sufficient ultimate facts have been alleged to withstand a motion to dismiss, and the issues that the Defendant is raising in this Motion to Dismiss should instead be addressed in a motion for summary judgment.

On the FDUTPA claim, Reed Hein argues that causation and damages are not sufficiently alleged, and further even if they were, FDUTPA does not reach parties and conduct occurring outside of the State of Florida. According to Reed Hein, it is undisputed that the only tie to Florida is that the Plaintiff is a Florida resident—the Defendants reside in either Washington or Oklahoma. Finally, the Defendant argues that there is no allegation of a "consumer transaction," which is the underlying requirement of a FDUTPA claim.

Analysis. The Court is not persuaded that a claim for tortious interference cannot be maintained premised on contract that is already in breach. Let's assume that the Cabrera defendants were in breach at the time they had contact with Reed Hein. A contract in breach does not necessarily mean that the contract is no longer extant—a breach, standing alone, does not extinguish a contract. For instance, a party "may not use just any breach by the [other party] to justify his or her nonperformance." M. Frey & T. Bitting, Introduction to Contract and Restitution 305 (1988). Moreover, a party can be in "continuing breach" of an existing contract, particularly when the underlying contract involves payments on an amount due. *See, e.g., General Dynamics Corp. v. Paulucci*, 914 So.2d 507, 510 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2620a]; *Bishop v. State Div. of Retirement*, 413 So.2d 776, 778 (Fla. 1st DCA 1982). Therefore, the Court rejects the Defendant's argument that Counts III and IV should be dismissed because the contract was in breach before Reed Hein ever had any contact with the Cabrera defendants.

Continuing with Counts III and IV, the Defendant further argues that the Plaintiff has failed to allege that Reed Hein intended to interfere with the Cabrera contract. First, even if this were true, this would certainly not be grounds to dismiss the case with prejudice. Second, reading together paragraphs 37, 40 and 60 of the Amended Complaint, the Court finds that the Plaintiff has sufficiently pled intent.

As to the agency argument, the Court finds that the resolution of this issue goes beyond the four corners of the complaint, and further agrees with the Plaintiff that at best these arguments should be instead made in a motion for summary judgment. Therefore, as to Counts III and IV, the Defendant's Motion to Dismiss is DENIED.

Moving on to Count V, the Court considers the Defendant's argument that there is no valid claim alleged under FDUTPA. Although FDUTPA is generally considered to be a "consumer" protection statute, it actually extends its protection beyond those generally considered to be "consumers." The statute provides that it is to "be construed liberally to [. . .] protect [. . .] legitimate business enterprises." Fla. Stat. §501.202(2) (2019). *See also id.* §501.203(6); *Wyndham Vacation Resorts, Inc. v. Timeshares Direct, Inc.*, 123 So.3d 1149, 1151-52 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D2168a] (scope of FDUTPA includes businesses). While it appears undisputed that the Plaintiff is a "legitimate business enterprise" located in Florida, the alleged improper conduct was instigated outside the State of Florida. Assuming what the Plaintiff alleges is true, an Oklahoma law firm and a Washington business contacted residents of Oklahoma and advised them how to "get out" of their timeshare plan located in Kissimmee. Reed Hein argues that the Florida statute does not and cannot encompass actions that did not take place in Florida, even if it were an "unfair, unconscionable, or deceptive" trade practice. The Court disagrees.

The purpose of FDUTPA is to protect consumers and business enterprises. The Plaintiff's allegations are that actions were taken—even if outside of the State of Florida—that targeted its interests with the State of Florida. Notably, the Plaintiff is a Florida company, and the timeshare interest at issue in this case is located in Osceola County, Florida. While the case law is not crystal clear, the Court believes that a trade practice outside of the State of Florida that targets business interests within the State of Florida falls within the scope of FDUTPA, assuming the trade practice is otherwise "unfair, unconscionable, or deceptive." *See Bank of America, N.A. v. Zaskey*, 2016 WL 2897410, *9 - *10 (S.D. Fla. 2016) (FDUTPA is ***not*** limited to only those situations in which the offending conduct "occurs entirely within Florida"). Therefore, as to Count V of the Amended Complaint, the Defendant's Motion is DENIED.

* * *

Criminal law—Refusal to submit to blood, breath or urine test—Constitutionality of statute—Due process—No merit to argument that section 316.1939, which allows state to use an earlier refusal that was sustained pursuant to preponderance of evidence standard, violates due process because it relieves state of burden of proving every element of crime beyond reasonable doubt—Element of refusal charge at issue is whether defendant's driving privilege has been previously suspended due to refusal to submit to lawful test, which must be proven beyond reasonable doubt, not whether defendant had previously refused lawful test—Further, defendant may challenge accuracy of prior suspension since section 316.1939 provides only that Department of Highway Safety and Motor Vehicles record showing prior suspension creates rebuttable presumption of such suspension—Equal protection challenge to statute, premised on argument that prior refusal in boating under influence case must be determined beyond reasonable doubt whereas prior refusal in DUI case is determined by preponderance of evidence, fails where there is no fundamental constitutional right at issue and no suspect class involved

STATE OF FLORIDA, Plaintiff, v. JORDAN BARR, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2014-CT-041253-AXXX. July 30, 2015. Benjamin B. Garagozlo, Judge. Counsel: Ben Fox, Assistant State Attorney, Viera, for Plaintiff. Robert Berry, Eisenmenger, Berry, Blaue & Peters, P.A., Viera, for Defendant.

[PER CURIAM AFFIRMED 8-10-2016.]

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[Corrected]

ORDER

THIS CAUSE, having come before the Court pursuant to the Defendant's motion seeking "*to declare section 316.1939 Florida Statutes Unconstitutional*" and the Court having heard arguments of respective counsel[1], and being otherwise fully advised in the premise, the Court finds as follows:

PREFACE

The parties have agreed that the Defendant's motion challenging the constitutionality of section 316.1939 of the Florida Statutes is dispositive.

All references in this Order to a chemical or a physical test of a motorist's breath, blood, or urine as described under section 316.1932 of the Florida Statutes shall hereafter be referred to as "BAC test" or "BAC testing".

Section 316.1939 of the Florida Statutes may hereinafter also be referred to as the "Refusal to Submit to Testing Statute". The criminal charge of driving under the influence shall hereinafter be referred to as "DUI" while the offense of boating under the influence may also be referred to as "BUI".

Lastly, the Department of Highway Safety and Motor Vehicles may also be referred to as "DHSMV".

FACTS

1. For the purposes of this analysis, it is assumed that: (i) that probable cause existed for Defendant's arrest for DUI; (ii) Defendant after being lawfully arrested for DUI refused to submit to a BAC test; (iii) based on Defendant's refusal to submit to a BAC test, she was then advised—in part—her refusal could constitute a misdemeanor if her driving privileges had been previously suspended due to a previous refusal to submit to a lawful test of her breath/ blood/ or urine; (iv) based on Defendant's driving record, her driving privilege had been suspended due to a previous refusal to submit to a BAC test; and (v) Upon her refusal to submit to a BAC test, Defendant is now charged with the crime of refusal to submit to testing in violation of section 316.1939 of the Florida Statutes.

2. The Defendant asserts that Florida's refusal to submit to BAC statute is unconstitutional—arguing that the legislation violates Defendant's due process and equal protection rights.

3. Defendant's first assertion raised is that the refusal to submit to BAC statute reduces the prosecution's burden of proof by allowing an element of the offense to be proven by a preponderance of the evidence as opposed to the beyond a reasonable doubt standard. In addition, Defendant next contends that this legislation has created a ". . . disparate treatment of similarly situated defendants" in that a higher standard of proof is needed to uphold a conviction for a similar statute dealing with a refusal to submit to testing in cases involving boating under the influence. *See*: Defendant's motion to declare 316.1939, Florida Statutes unconstitutional.

ISSUES

I. Whether § 316.1939 relieves the State of Florida from having to prove each element of the crime ofrefusal to submit beyond a reasonable doubt in violation of the Defendant's due process rights?

II. Whether § 316.1939 creates a "disparate treatment of two similarly situated classes of defendants" in violation of Defendant's equal protection rights?

ANALYSIS AND CONCLUSIONS OF LAW

4. As part ofhis dissenting opinion in *Bush v. Holmes*, 919 So. 2d 392, 413-414 (Fla. 2006) [31 Fla. L. Weekly S1a], Justice Bell eloquently articulated how courts should review a challenge to the constitutionality of a particular legislation. Justice Bell explained that " . . . courts 'have the power to declare laws unconstitutional only as a matter of imperative and unavoidable necessity". *Id.* at 413 (citing: *State ex rel. Crim v. Juvenal,* 159 So. 663, 664 (Fla. 1935). Meaning, a court is obligated " 'to resolve all doubts as to the validity of [a] statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent' ". *Id.* at 413 (citing: *Caple v. Tuttle's Design-Build, Inc.,* 753 So. 2d 49, 51 (Fla. 2000) [25 Fla. L. Weekly S76a] (quoting: *State v. Stalder*, 630 So.2d 1072, 1076 (Fla.1994)).

5. "Indeed, '[w]hen a legislative enactment is challenged the court should be liberal in its interpretation; every doubt should be resolved in favor of the constitutionality of the law, and the law should not be held invalid unless clearly unconstitutional beyond a reasonable doubt". *Id.* at 413-414 (citing: *Taylor v. Dorsey,* 155 Fla. 305, 19 So.2d 876, 882 (1944)).

6. Under Florida's Refusal to Submit to Testing Statute, it a first degree misdemeanor for a motorist to refuse to submit to a lawful BAC in the event the motorist is lawfully arrested for DUI and has had his or her driving privileges previously suspended for having refused to submit to a BAC testing. *See*: Fla. Stat§ 316.1939.

7. To prove that Defendant violated the Refusal to Submit to Testing Statute, the State of Florida must prove the following elements beyond a reasonable doubt:

> "[a]. A law enforcement officer had probable cause to believe Defendant drove or was in actual physical control of a motor vehicle in this state while under the influence of an alcoholic beverage or a controlled substance listed in Chapter 893 to the extent Defendant's normal faculties were impaired;
>
> [b]. The law enforcement officer lawfully arrested Defendant for Driving Under the Influence;
>
> [c]. Defendant was informed that if she refused to submit to a chemical test of her breath, her privilege to operate a motor vehicle would be suspended for a period of one year, or, in the case of a second or subsequent refusal, for a period of 18 months;
>
> [d]. Defendant was informed that it is a misdemeanor to refuse to submit to a lawful test of her breath, if her driving privilege had been previously suspended for a prior refusal to submit to a lawful test of her breath;
>
> [e]. Defendant after being so informed, refused to submit to a chemical test of her breath when requested to do so by a law enforcement officer; and,
>
> [f]. Defendant's driving privilege had been previously suspended for a prior refusal to submit to a lawful test of her breath, blood, or urine".

See: Florida Standard Criminal Jury Instruction, 28.13 (2015).

Defendant's Due Process Claim

8. "It is well settled that due process requires the [prosecution] to prove every element of a crime beyond a reasonable doubt". *Hayes v. State*, 660 So.2d 257, 265 (Fla. 1995) [20 Fla. L. Weekly S296a].

9. The Defendant points out that a first refusal by a motorist to submit to a BAC test who is lawfully arrested for DUI is not a crime. Rather, such a refusal could only result in the suspension of the motorist's driving privileges as part of an administrative process based on a preponderance of evidence standard.

10. Defendant alleges that Florida's Refusal to Submit to Testing Statute violates her due process rights by permitting the prosecution to use an earlier refusal to submit to a BAC sustained pursuant to a preponderance of evidence standard as a requisite element to prove the crime of Refusal to Submit to Testing—in effect alleviating the requirement for the prosecution to prove each element of the offense beyond a reasonable doubt. In support of this position, the Defendant

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directs the Court's attention to the holding in *Apprendi v. New Jersey,* 530 U.S. 466 (2000) .

11. In the *Apprendi* case, "[t]he New Jersey statutory scheme . . . [allowed] a jury to convict a defendant of a second-degree offense based on its finding beyond a reasonable doubt that [defendant] unlawfully possessed a prohibited weapon; after a subsequent and separate proceeding, it then allows a judge to impose punishment identical to that New Jersey provides for crimes of the first degree . . . based upon the judge's finding, by a preponderance of the evidence, that the defendant's "purpose" for unlawfully possessing the weapon was 'to intimidate' his victim on the basis of a particular characteristic the victim possessed". *Apprendi,* at 490-492.

12. Counsel for the State of Florida correctly asserts that Florida's Refusal to Submit to Testing Statute ". . . is different in nature to the statutory issues facing the *Apprendi* Court . . . [which] specifically gave the judge a fact finding role as to the sentence-enhancing element". *See*: State's Response to Defendant's motion to declare section 316.1939, Florida Statutes, unconstitutional.

13. Moreover—with due respect to defense counsel's argument—under Florida's Refusal to Submit to Testing Statute, one of the elements that the prosecution must prove beyond a reasonable doubt is whether Defendant's driving privileges were previously suspended due to a refusal to submit to a lawful BAC test as opposed to whether the Defendant had previously refused a lawful BAC test. *See*: *Fender v. State*, 980 So.2d 516 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2163b]; *see also: State v. Paolucci,* 13 Fla. L. Weekly Supp. 200a (Fla. Broward Cty. Ct. Oct. 20, 2005) (the use DHSMV records showing an earlier suspension due to a refusal as authorized under § 316.1939 did not reduce the prosecution's burden of proof from beyond a reasonable doubt to preponderance of the evidence standard).

14. Also, it should be noted that a defendant charged with violation of § 316.1939 may challenge the accuracy of the prior suspension due to refusal as listed in the DHSMV's records[2] since Florida's Refusal to Submit to Testing Statute creates ". . . a rebuttable presumption of such suspension". *See*: section 316.1939 Florida Statutes.

Defendant's Equal Protection Claim

15. The Defendant claims that "[i]n the BUI cases, the prior refusal is adjudicated using a standard of proof beyond a reasonable doubt" verses in a DUI case the first refusal determined under a preponderance of the evidence standard. *See*: Defendant's motion to declare 316.1939, Florida Statutes unconstitutional.

16. "In order to create an equal protection challenge to a statute [Defendant] must show there are at least two categories of persons similarly situated, who are being treated differently, without any rational explanation or justification. Where the classification is not a legally suspect one, or one involving fundamental right, only a rational basis for the different treatment must be shown in order for the statute to pass constitutional muster". *State v. McInnis,* 581 So. 2d 1370, 1372 (Fla. 5th DCA 1991).

17. Simply put, there is no fundamental constitutional right at issue, nor a "suspect class" involved herein.

18. Appreciating the notion that a driver's license is a privilege coupled with the need to impose reasonable regulations out of concern for the public's safety, clearly one must conclude that there is a reasonable relationship to a pennissible legislative objective differentiating between a refusal to submit to a BAC by a motorist charged with DUI verses a boater charged with BUI—when such legislation is neither discriminatory, arbitrary, nor oppressive. Whereupon it is hereby;

ORDERED and **ADJUDGED** that;

19. The Defendant's motion to declare the Statute unconstitutional is respectfully *denied*.

---

[1]This Court—as mentioned in open court—must again pause to recognize the exemplary level of advocacy and professionalism displayed at said hearing by counsel for the State of Florida and counsel for the Defendant.

[2]If judicial review is required before administrative action sustaining a driver's license suspension can be used as element of criminal offense, " . . . the applicable statutory scheme providing for judicial review of the D.H.S.M.V.'s administrative findings is more than sufficient to comport with requirements of due process. . . . One who fails to take advantage of a judicial review process or is unsuccessful at doing, and now finds him or herself in a worse situation therefore, might not feel that the process is fair or just, but can hardly be said not to have received all process that was due. *See*: *State v. Mena-Vazguez,* 13 Fla. L. Weekly Supp. 289b (Fla. Broward Cty. Ct., Nov. 28, 2005).

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Deductible—Insurer should have applied deductible to 100% of medical provider's charges before reduction under statutory fee schedule

VENUS MEDICAL CENTER, CORP., a/a/o Gretel Fabre, Plaintiff, v. UNITED AUTO INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2011-013316-SP-25, Section CGO4. November 4, 2019. Robert T. Watson, Judge. Counsel: Majid Vossoughi, Majid Vossoughi, P.A., Miami, for Plaintiff. Paula Elkea Ferris, House Counsel for United Auto. Ins. Co., Miami Gardens, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR ENTRY OF PARTIAL FINAL JUDGMENT

THIS CAUSE came before the Court on 08/26/19 on Plaintiff's Motion for Partial Summary Judgment.

The parties were represented by counsel at the hearing who presented arguments to this Court. Paula Elkea Ferris, Esq. appeared on behalf of the Defendant, and Majid Vossoughi, Esq. appeared on behalf of the Plaintiff.

The Court having reviewed Plaintiff's Motion with supporting evidence, the entire Court file, relevant legal authorities, and having heard argument from counsel and being otherwise sufficiently advised in the premises, hereby enters this Order GRANTING Plaintiff's Motion and makes the following factual findings and conclusions of law.

BACKGROUND & FACTUAL FINDINGS

Gretel D. Fabre was involved in an automobile accident on 03/12/11 and treated with Plaintiff in relation to injuries she sustained in said accident.

Plaintiff, as assignee of Defendant's policy of insurance, submitted its bills for treatment of Gretel D. Fabre for payment of Personal Injury Protection ("PIP") benefits to Defendant.

Plaintiff's motion argues that Defendant, due to its misapplication of its insured's policy deductible, has failed to pay PIP benefits for the following related and medically necessary treatment rendered on 03/14/11: (i) CPT code 72070[1]; (ii) CPT code 72100[2]; (iii) CPT code 73510[3]; (iv) CPT code 73140[4]; (v) CPT code 72040[5]; and (vi) CPT code 97010[6].

Defendant's statutorily mandated Explanations of Review reflect that in processing Plaintiff's claim for date of service 03/14/11 Defendant first reduced Plaintiff's bills and then applied its insured's

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policy deductible in the amount of $1,000 to the reduced amounts.

Plaintiff's motion argues that Fla. Stat. 627.739(2) required Defendant to apply its insured's policy deductible to "*100 percent of the expenses and losses*" received by Defendant or the face amount of Plaintiff's charges at which time its obligation to make payment of PIP benefits would have ripened.

Plaintiff's motion argues that had Defendant properly applied its insured's policy deductible to Plaintiff's bills it would have then been obligated to make payment of PIP benefits to Plaintiff in the amount of $326.82 for CPT codes 72070, 72100, 73510, 73140, 72040, and 97010 rendered on 03/14/11.

LEGAL ANALYSIS

Florida Rule of Civil Procedure 1.510(c) provides that "judgment sought must be rendered immediately if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law".

"Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law". *Volusia County v. Aberdeen at Ormond Beach, L.P.,* 760 So.2d 126 (Fla. 2000) [25 Fla. L. Weekly S390a] [citing *Menendez v. Palms West Condominium Ass'n,* 736 So.2d 58 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D1317a]]; *see also Hall v. Talcott,* 191 So.2d 40 (Fla. 1966); *Moore v. Morris,* 475 So.2d 666 (Fla. 1985).

Once the Plaintiff has met its initial burden of proof, the Defendant must come forward with evidence establishing a genuine issue of material fact. *Latour Auto Sales, Inc. v. Stromberg-Carlson Leasing Corp.,* 335 So.2d 600 (Fla. 3d DCA 1976). If the Defendant "fails to come forward with any affidavit or other proof in opposition to the motion for summary judgment, the [Plaintiff] need only establish a prima facie case, whereupon the court may enter its summary judgment." *Id.* at 601 [citing *Harvey Building, Inc. v. Haley,* 175 So.2d 780 (Fla. 1965)]; *see also Landers v. Milton,* 370 So.2d 368, 370 (Fla. 1979). Defendant cannot "merely assert that an issue does exist," but rather "must go forward with evidence sufficient to generate an issue on a material fact." *Byrd v. Leach,* 226 So.2d 866 (Fla. 4th DCA 1969).

The undisputed record before this Court, as evidenced by Defendant's statutorily mandated Explanation of Review, reflect that Defendant applied its insured's $1,000 policy deductible[7] as follows.

Defendant took Plaintiff's first $3,005 in charges ("Total Charges")[8] and had same reduced ("Reductions Bill Review") by a total of $1,985.28[9] leaving a balance of $1,019.72. Defendant then applied its $1,000 policy deductible to this reduced amount ($1,019.72 - $1,000) which left a balance of $19.72 for its payment consideration ($19.72 @ 80% = $15.78).

Fla. Stat. 627.739(2)[10] and binding precedent from the Supreme Court of Florida in *Progressive Select Ins. Co. v. Florida Hospital Medical Center,* 260 So.3d 219 (Fla. 2018) [44 Fla. L. Weekly S59a] require that a PIP policy deductible "*must be applied to 100 percent of the expenses and losses*" or the face amount of Plaintiff's charges before making any reductions:

> Section 627.739(2) *requires the deductible to be applied to the total medical charges prior to reduction* under the reimbursement limitation in [the PIP statute].
>
> . . .
>
> A plain reading of the statutory provision makes clear that the deductible *must be subtracted from the provider's charges before the reimbursement limitation* is applied.

Defendant should have, in line with the mandate of *Fla. Stat. 627.739(2),* applied its $1,000 policy deductible as follows:

(i) applied $360.00 of its policy deductible to 100% of the Plaintiff's bill for CPT code 99204 on date of service 03/14/11 (bill totaling $360.00);

(ii) applied $350.00 of its policy deductible to 100% of the Plaintiff's bill for CPT code 73030 on date of service 03/14/11 (bill totaling $350.00);

(iii) applied the remaining $290.00 of its policy deductible to 100% of the Plaintiff's bill for CPT code 72070 on date of service 03/14/11 (bill totaling $350.00).[11]

The proper application of the policy deductible triggers and ripens Defendant's obligation to make payment of PIP benefits. The proper application as noted above leaves a balance of $60.00 ($350.00 minus $290.00) on CPT code 72070 billed on date of service 03/14/11 for Defendant's consideration. Since this balance is less than the $78.44 amount allowed by Defendant for CPT code 72070[12], said CPT code is payable at 80% of $60.00 or $*48.00*.

As to CPT codes 72100, 73510, 73140, 72040, and 97010 billed on date of service 03/14/11 and depicted in Defendant's Explanations of Review, said treatment is not subject to the policy deductible. The billed amount for said treatment totals $1,450.00 and Defendant's allowed amount for these CPT codes total $348.52.[13] Defendant's obligation, at a minimum, was to pay 80% of what the Defendant itself had allowed for these codes; that is, $*278.82* ($348.52 at 80%).

The proper application of the policy deductible demonstrates Defendant's obligation to have made payment of PIP benefits in the total amount of $*326.82* ($48.00 for CPT code 72070 plus $278.82 for CPT codes 72100, 73510, 73140, 72040, and 97010 billed on date of service 03/14/11). Instead, due to its misapplication of the policy deductible the Defendant paid nothing for these codes.

Accordingly, based on this Court's analysis set forth above, it is

ORDERED AND ADJUDGED that Plaintiff's Motion for Partial Summary Judgment is GRANTED.

IT IS ADJUDGED that Plaintiff is entitled to partial summary judgment in its favor and against Defendant in the amount of $326.82, plus interest, for treatment rendered on 03/14/11 and billed under CPT codes 72070, 72100, 73510, 73140, 72040, and 97010.

This decision will be reflected in the Judgment for this case once all outstanding issues and claims are resolved.

---

[1]X-rays of the thoracic spine.

[2]X-rays of the lumbar spine.

[3]X-rays of the hip.

[4]X-rays of the finger.

[5]X-rays of the cervical spine.

[6]Hot/cold packs.

[7]All charges for which Defendant applied its insured's policy deductible are nominated by "Explanation Code" "271-100" within Defendant's Explanation of Review ("A deductible has been applied").

[8]The first $3,005 in Plaintiff's charges consist of CPT codes 99204 ($360), 73030 ($350), 72070 ($350), 72100 ($350), 73510 ($350), 73140 ($350), 73090 ($350), 72040 ($350), 97010 ($50), 97032 ($50), 97032 ($50), and 97035 ($45).

[9]Defendant calculated its total reductions in the amount of $1,985.28 by reducing CPT code 99204 by $2.54, 73030 by $278.66, 72070 by $271.56, 72100 by $257.74, 73510 by $262.06, 73140 by $280.30, 73090 by $287.72, 72040 by $261.38, 97010 by $40, 97032 by $12.04, 97032 by $12.04, and 97035 by $19.24.

[10]*Fla. Stat. 627.739(2)* provides:

> Insurers shall offer to each applicant and to each policyholder, upon the renewal of an existing policy, deductibles, in amounts of $250, $500, and $1,000. The deductible amount *must be applied to 100 percent of the expenses and losses* described in s. *627.736.* After the deductible is met, each insured is eligible to receive up to $10,000 in total benefits described in s. *627.736*(1). However, this subsection shall not be applied to reduce the amount of any benefits received in accordance with s. *627.736*(1)(c).

[11]By applying the remaining $290.00 of the policy deductible to 100% of this CPT code the $1,000 deductible threshold is met.

[12]Plaintiff's billed charge in the amount of $350.00 for CPT code 72070 minus Defendant's reductions in the amount of $271.56 ($350 - $271.56 = $78.44).

[13]Plaintiff's billed charges in the amount of $1,450.00 for CPT codes 72100, 73510, 73140, 72040, and 97010 minus Defendant's total reductions for these codes in the

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amount of $1,101.48 ($1,450 - $1,101.48 = $348.52).

* * *

Landlord-tenant—Eviction—Notice—Defects—Fifteen-day notice is defective for requiring tenant to vacate premises in middle of monthly tenancy period—Further, notice fails to give 30 days' notice required by city ordinance—Provision of Florida Residential Landlord and Tenant Act allowing landlord to amend notice and pleadings to avoid dismissal is inapplicable to eviction for reasons other than nonpayment of rent—Complaint dismissed without leave to amend

ECO STONE HOLDING, LLC, Plaintiff, v. ANALLIVE INES CALLE, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-005664-CC-20, Section CL01. October 1, 2020. Gordon Murray, Judge. Counsel: Carlos Ziegenhert and Nelson A. Rodriguez, Nelson A. Rodriguez-Varela, P.A., Miami, for Plaintiff. Guerby Noel, Legal Services of Greater Miami, Inc., Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before the Court on September 29, 2020, on Defendant's Motion to Dismiss. The Court, after having heard the arguments of counsel, and otherwise being fully informed in the premises, the Court makes the following findings:

FINDINGS OF FACT

1. Defendant, Anallive Ines Calle, rents the residential real property owned by Plaintiff, Eco Stone Holding, LLC, as a month-to-month tenant. Defendant's rent is due on the 1st of the month. Her month-to-month tenancy runs from the first of the month to the last day of each month.

2. The rental premises is located within the City of Miami.

3. On June 30, 2020, Plaintiff issued Defendant a 15-Day Notice to Deliver Possession, demanding that she vacate the property on or before July 15, 2020.

4. Plaintiff filed an Eviction Complaint on August 11, 2020.

CONCLUSIONS OF LAW

5. Pursuant to F.S. 83.59, an action for possession cannot be commenced until the tenancy is properly terminated. Plaintiff's 15-Day Notice to Deliver Possession fails to properly terminate Defendant's tenancy and is not compliant with F.S. 83.57(3) as it required Defendant to vacate the premises in the middle of her monthly tenancy period on or before July 15, 2020.

6. Pursuant to City of Miami Code of Ordinance Sec. 47-1(a), a landlord is required to terminate a tenancy with no less than 30 days' notice. Plaintiff's 15-Day Notice to Deliver Possession is defective because it fails to provide the required notice.

7. While F.S. 83.60(1)(a) provides the landlord with the ability to amend its notice or pleadings to avoid dismissal, it is inapplicable in this case. F.S. 83.60(1)(a) is clear in that it applies to an action for possession based upon non-payment of rent or in action seeking to recover unpaid rent. This action is neither.

IT IS THEREFORE ORDERED AND ADJUDGED as follows:

8. Defendant's Motion to Dismiss is GRANTED. Plaintiff's eviction action is DISMISSED without leave to amend. Defendant's counterclaim shall continue.

9. Plaintiff, ECO STONE HOLDING, LLC, shall take nothing by this action and Defendant, Anallive Ines Calle, shall go hence without a day. Defendant shall remain in possession of the property located at 1867 NW 35th Street, #5, Miami, FL 33142.

10. Defendant is the prevailing party in this eviction action. The Court reserves jurisdiction to determine entitlement and the amount of attorneys' fees and costs.

* * *

Civil procedure—Service on party represented by counsel—Where defendants are represented by counsel, service must be made on attorney, not defendants, and it is inappropriate for defendants' email addresses to be on e-filing portal

AMERIS BANK, Plaintiff, v. LENA HERNANDEZ ALVAREZ, et al., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-026365-CC-23, Section ND03. September 30, 2020. Linda Singer Stein, Judge. Counsel: Jeff Becker, Hiday & Ricke, P.A., for Plaintiff. Joel Lucoff, for Defendant.

ORDER REQUIRING DEFENDANTS' COUNSEL TO REMOVE DEFENDANTS FROM THE EPORTAL SERVICE LIST

THIS CAUSE came before the court on September 23, 2020, upon plaintiff's ore tenus motion for permission to serve defendants individually with pleadings and papers through the eportal because defendants' counsel placed the defendants email address on the eportal service list. The court, after hearing argument from both parties and over defendants' counsel's objection to plaintiff's request, finds that when a party is represented by counsel, any pleadings and papers must be served upon the attorney and not upon the represented party. Therefore, it is inappropriate for the party's e-mail addresses to be on the e-filing portal and they must be removed by Defendant's counsel forthwith.

ORDERED AND ADJUDGED that defendants' counsel shall forthwith remove his individual defendants from the eportal service list so that any papers or pleadings will properly be served upon the Defendant's attorney only.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Relatedness and medical necessity of treatment—Peer review report filed by insurer does not preclude partial summary judgment in favor of medical provider on issues of relatedness and medical necessity of those CPT codes not disputed in report—Where peer review physician opines that treatment underlying CPT code 97032 should be recoded but does not dispute relatedness or necessity of treatment, and insurer did not raise any coding issues in its defenses, report does not create factual issue as to relatedness and necessity of that treatment—Report that does not opine that insured was treated for anything other than injuries from covered accident fails to create fact issue as to relatedness of all treatment

SILVERLAND MEDICAL CENTER, LLC., a/a/o Yisander Garcia, Plaintiff v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2012-004723-SP-25, Section CG03. April 30, 2020. Patricia Marino Pedraza, Judge. Counsel: Majid Vossoughi, Majid Vossoughi, P.A., Miami, for Plaintiff. Paula Elkea Ferris, House Counsel for United Auto. Ins. Co., Miami Gardens, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO RELATED AND MEDICALLY NECESSARY TREATMENT

THIS CAUSE came before the Court on 04/27/2020 on Plaintiff's Motion for Partial Summary Judgment as to Related and Medically Necessary Treatment.

The Court having reviewed Plaintiff's Motion for Partial Summary Judgment as to Related and Medically Necessary Treatment with supporting evidence, Plaintiff's Memorandum of Law and Response to Peer Review Report of Dr. Michael Weinreb, D.C. the entire Court file, the relevant legal authorities, and having heard argument from counsel and being otherwise sufficiently advised in the premises, hereby enters this Order GRANTING Plaintiff's Motion for Partial Summary Judgment as to Related and Medically Necessary Treatment and makes the following factual findings and conclusions of law.

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BACKGROUND & FACTUAL FINDINGS

Yisander Garcia was involved in an automobile accident on 07/06/11 and treated with Plaintiff in relation to injuries he sustained in said accident.

Plaintiff, as assignee of Defendant's policy of insurance, submitted its bills for treatment of Yisander Garcia for payment of Personal Injury Protection ("PIP") benefits to Defendant.

Plaintiff then filed suit for PIP benefits pursuant to Fla. Stat. 627.736 alleging breach of contract by Defendant alleging its treatment rendered to Yisander Garcia was related to the subject accident and medically necessary.

On 09/19/19, Plaintiff filed an affidavit from Jason Morris Levine, D.C. in support of its contention that the services provided by Plaintiff were related and medically necessary to an accident that occurred on 07/06/11.

Dr. Levine's affidavit details the reported complaints of Mr. Garcia following his automobile accident of 07/06/11, his diagnosis, and the treatment program consisting of examinations, and various physiotherapies. He opines that the examinations, as well as treatment and modalities utilized by Plaintiff were related and medically necessary.

On 09/19/19, Plaintiff filed its Motion for Partial Summary Judgment as to Related and Medically Necessary Treatment as the affidavit testimony from Dr. Levine established Plaintiff's prima facie burden of proof on the issues of relatedness and medical necessity. *See Derius v. Allstate Indemnity Co.,* 723 So.2d 271 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a] (a plaintiff's prima facie case to recover PIP benefits requires proof that its services are related to the subject accident and medically necessary).

The Court finds that Plaintiff has made a prima facie showing as to relatedness and medical necessity of its treatment.

In opposition, Defendant relies upon the opinion of Michael Weinreb, D.C. who performed and/or prepared a peer review report pursuant to Fla. Stat. 627.736(7)(a). As more fully discussed below, Dr. Weinreb's opinion does not create a material issue of fact as to certain treatment and/or modalities rendered by the Plaintiff and same remains uncontested in this action.

LEGAL ANALYSIS

Florida Rule of Civil Procedure 1.510(c) provides that "judgment sought must be rendered immediately if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law".

"Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law". *Volusia County v. Aberdeen At Ormond Beach, L.P.,* 760 So.2d 126 (Fla. 2000) [25 Fla. L. Weekly S390a] [citing *Menendez v. Palms West Condominium Ass'n,* 736 So.2d 58 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D1317a]]; see also *Holl v. Talcott,* 191 So.2d 40 (Fla. 1966); *Moore v. Morris,* 475 So.2d 666 (Fla. 1985).

Once the Plaintiff has met its initial burden of proof, the Defendant must come forward with evidence establishing a genuine issue of material fact. *Latour Auto Sales, Inc. v. Stromberg-Carlson Leasing Corp.,* 335 So.2d 600 (Fla. 3d DCA 1976). If the Defendant "fails to come forward with any affidavit or other proof in opposition to the motion for summary judgment, the [Plaintiff] need only establish a prima facie case, whereupon the court may enter its summary judgment." *Id.* at 601 [citing *Harvey Building, Inc. v. Haley,* 175 So.2d 780 (Fla. 1965)]; *see also Landers v. Milton,* 370 So.2d 368, 370 (Fla. 1979). Defendant cannot "merely assert that an issue does exist," but rather "must go forward with evidence sufficient to generate an issue on a material fact." *Byrd v. Leach,* 226 So.2d 866 (Fla. 4th DCA 1969).

CPT code 99203

(Date of Service 09/08/11)

As it pertains to treatment rendered and billed by Plaintiff under CPT code *99203* (initial examination) from 09/08/11 through 10/13/11[1], Michael Weinreb, D.C. opines:

> 09/08/11 through 10/13/11
>
> **99203 Exam**
>
> The procedures above when rendered are withing the Chiropractic licensing chapter and are reasonable, related necessary for the date range listed only.

Accordingly, the record before this Court reflects that the medical necessity and relatedness of CPT code *99203* is undisputed for date of service 09/08/11 and Plaintiff's Motion is GRANTED as to said treatment.

CPT code 97010

(Dates of Service 09/08/11, 09/14/11, and 09/19/11)

As it pertains to treatment rendered and billed by Plaintiff under CPT code *97010* (hot/cold packs) from 09/08/11 through 10/13/11, Michael Weinreb, D.C. opines:

> 09/08/11 through 10/13/11
>
> **97010 HP/CP 09-08-11 thru 09-19-11**
>
> The procedures above when rendered are withing the Chiropractic licensing chapter and are reasonable, related necessary for the date range listed only.

Accordingly, the record before this Court reflects that the medical necessity and relatedness of CPT code *97010* is undisputed for dates of service 09/08/11, 09/14/11, and 09/19/11 and Plaintiff's Motion is GRANTED as to said treatment.

CPT code 97035

(Dates of Service 09/14/11, 09/19/11, 09/27/11, 10/04/11, 10/06/11, 10/11/11, 10/13/11)

As it pertains to treatment rendered and billed by Plaintiff under CPT code *97035* (ultrasound) from 09/08/11 through 10/13/11, Michael Weinreb, D.C. opines:

> 09/08/11 through 10/13/11
>
> **97035 US 2 units/ 1 unit only**
>
> The procedures above when rendered are withing the Chiropractic licensing chapter and are reasonable, related necessary for the date range listed only.

Accordingly, the record before this Court reflects that the medical necessity and relatedness of *one (1) unit* of CPT code *97035* is undisputed for dates of service 09/14/11, 09/19/11, 09/27/11, 10/04/11, 10/06/11, 10/11/11, 10/13/11 and Plaintiff's Motion is GRANTED as to said treatment.

CPT code 97124

(Dates of Service 09/08/11, 09/14/11, 09/19/11, 09/22/11, 09/27/11, 10/04/11, 10/06/11, 10/11/11, 10/13/11)

As it pertains to treatment rendered and billed by Plaintiff under CPT code *97124* (massage) from 09/08/11 through 10/13/11, Michael Weinreb, D.C. opines:

> 09/08/11 through 10/13/11
>
> **97124 Mass. 1 to 2 units/ 1 unit only**
>
> The procedures above when rendered are withing the Chiropractic licensing chapter and are reasonable, related necessary for the date range listed only.

Accordingly, the record before this Court reflects that the medical

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necessity and relatedness of *one (1) unit* of CPT code *97124* is undisputed for dates of service 09/08/11, 09/14/11, 09/19/11, 09/22/11, 09/27/11, 10/04/11, 10/06/11, 10/11/11, 10/13/11 and Plaintiff's Motion is GRANTED as to said treatment.

CPT code 97140

(Dates of Service 09/14/11 and 09/19/11)

As it pertains to treatment rendered and billed by Plaintiff under CPT code *97140* (manual therapy) from 09/08/11 through 10/13/11, Michael Weinreb, D.C. opines:

> 09/08/11 through 10/13/11
>
> **97140 MF Massage**
>
> The procedures above when rendered are withing the Chiropractic licensing chapter and are reasonable, related necessary for the date range listed only.

Accordingly, the record before this Court reflects that the medical necessity and relatedness of CPT code *97140* is undisputed for dates of service 09/14/11 and 09/19/11, and Plaintiff's Motion is GRANTED as to said treatment.

CPT code 97110

(Dates of Service 09/22/11)

As it pertains to treatment rendered and billed by Plaintiff under CPT code *97110* (therapeutic exercises) from 09/08/11 through 10/13/11, Michael Weinreb, D.C. opines:

> 09/08/11 through 10/13/11
>
> **97110 Exercise**
>
> The procedures above when rendered are withing the Chiropractic licensing chapter and are reasonable, related necessary for the date range listed only.

Accordingly, the record before this Court reflects that the medical necessity and relatedness of CPT code *97110* is undisputed for dates of service 09/22/11 and Plaintiff's Motion is GRANTED as to said treatment.

CPT code 98941

(Dates of Service 10/04/11 and 10/13/11)

As it pertains to treatment rendered and billed by Plaintiff under CPT code *98941* (chiropractic adjustments) from 09/08/11 through 10/13/11, Michael Weinreb, D.C. opines:

> 09/08/11 through 10/13/11
>
> **98941 Adjustment**
>
> The procedures above when rendered are withing the Chiropractic licensing chapter and are reasonable, related necessary for the date range listed only.

Accordingly, the record before this Court reflects that the medical necessityand relatedness of CPT code *98941* is undisputed for dates of service 10/04/11 and 10/13/11 and Plaintiff's Motion is GRANTED as to said treatment.

CPT code 97032

(Dates of Service 09/08/11, 09/14/11, 09/19/11, 09/22/11, 09/27/11, 10/04/11, 10/06/11, 10/11/11, and 10/13/11)

As it pertains to treatment rendered and billed by Plaintiff under CPT code *97032* (electrical muscle stimulation) from 09/08/11 through 10/13/11, Michael Weinreb, D.C. opines:

> 09/08/11 through 10/13/11
>
> **97032 Attended EMS/recode as 97014/1 unit only**
>
> The procedures above when rendered are withing the Chiropractic licensing chapter and are reasonable, related necessary for the date range listed only.
>
> The *documentation* failed to demonstrate the medical necessity, the support, urgency, function and necessity of attended EMS 97032. The purpose of attended therapy is not reasonable, related and necessary for all dates. An *alternative procedure code* for the *same therapy* that provides the *same physiological* effect is 97014 EMS. ***97032 should be recoded and billed at the 97014 procedure level***. The *documentation* did not provide that the claimant had any severe muscular restrictions, neurological deficits, prone and supine difficulties, underlining disease and or illness that would require the need for direct supervision and ongoing attended 97032 therapy. There is no factual foundation or support that the claimant's diagnosis required an attended therapy. There is no factual basis in the diagnosis that would prevent the claimant from receiving unattended 97014, therapy.

Michael Weinreb, D.C.'s opinion as to CPT code 97032 does not dispute the relatedness and medical necessity of the electrical muscle stimulation treatment itself and, accordingly, his report does not create a factual as to this treatment. Instead, Michael Weinreb, D.C. opines that CPT code 97032 should be "recoded and billed" as a different CPT code, "97014", which he asserts is an "*alternative procedure code for the same therapy that provides the same physiological effect*".

Michael Weinreb, D.C.'s "recoding" opinion as to CPT code 97032 is not premised upon the statutory definition and/or factors for determining whether treatment was "medically necessary".[2] That is, Michael Weinreb, D.C.'s opinion is premised upon purported "CPT coding", "upcoding", and/or medical "record keeping" issues as opposed to the statutory definition of "medically necessary" as otherwise required by the No-Fault Act.

Issues pertaining to "CPT coding" and/or "upcoding" which may otherwise serve as grounds for denial of treatment are affirmative defenses that must be pled as a bar to payment of a PIP claim. *See e.g., Progressive v. Craig A. Newman, D.C.,* 15 Fla. L. Weekly Supp. 129a (Fla. 13th Circuit Appellate, July 17, 2007) (holding that upcoding is an affirmative defense that ought to be pled and for which a carrier has the burden of persuasion); *see also Fla. Stat. 627.736(5)(b)(1)(e)*.

Defendant has not raised any "CPT coding", "upcoding", or "record keeping" issues as an affirmative defense in this case. Since no such "CPT coding", "upcoding", or "record keeping" affirmative defenses pertaining to CPT code 97032 have been pled by the Defendant, any such defenses are deemed waived and not an issue in this case. *Fla R. Civ. Pro. 1.140(h)(1)*.

This Court will not permit inadmissible testimony of Michael Weinreb, D.C. to serve as a conduit to inject otherwise unpled affirmative defenses into this case. To hold otherwise would implicate due process rights of the Plaintiff and run afoul of well-established binding precedent.

It is reversible error to grant summary judgment on an unpled affirmative defense. *See Couchman v. Goodbody & Co.,* 231 So.2d 842 (Fla. 4th DCA 1970) (reversing summary judgment based on an unpled defense without amendment of the pleadings and holding that on motion for summary judgment issues to be considered are those made by the pleadings); *Strahan Manufacturing Co. v. Pike,* 194 So.2d 277 (Fla. 2d DCA 1967); *H.L. Mills v. Dade County,* 206 So.2d 227 (Fla. 3d DCA 1968); *Goldberger v. Regency Highland Condo. Ass'n, Inc.,* 452 So.2d 583, 585 (Fla. 4th DCA 1984); *Goldschmidt v. Holman,* 571 So.2d 422, 423 (Fla. 1990).

Likewise, a party cannot present evidence at trial or summary judgment regarding an unpled affirmative defense. *See e.g., Meigs v. C.F. Lear*, 191 So.2d 286 (Fla. 1st DCA 1966) (dismissing appeal and affirming a denial of motion for summary judgment holding that *summary judgment is not to be used as a substitute for parties' pleadings* and where defenses of estoppel and statute of limitation were not raised in the pleadings *such defenses did not constitute issues in case in which parties could submit evidence either at trial or in*

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summary judgment proceedings); *Straub v. Muir-Villas Homeowners Ass'n, Inc.,* 128 So.3d 885, 890 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2655a] (finding error in trial court's consideration of an unpled defense); *B.B.S. v. R.C.B.*, 252 So.2d 837 (Fla. 2d DCA 1971) (an affirmative defense must be pleaded and not raised by motion for summary judgment); *Sunbeam Television Corp. v. Mitzel*, 83 So.3d 865, 875 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D183a] (where a party pleads one claim but tries to prove another, it is error for a trial court to allow argument on the unpled issue at trial); *Bloom v. Dorta-Duque*, 743 So.2d 1202, 1203 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2532a] (a party cannot be found liable under a theory that was not specifically pled); *Bank of America v. Asbury*, 165 So.3d 808, 809 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1230a] ("[l]itigants in civil controversies must state their legal positions within a particular document, a pleading, so that the parties and the court are absolutely clear what the issues to be adjudicated are"); *Assad v. Mendell*, 550 So.2d 52, 53 (Fla. 3d DCA 1989) (a party should not suffer the unfair surprise and prejudice of legal claims and theories not encompassed by the pleadings).

Therefore, Michael Weinreb, D.C.'s purported "recoding" opinion as to CPT code 97032 is premised on an unpled affirmative defense rendering same inadmissible testimony that does not create a factual issue for purposes of summary judgment and/or trial.

Accordingly, as it pertains to *one (1) unit* of CPT code *97032* the record before this Court does not create a factual issue as to the relatedness and medical necessity on 09/08/11, 09/14/11, 09/19/11, 09/22/11, 09/27/11, 10/04/11, 10/06/11, 10/11/11, and 10/13/11 and Plaintiff's Motion is GRANTED as to said treatment.

Relatedness of All Treatment

and Dates of Service

Michael Weinreb, D.C.'s report does not purport to opine that Yisander Garcia was treated for anything other than the injuries sustained in the 07/06/11 motor vehicle accident. Accordingly, Michael Weinreb, D.C.'s report fails to create a fact issue as to the relatedness of all treatment rendered by Plaintiff since same does indicate that any treatment did not "*arise out of the ownership, maintenance, or use of a motor vehicle.*" Fla. Stat. 627.736(1).

In *Sevila Pressley Weston v. United Auto. Ins. Co.,* 21 Fla. L. Weekly Supp. 306b (Fla. 11th Jud. Circ. App., November 26, 2013), the Eleventh Judicial Circuit sitting in its appellate capacity held that "relatedness is established by showing that injuries and subsequent medical treatment. . .arose out of a subject accident":

> With respect to the issue of relatedness in PIP cases, "the medical treatment covered by the insurance policy is treatment that is related to the bodily injury arising out of the ownership, maintenance, or use of the motor vehicle." *See In re Standard Jury Instructions in Civil Cases,* 966 So. 2d 940, 942 (Fla. 2007) [32 Fla. L. Weekly S563a]. In simpler parlance, *relatedness is established by showing that injuries and subsequent medical treatment therefor arose out of a subject accident.*

The *Sevila* Court reversed the trial court's denial of a motion for directed verdict on the issue of relatedness of treatment finding that there was no evidence to show that the injuries and treatment at issue "arose from a difference source other than the subject accident":

> Weston testified that all the injuries for which she was treated arose out of the April 11, 2005 accident. This testimony went unrefuted, in that *there was no evidence that any of these injuries were pre-existent or otherwise arose from a different source other than the subject accident.*
>
> . . .
>
> *In order to refute relatedness, United Auto had to present actual and/or factual evidence which would purport to more or less show that the injuries and subsequent medical treatment did not arise out of the subject accident.*
>
> . . .
>
> [S]ince *there was no legally sufficient evidence presented by United Auto to refute Weston's testimony that her injuries and treatment were related to the accident,* the trial judge should have granted Weston's motion for directed verdict on the issue of relatedness.

The record evidence before this Court reflects that Yisander Garcia was injured as a result of the motor vehicle accident of 07/06/11 and that the treatment and/or services rendered by the Plaintiff were performed in relation to same. Defendant has not come forth with any evidence whatsoever purporting to show that Yisander Garcia was treated for anything other than the injuries sustained in the 07/06/11 motor vehicle accident as otherwise required by *Sevila. See also American Health & Rehab., Inc. v. United Auto. Ins. Co.,* 23 Fla. L. Weekly Supp. 615b (Fla. 17th Jud. Circ., Broward County, J. Skolnik, October 16, 2015) ("[t]he mere denial by United Auto that the treatment was related. . .without the demonstration of some intervening act or circumstance eliminating the pre-existing relatedness does not create a genuine issue of material fact"); *A-Plus Medical & Rehab Center v. State Farm,* 27 Fla. L. Weekly Supp. 186a (Fla. 11th Jud. Circ., Miami-Dade County, J. Diaz, March 19, 2019) (finding affidavit insufficient to create genuine issue of material fact as to relatedness since it failed to set forth "any factual basis to conclude that the claimant was treated for anything other than the injuries in the [subject] accident"); *Coast Chiro. Center v. State Farm,* 26 Fla. L. Weekly Supp. 327a (Fla. 17th Jud. Circ., Broward County, J. Benson, June 18, 2018) (same); *Marshall Bronstein, D.C. v. United Auto. Ins. Co.,* 22 Fla. L. Weekly Supp. 945b (Fla. 11th Jud. Circ., Miami-Dade County, J. Multack, March 11, 2015) ("the term 'related' represents a causal connection between the treated injury and the automobile accident" and does not "hinge[ ] on the benefit or necessity of treatment", that is, "[t]he terms 'related' and 'necessary'. . .must be analyzed independent of one another").

Accordingly, the record before this Court reflects that the relatedness of all treatment rendered by the Plaintiff to the 07/06/11 automobile accident is undisputed, and Plaintiff's Motion is GRANTED as to the issue of relatedness for this undisputed treatment.

Therefore, based on this Court's analysis set forth above, it is

ORDERED AND ADJUDGED that Plaintiff's Motion for Partial Summary Judgment as to Related and Medically Necessary Treatment is GRANTED in part as more fully set forth above.

---

[1]Dr. Weinreb opines that "*[t]reatment, testing and examination beyond 10-13-11 can be considered not reasonable treatment, related and medically necessary*".

[2]*Fla. Stat. 627.732(2)* specifically defines "medically necessary" as that term is used throughout the No-Fault Act as follows:

(2) "Medically necessary" refers to a medical service or supply that a prudent physician would provide for the purpose of preventing, diagnosing, or treating an illness, injury, disease, or symptom in a manner that is:

(a) In accordance with generally accepted standards of medical practice;

(b) Clinically appropriate in terms of type, frequency, extent, site, and duration; and

(c) Not primarily for the convenience of the patient, physician, or other health care provider.

* * *

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Insurance—Personal injury protection—Coverage—Medical expenses— Reasonableness of charges—Collateral estoppel—Where identical parties have previously litigated identical issue of reasonableness of medical provider's charges for same CPT codes, parties had full and fair opportunity to litigate issue and did litigate issue in prior proceedings, and issue is critical and necessary part of litigation, all elements necessary for application of doctrine of collateral estoppel are met—It is immaterial that prior adjudications pertained to different accidents, patients, claims, causes of action and assignments of benefits than present case—No merit to argument that doctrine of collateral estoppel should not be applied because insurer believes that prior adjudications constituted error where insurer allowed those adjudications to become final without appeal—No merit to argument that court is barred from applying doctrine of collateral estoppel because it was not raised in provider's reply, as rules and law did not permit provider to file reply asserting collateral estoppel—Provider is entitled to judgment on reasonableness issue as matter of law

DOCTOR REHAB CTR. INC., a/a/o Aymara Diaz, Plaintiff, v. UNITED AUTO INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2011-002982-SP-21, Section HI01. April 20, 2020. Milena Abreu, Judge. Counsel: Majid Vossoughi, Brad R. Blackwelder, and David J. Mannering, Majid Vossoughi, P.A., Miami, for Plaintiff. Paula Elkea Ferris, House Counsel United Auto Ins. Co., Miami Gardens, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR ORDER PRECLUDING AND/OR SUMMARY JUDGMENT AS TO THE REASONABLENESS OF PLAINTIFF'S CHARGES BASED ON THE DOCTRINE OF COLLATERAL ESTOPPEL (ISSUE PRECLUSION)

THIS CAUSE came before the Court on 02/21/20 on Plaintiff's Motion for Order Precluding Defendant From Contesting the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel and Plaintiff's Motion for Summary Judgment as to the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel (Issue Preclusion).

The parties were represented by counsel at the hearing who presented arguments to this Court. Paula Elkea Ferris, Esq. appeared on behalf of the Defendant, and Majid Vossoughi, Esq., Brad Blackwelder, Esq., and David Mannering, Esq. appeared on behalf of the Plaintiff.

The Court having reviewed Plaintiff's Motion for Order Precluding Defendant From Contesting the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel and Plaintiff's Motion for Summary Judgment as to the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel, the entire Court file, the relevant legal authorities, and having heard argument from counsel and being otherwise fully advised in the premises, hereby makes the following factual findings and conclusions of law, and enters this Order GRANTING Plaintiff's Motion for Order Precluding Defendant From Contesting the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel and Plaintiff's Motion for Summary Judgment as to the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel.

Background & Factual Findings

Aymara Diaz was involved in an automobile accident on November 26, 2009 and treated with Plaintiff from November 30, 2009 through July 22, 2010 in relation to injuries sustained in said accident.

Plaintiff submitted its bills for treatment of Aymara Diaz to Defendant for payment of Personal Injury Protection ("PIP") benefits containing the following twelve (12) charges: 99203 ($250; initial examination), *97035* ($50; ultrasound), *97140* ($70; manual therapy), *97124* ($60; massage), *97530* ($65; therapeutic activities), *97010* ($50; hot/cold pack), *97110* ($60; therapeutic exercises), *97012* ($40; mechanical traction), *G0283 / 97014* ($50; electric stimulation), *98940* ($85; chiropractic adjustments), *99213* ($150; patient evaluation), *97112* ($70; neuromuscular reeducation).

Plaintiff's motion reflects that a court of competent jurisdiction has previously adjudicated through final judgment the reasonableness of Plaintiff's charges in the following two (2) cases against Defendant:

i. *Doctor Rehab Center, Inc., a/a/o Julian Grillo v. United Automobile Insurance Company,* Case No. 11-01877 SP 26;[1]

ii. *Doctor Rehab Center, Inc., a/a/o Jose Miranda v. United Automobile Insurance Company,* Case No. 11-01982 SP 26.[2]

Plaintiff argues that the doctrine of Collateral Estoppel and/or Issue Preclusion precludes Defendant from re-litigating the identical issue of reasonableness of Plaintiff's charges for the very same treatment and/or CPT codes previously litigated through final judgment between the very same parties. Plaintiff argues that since all of the requisite elements for application of the doctrine of Collateral Estoppel and/or Issue Preclusion have been met this Court is mandated to apply the doctrine in this case.

Defendant argues that the doctrine of Collateral Estoppel does not apply since the "operative facts" such as the claim #, date of loss, and patients are not identical in the instant action and the prior adjudications. Defendant also argues that the parties are not identical since in each PIP case the Plaintiff received an assignment of benefits from a different insured. Defendant further argues against application of the doctrine of Collateral Estoppel claiming error on the part of the court in the prior adjudications although it is undisputed that the Defendant did not appeal the final judgments in those cases and allowed same to become final without attack. Finally, Defendant argues that this Court is barred from considering Plaintiff's Collateral Estoppel arguments and motion since the issue was not raised in a reply to Defendant's affirmative defenses.

Summary Judgment Standard

Florida Rule of Civil Procedure 1.510 provides that "[t]he judgment sought must be rendered immediately if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law".

"Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law". *Volusia County v. Aberdeen At Ormond Beach, L.P.,* 760 So.2d 126 (Fla. 2000) [25 Fla. L. Weekly S390a] (citing *Menendez v. Palms West Condominium Ass'n,* 736 So.2d 58 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D1317a].

In a PIP case, the Plaintiff's burden of proof in establishing its prima facie case to recover PIP benefits requires proof that its bills and/or charges for the services rendered are reasonable in price. *See Derius v. Allstate Indemnity Co.,* 723 So.2d 271 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a].

Legal Analysis

Doctrine of Collateral Estoppel (Issue Preclusion)

"Collateral estoppel is a judicial doctrine which in general terms prevents identical parties from relitigating the same issues that have already been decided." *Department of Health and Rehabilitative Services v. B.J.M.,* 656 So.2d 906, 910 (Fla. 1995) [20 Fla. L. Weekly S188a] (citing to *Mobil Oil Corp. v. Shevin,* 354 So. 2d 372, 374 (Fla. 1977) (action by oil companies should have been dismissed under doctrine of collateral estoppel since identical issue of Attorney General's authority was previously determined by the Fifth District Court of Appeal); *see also, Seaboard Coast Line Railroad v. Cox,* 338 So.2d 190 (Fla. 1976) (approving the District Court of Appeal's affirmance of lower court's grant of partial summary judgment as to

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issue of liability based on doctrine of collateral estoppel or estoppel by judgment); *Weiss v. Courshon,* 768 So.2d 2 (2000) [25 Fla. L. Weekly D1237a] (applying the doctrine of collateral estoppel to prevent relitigating an action for accounting and breach of fiduciary duties which was decided in federal Court); *Provident Life and Accident Ins. Co. v. Genovese, M.D.,* 138 So.3d 474 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D442b] (reversing a trial court's denial of a motion for directed verdict and remanding for entry of directed verdict based on doctrine of collateral estoppel).

"The doctrine is intended to prevent repetitious litigation of what is essentially the same dispute". *Id.* (citing *Zimmerman v. State of Florida Office of Insurance Regulation,* 944 So.2d 1163 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D3126a]). The doctrine "serves to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.' " *United States v. Mendoza,* 464 U.S. 154, 158 (1984) (citing *Allen v. McCurry,* 449 U.S. 90, 94 (1980)).

Florida jurisprudence reflects that courts have applied the doctrine to various areas of law and causes of action such as breach of contract[3], wrongful death[4], negligence[5], declaratory relief[6], dissolution of marriage[7], uninsured motorist claim[8], constitutional challenges[9], action for accounting breach of fiduciary duties[10], and appeals from administrative rulings[11].

"The essential elements of the doctrine are that the parties and issues be identical, and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction." *Department of Health and Rehabilitative Services v. B.J.M.,* 656 So.2d 906, 910 (Fla. 1995) [20 Fla. L. Weekly S188a] (quoting *Mobil Oil Corp. v. Shevin,* 354 So. 2d 372, 374 (Fla. 1977)); *Seaboard Coast Line Railroad v. Cox,* 338 So.2d 190 (Fla. 1976).

The Third District Court of Appeal has articulated and held that the following elements must be met for the application of the doctrine of Collateral Estoppel and/or Issue Preclusion: (1) the identical issues were presented in a prior proceeding; (2) there was a full and fair opportunity to litigate the issues in the prior proceeding; (3) the issues in the prior litigation were a critical and necessary part of the prior determination; (4) the parties in the two proceedings were identical; and (5) the issues were actually litigated in the prior proceeding. *See e.g., Pearce v. Sandler,* 219 So.3d 961 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1214b] (citing to *Topps v. State*, 865 So.2d 1253, 1255 (Fla. 2004) [29 Fla. L. Weekly S21a]; *see also Carnival Corp. v. Middleton,* 941 So.2d 421 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2480a].

As it pertains to the *first element,* the record before this Court reflects that in Case No. 11-01877 SP 26 and Case No. 11-01982 SP 26, the identical parties to this action previously litigated the reasonableness of Plaintiff's charges for the very same CPT codes at issue in this case: 99203 ($250), 97035 ($50), 97140 ($70), 97124 ($60), 97530 ($65), 97010 ($50), 97110 ($60), 97012 ($40), G0283 / 97014 ($50), 98940 ($85), 99213 ($150), 97112 ($70). As such, the first element for application of the doctrine has been met.

As it pertains to the *second and fifth elements,* the record before this Court reflects that in the prior cases litigated between the parties they had a full and fair opportunity to fully litigate the issue of reasonableness of Plaintiff's charges and the issue was actually litigated through final judgment after extensive motion practice, discovery, presentation of evidence, and service of affidavits and record evidence as to the central issue of reasonableness of Plaintiff's charges. As such, the second and fifth elements for application of the doctrine have been met.

As it pertains to the *third element,* "[a]n issue is a critical and necessary part of the prior proceeding where its determination is essential to the ultimate decision." *Provident Life and Accident Ins. Co. v. Genovese, M.D.,* 138 So.3d 474, 478 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D442b] (citing *Porter v. Saddlebrook Resorts, Inc.,* 679 So.2d 1212, 1215 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D1881a]). In the context of PIP litigation, the issue of reasonableness of charges is not only "a critical and necessary part" of the litigation, but same is in fact part and parcel of Plaintiff's prima facie burden of proof. *See Derius v. Allstate Indemnity Co.,* 723 So. 2d 271, 272 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a]. As such, the third element for application of the doctrine has been met.

As it pertains to the *fourth element,* the parties to the instant action are clearly the identical parties in Case No. 11-01877 SP 26 and Case No. 11-01982 SP 26 cases where the issue of reasonableness of Plaintiff's charges was litigated through final judgment. As such, the fourth element for application of the doctrine has also been met.

Binding decisional precedent holds that once the elements are met, a court is obligated to apply the doctrine of collateral estoppel. *Provident Life and Accident Ins. Co. v. Genovese, M.D.,* 138 So.3d 474 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D442b] (reversing a trial court's denial of a motion for directed verdict and remanding for entry of directed verdict based on doctrine of collateral estoppel); *Mobil Oil Corp. v. Shevin,* 354 So. 2d 372, 374 (Fla. 1977) (remanding action to trial court with directions to have action by oil companies dismissed under doctrine of collateral estoppel since the issue pertaining to Attorney General's authority was previously adjudicated adversely to the companies by the Fifth District Court of Appeal). Additionally, our own Circuit, sitting in it appellate capacity just recently affirmed the entry of final judgment against the Defendant on the issue of reasonableness of charges holding that United was "precluded from re-litigating the issue of reasonableness under the doctrine of collateral estoppel," citing to *Pearce v. Sandler*, 219 So.3d 961 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1214b], see (Case No: 2018-228-AP-01: *United Automobile Insurance Company v. Doctor Rehab Center, Inc.*, Lower Case No: 2011-1980-SP-26, decided on April 14, 2020- [45 Fla. L. Weekly D1766a] *Not Final until disposition of any timely filed motion for rehearing, clarification, or certification).

Based on the foregoing, this Court finds that all elements for application of the doctrine of Collateral Estoppel have been met. As such, Plaintiff is entitled to judgment as a matter of law as to reasonableness of its charges for CPT codes 99203 ($250), 97035 ($50), 97140 ($70), 97124 ($60), 97530 ($65), 97010 ($50), 97110 ($60), 97012 ($40), G0283 / 97014 ($50), 98940 ($85), 99213 ($150), 97112 ($70) and Defendant is precluded from re-litigating same.

Accordingly, although the prior adjudications pertained to different motor vehicle accidents, patients, claims, and/or causes of action, the question or issue of reasonableness of Plaintiff's charges was common and litigated through final judgment in the prior actions. It is immaterial that the prior adjudications pertained to different motor vehicle accidents, patients, claims, and/or causes of action than in the instant case as there is no element requiring "identity in the thing sued for" and/or "identity of the cause of action" for application of the doctrine of Collateral Estoppel (Issue Preclusion).

Similarly, Defendant's argument that the parties are not identical since in each PIP case the Plaintiff received an assignment of benefits (commonly abbreviated as "AOB") from a different insured is without merit.

In *Seaboard Coast Line Railroad Co. v. Cox,* 338 So. 2d 190 (Fla. 1976) the Supreme Court of Florida rejected the same argument in the context of Collateral Estoppel. In *Seaboard Coast,* a guardian on behalf of a minor brought a successful suit for the wrongful death of the minor's mother establishing liability against a railroad company. The minor then brought a second suit for the wrongful death of his father and the trial court found that the railroad company was collaterally estopped on the issue of liability. On appeal the Supreme

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Court of Florida rejected the railroad company's argument that "there [was] no identity of the parties since the action is derivative in nature and stems from deaths of different persons", finding that the doctrine of Collateral Estoppel applies "in situations where the actions were derivative". Accordingly, although the instant action and the prior adjudications derive from different assignors, it is the very same Plaintiff medical provider—Doctor Rehab Center, Inc.,—that brought both this action and the prior adjudications, thereby meeting the identity of parties element for purposes of Collateral Estoppel.

Defendant's assignment of benefits argument also fails since under Collateral Estoppel only an "identity of the parties" is required and there is no element requiring "*identity of the quality or capacity*" of the parties.[13] Defendant argues that the Plaintiff, in this as well as the prior actions, is only acting in a "representative capacity" standing in the shoes of the assignor, as opposed to its "individual capacity" as a medical provider and corporate entity organized and existing under the laws of this State. Accordingly, even if it could be said that the Plaintiff was acting in different "capacities" in this and the prior actions, any such distinction is immaterial for purposes of Collateral Estoppel.

Moreover, this Court notes that the identity of parties element under the doctrine of Collateral Estoppel extends to parties "and their privies". *Southeastern Fidelity Ins. Co. v. Rice,* 515 So.2d 240, 242 (Fla. 4th DCA 1987); *see also, Stogniew v. McQueen*, 656 So.2d 917, 919 (Fla. 1995) [20 Fla. L. Weekly S208a]; *Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano*, 450 So.2d 843 (Fla. 1984) ("collateral estoppel may be asserted only when the identical issue has been litigated between the same parties or their privies"). Clearly, there is privity between the Plaintiff in the instant action as well as the Plaintiff in the prior PIP actions it filed, since both "have an interest in the action such that [they] will be bound by the final judgment as if [they] were a party". *Southeastern Fidelity Ins. Co. v. Rice,* 515 So.2d 240, 242 (Fla. 4th DCA 1987). Regardless of the assignee, Doctor Rehab Center, Inc. is a single corporate entity organized and existing under the laws of this State. It is this entity that is entitled to payment of PIP benefits, it is this entity that collects, deposits, and files suits for PIP payments from insurers, and it is this entity that would bound by any judgments in cases it filed as assignee of a PIP insured.[14]

Defendant's argument that the doctrine of Collateral Estoppel should not be applied since it believes the prior adjudications constitute error is also unavailing. This same argument was expressly rejected by the Supreme Court of Florida in *Seaboard Coast Line Railroad Co. v. Cox,* 338 So. 2d 190 (Fla. 1976):

> "We conclude that *there is no merit in petitioner's argument and that it is bound by the result of the first action.*
>
> We further hold that the *respondent may not now contest the propriety of applying the percentage of liability determination made by the jury in the first suit.* ***The respondent allowed the first judgment to become final without attack, and he cannot now collaterally attack that result.*** The petitioner's 15% nonliability as determined by the jury in the first trial is therefore applicable in the second action for damages."

As in *Seaboard Coast,* Defendant did not appeal any of the prior final judgments relied upon by the Plaintiff in asserting the doctrine of Collateral Estoppel. Defendant allowed the prior adjudications "to become final without attack" and "cannot now collaterally attack that result", that is, "it is bound by the result of the [prior] action[s]". *Id.*

Finally, the Court rejects Defendant's argument that it is barred from considering Plaintiff's Collateral Estoppel arguments and motion since the issue was not raised in a reply to Defendant's affirmative defenses. Fla. R. Civ. P. 1.100(a) requires filing of a "reply" to an affirmative defense only when the opposing party seeks to "avoid" that defense. Indeed, a plaintiff who "does not seek to avoid the substantive allegation of the defendant's affirmative defense. . .need not file, indeed, is precluded by the rules from filing, a reply". *Kitchen v. Kitchen,* 404 So.2d 201 (Fla. 2d DCA 1981). Plaintiff did not raise the doctrine of Collateral Estoppel to "avoid" any affirmative defenses pled by the Defendant. Instead, the doctrine was raised in regard to an element of Plaintiff's own prima facie burden of proof, to wit, the reasonableness of Plaintiff's charges. Accordingly, the rules and applicable law did not require, or even permit, Plaintiff to file a "reply" asserting the doctrine of Collateral Estoppel in this case.

Conclusion

Accordingly, based on this Court's analysis set forth above, it is

ORDERED AND ADJUDGED that Plaintiff's Motion for Order Precluding Defendant From Contesting the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel and Plaintiff's Motion for Summary Judgment as to the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel is hereby GRANTED. Plaintiff's charges for treatment and/or CPT codes 99203 ($250), 97035 ($50), 97140 ($70), 97124 ($60), 97530 ($65), 97010 ($50), 97110 ($60), 97012 ($40), G0283 / 97014 ($50), 98940 ($85), 99213 ($150), 97112 ($70) are reasonable in price as a matter of law and Defendant is precluded from re-litigating same pursuant to the doctrine of Collateral Estoppel and/or Issue Preclusion.

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[1]This case adjudicated the reasonableness of Plaintiff's charges for the following treatment and/or CPT codes: 99203 ($250), 97035 ($50), 97140 ($70), 97124 ($60), 97530 ($65), 97010 ($50), 97012 ($40), G0283 ($50), 98940 ($85), 99213 ($150), 97112 ($70). A final judgment was entered in favor of Plaintiff and against Defendant on April 14, 2015.

[2]This case adjudicated the reasonableness of Plaintiff's charges for the following treatment and/or CPT codes: 97035 ($50), 97140 ($70), 97124 ($60), 97530 ($65), 97010 ($50), 97110 ($60), 97012 ($40), 97014 ($50), 98940 ($85), 99213 ($150), 97112 ($70). In this case Defendant, after much litigation, confessed to judgment. The mere fact that Defendant confessed to judgment does not make the prior final adjudication any less binding upon the parties. *See e.g., Eastern Shores Sales Co. v. City of North Miami Beach,* 363 So.2d 321 (Fla. 1978) ("[t]he fact that the [prior] decree. . .was by consent did not make it any less conclusive or binding on the parties"); *Hay v. Salisbury*, 92, Fla. 446, 109 So. 617 (Fla. 1926) ("[a] judgment by default or upon confession is, in its nature, just as conclusive on the rights of the parties before the court, as a judgment upon demurrer or verdict"); *In re Zoernack,* 289 B.R. 220 (M.D. Florida, 2003) (federal court applying Florida law on the doctrine of collateral estoppel found that a consent to judgment is treated the same as any other judgment and carries issue preclusion under the doctrine); *Arrieta-Gimenez v. Arrieta-Negron,* 551 So.2d 1184 (Fla. 1989) (rejecting argument "attempt[ing] to differentiate between a consent judgment and a final judgment entered after trial on the merits" and finding that a consent judgment is entitled to preclusive effect); *see also, Cabinet Craft, Inc. v. A.G. Spanos Enterprises, Inc.,* 348 So.2d 920 (Fla. 2d DCA 1977) ("for purposes of res judicata, a judgment entered upon default is just as conclusive as one which was hotly contested").

[3]*See e.g., West Point Const. Co. v. Fidelity and Deposit Co. of Maryland,* 515 So.2d 1374 (Fla. 3d DCA 1987); *Daniel Intern. Corp. v. Better Const., Inc.,* 593 So.2d 524 (Fla. 3d DCA 1991); *Wise v. Tucker,* 399 So.2d 500 (Fla. 4th DCA 1981); *Provident Life and Accident Insurance Company v. Genovese,* 138 So.3d 474 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D442b].

[4]*See e.g., Rehe v. Airport U-Drive, Inc.,* 63 So.2d 66 (Fla. 1953); *Seaboard Coast Line Railroad Co. v. Cox,* 338 So. 2d 190 (Fla. 1976).

[5]*See e.g., Shearn v. Orlando Funeral Home, Inc.,* 88 So.2d 591 (Fla. 1956); *Lorf v. Indiana Insurance Co.,* 426 So.2d 1225 (Fla. 4th DCA 1983); *Husky Industries, Inc. v. Griffith,* 422 So.2d 996 (Fla. 5th DCA 1982).

[6]*See e.g., Mobil Oil Corp. v. Shevin,* 354 So.2d 372 (Fla. 1977); *Paresky v. Miami-Dade County Bd. Of County Com'rs,* 893 So.2d 664 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D462b]; *Essenson v. Polo Club Associates,* 688 So. 2d 981 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D552a].

[7]*See e.g., Field v. Field,* 91 So.2d 640 (Fla. 1956).

[8]*See e.g., U.S. Fidelity & Guar. Co. v. Odoms,* 444 So. 2d 78 (Fla. 5th DCA 1984).

[9]*See e.g., GLA and Associates, Inc., v. City of Boca Raton,* 855 So.2d 278 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2318a].

[10]*See e.g., Weiss v. Courshon,* 768 So.2d 2 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1237a].

[11]*See e.g., Zimmerman v. State Office of Ins. Regulation,* 944 So.2d 1163 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D3126a].

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[12]The only one of these four (4) "identities" that is applicable in the context of Collateral Estoppel is the identity of the parties to the action. *Pearce v. Sandler,* 219 So.3d 961, 966-67 (Fla. 3d DCA 2017). [Editor's note: Reference to footnote 12 not present in body of court document.]

[13]As discussed above, the element requiring "identity of the quality or capacity" of the parties is applicable in the context of Res Judicata, not Collateral Estoppel. *Pearce v. Sandler,* 219 So.3d 961, 966-67 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1214b].

[14]To illustrate this point, suppose Defendant had prevailed in a suit brought by Plaintiff as assignee of an insured, resulting in Defendant obtaining a judgment for attorney's fees incurred in the litigation. Plaintiff could not avoid payment of the judgment by asserting that it was merely acting in a "representative capacity" in the suit and that the entity as assignee does not have a bank account or any funds to its name. Clearly, Plaintiff in its "individual capacity" as a corporate entity would be required to pay the judgment.

*   *   *

Insurance—Personal injury protection—Coverage—Medical expenses— Reasonableness of charges—Collateral estoppel—Where identical parties have previously litigated identical issue of reasonableness of medical provider's charges for same CPT codes, parties had full and fair opportunity to litigate issue and did litigate issue in prior proceedings, and issue was critical and necessary part of litigation, all elements necessary for application of doctrine of collateral estoppel are met—It is immaterial that prior adjudications pertained to different accidents, patients, claims, causes of action, and assignments of benefits than present case—No merit to argument that doctrine of collateral estoppel should not be applied because insurer believes that prior adjudications constituted error where insurer allowed those adjudications to become final without appeal—No merit to argument that court is barred from applying doctrine of collateral estoppel because it was not raised in provider's reply, as rules and law did not permit provider to file reply asserting collateral estoppel—Provider is entitled to judgment on reasonableness issue as matter of law

NEW MEDICAL GROUP INC., a/a/o Jessica Salazar, Plaintiff, v. UNITED AUTOMOBILE INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2011-002945-SP-21, Section HI01. April 20, 2020. Milena Abreu, Judge. Counsel: Majid Vossoughi, Brad R. Blackwelder, and David J. Mannering, Majid Vossoughi, P.A., Miami, for Plaintiff. Paula Elkea Ferris, House Counsel for United Auto. Ins. Co., Miami Gardens, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR ORDER PRECLUDING AND/OR SUMMARY JUDGMENT AS TO THE REASONABLENESS OF PLAINTIFF'S CHARGES BASED ON THE DOCTRINE OF COLLATERAL ESTOPPEL (ISSUE PRECLUSION)

THIS CAUSE came before the Court on 02/21/20 on Plaintiff's Motion for Order Precluding Defendant From Contesting the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel and Plaintiff's Motion for Summary Judgment as to the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel (Issue Preclusion).

The parties were represented by counsel at the hearing who presented arguments to this Court. Paula Elkea Ferris, Esq. appeared on behalf of the Defendant, and Majid Vossoughi, Esq., Brad Blackwelder, Esq., and David Mannering, Esq. appeared on behalf of the Plaintiff.

The Court having reviewed Plaintiff's Motion for Order Precluding Defendant From Contesting the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel and Plaintiff's Motion for Summary Judgment as to the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel, the entire Court file, the relevant legal authorities, and having heard argument from counsel and being otherwise fully advised in the premises, hereby makes the following factual findings and conclusions of law, and enters this Order GRANTING Plaintiff's Motion for Order Precluding Defendant From Contesting the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel and Plaintiff's Motion for Summary Judgment as to the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel.

Background & Factual Findings

Jessica Salazar was involved in an automobile accident on August 5, 2009 and treated with Plaintiff from August 6, 2009 through December 2, 2009 in relation to injuries sustained in said accident.

Plaintiff submitted its bills for treatment of Jessica Salazar to Defendant for payment of Personal Injury Protection ("PIP") benefits containing the following thirteen (13) charges: *99203* ($250; initial examination), *72070* ($250; thoracic spine x-rays); *72100* ($250; lumbar spine x-rays), *97124* ($60; massage); *97010* ($50; hot/cold pack), *97110* ($60; therapeutic exercises), *97035* ($50; ultrasound), *97012* ($40; mechanical traction), *97140* ($70; manual therapy), *97014 / G0283* ($50; electric stimulation), *98940* ($85; chiropractic adjustments), *99213* ($150; patient evaluation), *97112* ($70; neuromuscular reeducation).

Plaintiff's motion reflects that a court of competent jurisdiction has previously adjudicated through final judgment the reasonableness of Plaintiff's charges in the following six (6) cases against Defendant:

i. *New Medical Group, Inc., a/a/o Luis Montoya v. United Automobile Insurance Company,* Case No. 11-1491 CC 26;[1]

ii. *New Medical Group, Inc., a/a/o Jamileth Solorzano v. United Automobile Insurance Company,* Case No. 11-1492 CC 26;[2]

iii. *New Medical Group, Inc., a/a/o Leonel Valdes v. United Automobile Insurance Company,* Case No. 11-1873 SP 26;[3]

iv. *New Medical Group, Inc., a/a/o Nancy Rodriguez v. United Automobile Insurance Company,* Case No. 11-1874 SP 26;[4]

v. *New Medical Group, Inc., a/a/o Gledys Herrera v. United Automobile Insurance Company,* Case No. 11-1870 SP 26;[5]

vi. *New Medical Group, Inc., a/a/o Rose Corsetti v. United Automobile Insurance Company,* Case No. 11-1875 SP 26.[6]

Plaintiff argues that the doctrine of Collateral Estoppel and/or Issue Preclusion precludes Defendant from re-litigating the identical issue of reasonableness of Plaintiff's charges for the very same treatment and/or CPT codes previously litigated through final judgment between the very same parties. Plaintiff argues that since all of the requisite elements for application of the doctrine of Collateral Estoppel and/or Issue Preclusion have been met this Court is mandated to apply the doctrine in this case.

Defendant argues that the doctrine of Collateral Estoppel does not apply since the "operative facts" such as the claim #, date of loss, and patients are not identical in the instant action and the prior adjudications. Defendant also argues that the parties are not identical since in each PIP case the Plaintiff received an assignment of benefits from a different insured. Defendant further argues against application of the doctrine of Collateral Estoppel claiming error on the part of the court in the prior adjudications although it is undisputed that the Defendant did not appeal the final judgments in those cases and allowed same to become final without attack. Finally, Defendant argues that this Court is barred from considering Plaintiff's Collateral Estoppel arguments and motion since the issue was not raised in a reply to Defendant's affirmative defenses.

Summary Judgment Standard

Florida Rule of Civil Procedure 1.510 provides that "[t]he judgment sought must be rendered immediately if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law".

"Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law". *Volusia County v. Aberdeen At Ormond Beach, L.P.,* 760 So.2d 126 (Fla. 2000) [25 Fla. L. Weekly S390a] (citing *Menendez v. Palms West Condominium Ass'n,* 736 So.2d 58 (Fla. 1st

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DCA 1999) [24 Fla. L. Weekly D1317a].

In a PIP case, the Plaintiff's burden of proof in establishing its prima facie case to recover PIP benefits requires proof that its bills and/or charges for the services rendered are reasonable in price. *See Derius v. Allstate Indemnity Co.,* 723 So.2d 271 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a].

Legal Analysis

Doctrine of Collateral Estoppel (Issue Preclusion)

"Collateral estoppel is a judicial doctrine which in general terms prevents identical parties from relitigating the same issues that have already been decided." *Department of Health and Rehabilitative Services v. B.J.M.,* 656 So.2d 906, 910 (Fla. 1995) [20 Fla. L. Weekly S188a] (citing to *Mobil Oil Corp. v. Shevin,* 354 So. 2d 372, 374 (Fla. 1977) (action by oil companies should have been dismissed under doctrine of collateral estoppel since identical issue of Attorney General's authority was previously determined by the Fifth District Court of Appeal); *see also, Seaboard Coast Line Railroad v. Cox,* 338 So.2d 190 (Fla. 1976) (approving the District Court of Appeal's affirmance of lower court's grant of partial summary judgment as to issue of liability based on doctrine of collateral estoppel or estoppel by judgment); *Weiss v. Courshon,* 768 So.2d 2 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1237a] (applying the doctrine of collateral estoppel to prevent relitigating an action for accounting and breach of fiduciary duties which was decided in federal Court); *Provident Life and Accident Ins. Co. v. Genovese, M.D.,* 138 So.3d 474 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D442b] (reversing a trial court's denial of a motion for directed verdict and remanding for entry of directed verdict based on doctrine of collateral estoppel).

"The doctrine is intended to prevent repetitious litigation of what is essentially the same dispute". *Id.* (citing *Zimmerman v. State of Florida Office of Insurance Regulation,* 944 So.2d 1163 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D3126a]). The doctrine "serves to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.' " *United States v. Mendoza,* 464 U.S. 154, 158 (1984) (citing *Allen v. McCurry,* 449 U.S. 90, 94 (1980)).

Florida jurisprudence reflects that courts have applied the doctrine to various areas of law and causes of action such as breach of contract[7], wrongful death[8], negligence[9], declaratory relief[10], dissolution of marriage[11], uninsured motorist claim[12], constitutional challenges[13], action for accounting and breach of fiduciary duties[14], and appeals from administrative rulings[15].

"The essential elements of the doctrine are that the parties and issues be identical, and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction." *Department of Health and Rehabilitative Services v. B.J.M.,* 656 So.2d 906, 910 (Fla. 1995) [20 Fla. L. Weekly S188a] (quoting *Mobil Oil Corp. v. Shevin,* 354 So. 2d 372, 374 (Fla. 1977)); *Seaboard Coast Line Railroad v. Cox,* 338 So.2d 190 (Fla. 1976).

The Third District Court of Appeal has articulated and held that the following elements must be met for the application of the doctrine of Collateral Estoppel and/or Issue Preclusion: (1) the identical issues were presented in a prior proceeding; (2) there was a full and fair opportunity to litigate the issues in the prior proceeding; (3) the issues in the prior litigation were a critical and necessary part of the prior determination; (4) the parties in the two proceedings were identical; and (5) the issues were actually litigated in the prior proceeding. *See e.g., Pearce v. Sandler,* 219 So.3d 961 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1214b] (citing to *Topps v. State*, 865 So.2d 1253, 1255 (Fla. 2004) [29 Fla. L. Weekly S21a]; *see also Carnival Corp. v. Middleton,* 941 So.2d 421 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2480a].

As it pertains to the *first element,* the record before this Court reflects that in six (6) prior cases (Case Nos. 11-1491 CC 26, 11-1492 CC 26, 11-1873 SP 26, 11-1874 SP 26, 11-1870 SP 26, 11-1875 SP 26) the identical parties to this action previously litigated the reasonableness of Plaintiff's charges for the very same CPT codes at issue in this case: 99203 ($250), 72070 ($250), 72100 ($250), 97124 ($60), 97010 ($50), 97110 ($60), 97035 ($50), 97012 ($40), 97140 ($70), 97014 / G0283 ($50), 98940 ($85), 99213 ($150), 97112 ($70). As such, the first element for application of the doctrine has been met.

As it pertains to the *second and fifth elements,* the record before this Court reflects that in the prior cases litigated between the parties they had a full and fair opportunity to fully litigate the issue of reasonableness of Plaintiff's charges and the issue was actually litigated through final judgment after extensive motion practice, discovery and deposition(s), presentation of evidence, and service of affidavits and record evidence as to the central issue of reasonableness of Plaintiff's charges. As such, the second and fifth elements for application of the doctrine have been met.

As it pertains to the *third element,* "[a]n issue is a critical and necessary part of the prior proceeding where its determination is essential to the ultimate decision." *Provident Life and Accident Ins. Co. v. Genovese, M.D.,* 138 So.3d 474, 478 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D442b] (citing *Porter v. Saddlebrook Resorts, Inc.,* 679 So.2d 1212, 1215 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D1881a]). In the context of PIP litigation, the issue of reasonableness of charges is not only "a critical and necessary part" of the litigation, but same is in fact part and parcel of Plaintiff's prima facie burden of proof. *See Derius v. Allstate Indemnity Co.,* 723 So. 2d 271, 272 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a]. As such, the third element for application of the doctrine has been met.

As it pertains to the *fourth element,* the parties to the instant action are clearly the identical parties in the prior six (6) cases (Case Nos. 11-1491 CC 26, 11-1492 CC 26, 11-1873 SP 26, 11-1874 SP 26, 11-1870 SP 26, 11-1875 SP 26) where the issue of reasonableness of Plaintiff's charges was litigated through final judgment. As such, the fourth element for application of the doctrine has also been met.

Binding decisional precedent holds that once the elements are met, a court is obligated to apply the doctrine of collateral estoppel. *Provident Life and Accident Ins. Co. v. Genovese, M.D.,* 138 So.3d 474 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D442b] (reversing a trial court's denial of a motion for directed verdict and remanding for entry of directed verdict based on doctrine of collateral estoppel); *Mobil Oil Corp. v. Shevin,* 354 So. 2d 372, 374 (Fla. 1977) (remanding action to trial court with directions to have action by oil companies dismissed under doctrine of collateral estoppel since the issue pertaining to Attorney General's authority was previously adjudicated adversely to the companies by the Fifth District Court of Appeal). Additionally, our own Circuit, sitting in it appellate capacity just recently affirmed the entry of final judgment against the Defendant on the issue of reasonableness of charges holding that United was "precluded from re-litigating the issue of reasonableness under the doctrine of collateral estoppel," citing to *Pearce v. Sandler,* 219 So.3d 961 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1214b], see (Case No: 2018-228-AP-01: *United Automobile Insurance Company v. Doctor Rehab Center, Inc.*, Lower Case No: 2011-1980-SP-26, *Not a Final until disposition of any timely filed motion for rehearing, clarification, or certification).

Based on the foregoing, this Court finds that all elements for application of the doctrine of Collateral Estoppel have been met. As such, Plaintiff is entitled to judgment as a matter of law as to reasonableness of its charges for CPT codes 99203 ($250), 72070 ($250), 72100 ($250), 97124 ($60), 97010 ($50), 97110 ($60), 97035 ($50), 97012 ($40), 97140 ($70), 97014 / G0283 ($50), 98940 ($85), 99213

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($150), 97112 ($70) and Defendant is precluded from re-litigating same. To hold otherwise would circumvent the purpose and intent of the doctrine, result in unnecessary repetitious litigation, undermine the parties' reliance on prior adjudication, allow inconsistent decisions, and needlessly expend otherwise scarce judicial resources.

Accordingly, although the prior adjudications pertained to different motor vehicle accidents, patients, claims, and/or causes of action, the question or issue of reasonableness of Plaintiff's charges was common and litigated through final judgment in the prior actions. It is immaterial that the prior adjudications pertained to different motor vehicle accidents, patients, claims, and/or causes of action than in the instant case as there is no element requiring "identity in the thing sued for" and/or "identity of the cause of action" for application of the doctrine of Collateral Estoppel (Issue Preclusion).

Similarly, Defendant's argument that the parties are not identical since in each PIP case the Plaintiff received an assignment of benefits (commonly abbreviated as "AOB") from a different insured is without merit.

In *Seaboard Coast Line Railroad Co. v. Cox,* 338 So. 2d 190 (Fla. 1976) the Supreme Court of Florida rejected the same argument in the context of Collateral Estoppel. In *Seaboard Coast,* a guardian on behalf of a minor brought a successful suit for the wrongful death of the minor's mother establishing liability against a railroad company. The minor then brought a second suit for the wrongful death of his father and the trial court found that the railroad company was collaterally estopped on the issue of liability. On appeal the Supreme Court of Florida rejected the railroad company's argument that "there [was] no identity of the parties since the action is derivative in nature and stems from deaths of different persons", finding that the doctrine of Collateral Estoppel applies "in situations where the actions were derivative". Accordingly, although the instant action and the prior adjudications derive from different assignors, it is the very same Plaintiff medical provider—New Medical Group, Inc.,—that brought both this action and the prior adjudications, thereby meeting the identity of parties element for purposes of Collateral Estoppel.

Defendant's assignment of benefits argument also fails since under Collateral Estoppel only an "identity of the parties" is required and there is no element requiring "*identity of the quality or capacity*" of the parties.[16] Defendant argues that the Plaintiff, in this as well as the prior actions, is only acting in a "representative capacity" standing in the shoes of the assignor, as opposed to its "individual capacity" as a medical provider and corporate entity organized and existing under the laws of this State. Accordingly, even if it could be said that the Plaintiff was acting in different "capacities" in this and the prior actions, any such distinction is immaterial for purposes of Collateral Estoppel.

Moreover, this Court notes that the identity of parties element under the doctrine of Collateral Estoppel extends to parties "*and their privies*". *Southeastern Fidelity Ins. Co. v. Rice,* 515 So.2d 240, 242 (Fla. 4th DCA 1987); *see also, Stogniew v. McQueen*, 656 So.2d 917, 919 (Fla. 1995) [20 Fla. L. Weekly S208a]; *Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano*, 450 So.2d 843 (Fla. 1984) ("collateral estoppel may be asserted only when the identical issue has been litigated between the same parties or their privies"). Clearly, there is privity between the Plaintiff in the instant action as well as the Plaintiff in the prior PIP actions it filed, since both "have an interest in the action such that [they] will be bound by the final judgment as if [they] were a party". *Southeastern Fidelity Ins. Co. v. Rice,* 515 So.2d 240, 242 (Fla. 4th DCA 1987). Regardless of the assignee, New Medical Group, Inc. is a single corporate entity organized and existing under the laws of this State. It is this entity that is entitled to payment of PIP benefits, it is this entity that collects, deposits, and files suits for PIP payments from insurers, and it is this entity that would bound by any judgments in cases it filed as assignee of a PIP insured.[17]

Defendant's argument that the doctrine of Collateral Estoppel should not be applied since it believes the prior adjudications constitute error is also unavailing. This same argument was expressly rejected by the Supreme Court of Florida in *Seaboard Coast Line Railroad Co. v. Cox,* 338 So. 2d 190 (Fla. 1976):

> "We conclude that *there is no merit in petitioner's argument and that it is bound by the result of the first action.*
>
> We further hold that the *respondent may not now contest the propriety of applying the percentage of liability determination made by the jury in the first suit.* ***The respondent allowed the first judgment to become final without attack, and he cannot now collaterally attack that result.*** The petitioner's 15% nonliability as determined by the jury in the first trial is therefore applicable in the second action for damages."

As in *Seaboard Coast,* Defendant did not appeal any of the prior final judgments relied upon by the Plaintiff in asserting the doctrine of Collateral Estoppel. Defendant allowed the prior adjudications "to become final without attack" and "cannot now collaterally attack that result", that is, "it is bound by the result of the [prior] action[s]". *Id.*

Finally, the Court rejects Defendant's argument that it is barred from considering Plaintiff's Collateral Estoppel arguments and motion since the issue was not raised in a reply to Defendant's affirmative defenses. Fla. R. Civ. P. 1.100(a) requires filing of a "reply" to an affirmative defense only when the opposing party seeks to "avoid" that defense. Indeed, a plaintiff who "does not seek to avoid the substantive allegation of the defendant's affirmative defense. . .need not file, indeed, is precluded by the rules from filing, a reply". *Kitchen v. Kitchen,* 404 So.2d 201 (Fla. 2d DCA 1981). Plaintiff did not raise the doctrine of Collateral Estoppel to "avoid" any affirmative defenses pled by the Defendant. Instead, the doctrine was raised in regard to an element of Plaintiff's own prima facie burden of proof, to wit, the reasonableness of Plaintiff's charges. Accordingly, the rules and applicable law did not require, or even permit, Plaintiff to file a "reply" asserting the doctrine of Collateral Estoppel in this case.

Conclusion

Accordingly, based on this Court's analysis set forth above, it is

ORDERED AND ADJUDGED that Plaintiff's Motion for Order Precluding Defendant From Contesting the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel and Plaintiff's Motion for Summary Judgment as to the Reasonableness of Plaintiff's Charges Based on the Doctrine of Collateral Estoppel is hereby GRANTED. Plaintiff's charges for treatment and/or CPT codes 99203 ($250), 72070 ($250), 72100 ($250), 97124 ($60), 97010 ($50), 97110 ($60), 97035 ($50), 97012 ($40), 97140 ($70), 97014 / G0283 ($50), 98940 ($85), 99213 ($150), 97112 ($70) are reasonable in price as a matter of law and Defendant is precluded from re-litigating same pursuant to the doctrine of Collateral Estoppel and/or Issue Preclusion.

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[1]This case adjudicated the reasonableness of Plaintiff's charges for the following treatment and/or CPT codes: 99203 ($250), 72070 ($250), 72100 ($250), 97124 ($60), 97010 ($50), 97110 ($60), 97035 ($50), 97012 ($40), 97140 ($70), G0283 / 97014 ($50), 98940 ($85), 99213 ($150), 97112 ($70). A final judgment was entered in favor of Plaintiff and against Defendant on April 14, 2015.

[2]This case adjudicated the reasonableness of Plaintiff's charges for the following treatment and/or CPT codes: 99203 ($250), 72070 ($250), 97124 ($60), 97010 ($50), 97110 ($60), 97035 ($50), 97012 ($40), 97140 ($70), G0283 / 97014 ($50), 98940 ($85), 99213 ($150), 97112 ($70). A final judgment was entered in favor of Plaintiff and against Defendant on April 14, 2015.

[3]This case adjudicated the reasonableness of Plaintiff's charges for the following treatment and/or CPT codes: 99203 ($250), 97124 ($60), 97010 ($50), 97110 ($60), 97035 ($50), 97012 ($40), 97140 ($70), G0283 / 97014 ($50), 98940 ($85), 99213

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($150), 97112 ($70). A final judgment was entered in favor of Plaintiff and against Defendant on April 14, 2015.

[4]This case adjudicated the reasonableness of Plaintiff's charges for the following treatment and/or CPT codes: 99203 ($250), 72070 ($250), 72100 ($250), 97124 ($60), 97010 ($50), 97110 ($60), 97035 ($50), 97012 ($40), 97140 ($70), G0283 / 97014 ($50), 98940 ($85), 99213 ($150), 97112 ($70). A final judgment was entered in favor of Plaintiff and against Defendant on April 14, 2015.

[5]This case adjudicated the reasonableness of Plaintiff's charges for the following treatment and/or CPT codes: 99203 ($250), 97124 ($60), 97010 ($50), 97110 ($60), 97035 ($50), 97012 ($40), 97140 ($70), G0283 / 97014 ($50), 98940 ($85), 99213 ($150), 97112 ($70). A final judgment was entered in favor of Plaintiff and against Defendant on April 14, 2015.

[6]This case adjudicated the reasonableness of Plaintiff's charges for the following treatment and/or CPT codes: 99203 ($250), 97124 ($60), 97010 ($50), 97110 ($60), 97035 ($50), 97012 ($40), 97140 ($70), G0283 / 97014 ($50), 98940 ($85), 99213 ($150), 97112 ($70). A final judgment was entered in favor of Plaintiff and against Defendant on April 14, 2015.

[7]*See e.g., West Point Const. Co. v. Fidelity and Deposit Co. of Maryland*, 515 So.2d 1374 (Fla. 3d DCA 1987); *Daniel Intern. Corp. v. Better Const., Inc.*, 593 So.2d 524 (Fla. 3d DCA 1991); *Wise v. Tucker,* 399 So.2d 500 (Fla. 4th DCA 1981); *Provident Life and Accident Ins. Co. v. Genovese, M.D.,* 138 So.3d 474 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D442b].

[8]*See e.g., Rehe v. Airport U-Drive, Inc.*, 63 So.2d 66 (Fla. 1953); *Seaboard Coast Line Railroad Co. v. Cox,* 338 So. 2d 190 (Fla. 1976).

[9]*See e.g., Shearn v. Orlando Funeral Home, Inc.*, 88 So.2d 591 (Fla. 1956); *Lorf v. Indiana Insurance Co.,* 426 So.2d 1225 (Fla. 4th DCA 1983); *Husky Industries, Inc. v. Griffith,* 422 So.2d 996 (Fla. 5th DCA 1982).

[10]*See e.g., Mobil Oil Corp. v. Shevin*, 354 So.2d 372 (Fla. 1977); *Paresky v. Miami-Dade County Bd. Of County Com'rs,* 893 So.2d 664 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D462b]; *Essenson v. Polo Club Associates,* 688 So. 2d 981 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D552a].

[11]*See e.g., Field v. Field,* 91 So.2d 640 (Fla. 1956).

[12]*See e.g., U.S. Fidelity & Guar. Co. v. Odoms,* 444 So. 2d 78 (Fla. 5th DCA 1984).

[13]*See e.g., GLA and Associates, Inc., v. City of Boca Raton,* 855 So.2d 278 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2318a].

[14]*See e.g., Weiss v. Courshon*, 768 So.2d 2 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1237a].

[15]*See e.g., Zimmerman v. State Office of Ins. Regulation*, 944 So.2d 1163 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D3126a].

[16]As discussed above, the element requiring "identity of the quality or capacity" of the parties is applicable in the context of Res Judicata, not Collateral Estoppel. *Pearce v. Sandler,* 219 So.3d 961, 966-67 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1214b].

[17]To illustrate this point, suppose Defendant had prevailed in a suit brought by Plaintiff as assignee of an insured, resulting in Defendant obtaining a judgment for attorney's fees incurred in the litigation. Plaintiff could not avoid payment of the judgment by asserting that it was merely acting in a "representative capacity" in the suit and that the entity as assignee does not have a bank account or any funds to its name. Clearly, Plaintiff in its "individual capacity" as a corporate entity would be required to pay the judgment.

* * *

Insurance—Personal injury protection—Affirmative defenses—Accord and satisfaction—"Full and final" language on check in same size as surrounding text and not distinguished by contrasting type, font, or color does not amount to conspicuous statement—Medical provider's motion for summary judgment on defense is granted

NEW MEDICAL GROUP INC., a/a/o Anisleidys Ravelo, Plaintiff, v. UNITED AUTOMOBILE INSURANCE CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County, Small Claims Division. Case No. 2011-002943-SP-21, Section HI 01. January 23, 2020. Milena Abreu, Judge. Counsel: Majid Vossoughi and David J. Mannering, Majid Vossoughi, P.A., Miami, for Plaintiff. Paula Elkea Ferris, House Counsel United Auto Ins. Co., Miami Gardens, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S ACCORD AND SATISFACTION AFFIRMATIVE DEFENSE AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON ACCORD AND SATISFACTION

FACTUAL BACKGROUND:

1. This case stems from an alleged car accident that occurred on 7/23/09.

2. The claimant, Anisleidys M. Ravelo received treatment from the Plaintiff from July 28, 2009 through August 10, 2009.

3. On or about October 20, 2009, Defendant tendered drafts to Plaintiff for the services rendered between July 28, 2009, and August 10, 2009.

4. The benefits draft tendered by Defendant contained the following language on the payee line of the check:

> "NEW MEDICAL GROUP, a/a/o Anisleidys Ravelo, dos: 07/29/09-.08/10/09. Full and Final payment for Pip Benefits

5. Attached to the check was the Defendant's Explanation of Review.

6. Payment was accepted by Plaintiff and the check cashed.

7. As a result, Defendant asserts Plaintiff accepted and negotiated the draft in accord and satisfaction of its bills.

8. Plaintiff subsequently filed the instant lawsuit against Defendant.

LEGAL ANALYSIS:

Pursuant to Florida Stat. 673.311, accord and satisfaction requires the Defendant to prove:

> (i) That its tender was in good faith;
>
> (ii) That the amount of the claim was "unliquidated" or "subject to a bonafide dispute"; and
>
> (iii) That the instrument (check) or an accompanying written communication contained a "conspicuous statement" to the effect that the instrument was tendered in full satisfaction of the claim.

During the hearing of January 15, 2020, the Court made factual findings the Defendant met the first two elements of accord and satisfaction; Specifically the Court found that the check was in fact tendered in good faith and the amount of the claim subject to a bonafide dispute. Thereafter, the Court focused its inquiry on the third element of the statute—whether the check in fact contains a "conspicuous statement" tendered in full satisfaction of the claim.

The Court finds the Defendant's tender of payment does not meet the statutory requirement that it be "conspicuous" as defined by Florida Statute, 671.201(10). Specifically, 671.201(10) states:

> (10) "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" is a decision for the court. Conspicuous terms include the following:
>
> (a) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
>
> (b) Language in the body of a record or display in larger type than the surrounding text or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

The Court first notes of importance that the record evidence is a black and white copy of an original check. The Court was not provided with the original check. Defense counsel did advise and the parties agreed the color of the typesetting on the entirety of the check was black.

In this case the Court finds no "heading" other than the preprinted name of the Defendant Insurance Company on the top of the check. The focus therefore is on the language in the *body of the payee line on the draft*; Specifically the Court finds with regards to the specific language/text on the draft:

> 1) The text is *not* in capital letters equal to or greater in size than any other writing on the payee line; in fact it is the opposite: the text is all printed in *lower case*; (but for the name of the Plaintiff that is in capital letters);
>
> 2) The font size appears to be smaller than the rest of the text on the entirety of the check;
>
> 3) No differentiating color to highlight the language;
>
> 4) No set off of the text by symbol or marks of any kind from any of the surrounding text;

Plaintiff relies on the case of *Gonzalez v. Associates Life Ins., Co.*,

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641 So.2d 895 (Fla. 3d DCA 1994) to support its own Motion for Summary Judgment on the issue of accord and satisfaction. The *Gonzalez* court found the language in the body of a policy was not "conspicuous" because "the language in question is in no way distinguished from the reminder of the data page provisions. The fact that this language is not highlighted, set apart, or emphasized in any way, renders it not conspicuous."

While the Defendant asserted the *Gonzalez* case was distinguishable in that the case dealt with a specific clause contained within a policy and not a check, this Court finds that argument of no consequence. As the *Gonzalez* case noted that while the language was clearly legible and not buried in the midst of dense language or fine print, the applicable statute in that case required the language to be "conspicuous."

Similarly, while the text in the payee line of the check in the instant case may be discernible, it is not conspicuous as defined by Florida Statute 671.201. *See also United Auto Ins. Co. v. Gables Ins. Recovery, Inc., a/a/o Laraine Marques*, 26 Fla. L. Weekly Supp. 460a (Fla. 11th Cir. Appellate, July 30, 2018); *Michael J. Delesparra, D.C., P.A., v. United Auto Ins. Co.*, 19 Fla. L. Weekly Supp. 214a (Fla. 17th Cir.Cty., Judge Lee, December 8, 2011); *Atlantic Acu-Medical Center Corp., a/a/o Guillaume Baptiste v. United Auto. Ins. Co.*, 16 Fla. L. Weekly Supp. 781a (Fla. 17th Cir. City., Judge Merrigan, May 26, 2009); *MRI Services I, Inc., a/a/o Kevin Henderson v. United Auto Ins. Co.*, 22 Fla. L. Weekly Supp. 856a (Fla. 17th Cir. Cty., Judge Lee, January 14, 2015); *Progressive Rehab. And Orthopedic Services, LLC a/a/o Victor Bure-Figueroa v. United Auto. Ins. Co.*, 20 Fla. L. Weekly Supp. 438a (Fla. 11th Cir. Cty., Judge King, August 31, 2015).

The Defendant also asserts accord and satisfaction under common law that requires: 1) mutual intent to effect a settlement of an existing dispute by entering into a superseding agreement; and 2) actual performance in accordance with the new agreement." Defendant argues the cashing of the check was the superseding agreement. The Court disagrees. Furthermore, accord and satisfaction has been codified in Florida pursuant to statute, 673.311, thereby eliminating the common law "meeting of the minds" and instead requiring "conspicuousness."

SUMMARY JUDGMENT

Pursuant to Fla. R. Civ. P. 1.150(c), summary judgment is warranted "if the pleadings, and summary judgment evidence on file show that there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law." *See also State Farm Mut. Auto. Co. v. Gonzalez*, 178 So.3d 448, 450 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2352a], citing *State Farm Mut. Auto. Ins. Co. v. Pressley*, 28 So.3d 105, 107 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D150b]. The party moving for summary judgment must present evidence supporting its claim and once it does, the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue." *R. Plants, Inc. v. Dome Enters.*, 221 So.3d 752, 753-54 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1319a] citing *Landers v. Milton*, 370 So.2d 368, 370 (Fla. 1979). Moreover, because the issue of "conspicuousness" is a question of law for this Court's determination, from the plain and unambiguous language of the applicable statutes in this case, the Court finds the defense of accord satisfaction fails as a matter of law.

Accordingly, Defendant's Motion for Summary Judgment as to the Defense of Accord and Satisfaction is respectfully **denied** and the Plaintiff's Motion for Summary Judgment on Defendant's Affirmative Defense of Accord and Satisfaction is **granted.**

* * *

Insurance—Personal injury protection—Coverage—Medical expenses— Reasonableness of charges—Collateral estoppel—Prior proceedings between insurer and medical provider do not bar litigation of issue of reasonableness of charges in present case where amounts at issue, CPT codes sued for, theories of breach, and motions for summary judgment in present action differ from those in prior proceedings—Although insurer confessed judgment in prior actions, insurer did not acquiesce that charges were reasonable

NEW MEDICAL GROUP INC., a/a/o Sonia Pita, Plaintiff, v. STATE FARM MUTUAL AUTO. INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2015-000053-SP-25, Section CG01. September 29, 2020. Linda Melendez, Judge. Counsel: Jose O. Diaz and Daniel Martinez, Hialeah, for Plaintiff. Scott E. Danner, Kirwan, Spellacy & Danner, Fort Lauderdale, for Defendant.

ORDER DENYING THE PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING COLLATERAL ESTOPPEL

THIS MATTER came before the Court on September 10, 2020 on *Plaintiff's Motion for Partial Summary Judgment Regarding the Reasonableness of Plaintiff's Charge.* The Court heard argument of counsel, reviewed the record, including the Plaintiff's Motion for Partial Summary Judgment, Plaintiff's requests for judicial notice, *Plaintiff's Notice of Filing—Fernandez Action, Plaintiff's Notice of Filing—Delgado Action, Plaintiff's Memorandum of Law re: Collateral Estoppel as a Bar to Preclude Defendant from Re-Litigating the Reasonableness of Plaintiff's Charges, Defendant's Response to Plaintiff's Motion for Partial Summary Judgment Regarding the Reasonableness of Plaintiff's Charges* (the "Response"), the Affidavit of Fernando Menendez filed by Defendant (the "Menendez Affidavit"), Plaintiff's *Second Notice of Supplemental Authority in Support of Plaintiff's Motion for Partial Summary Judgment Regarding the Reasonableness of Plaintiff's Charges* and *Defendant's Notice of Filing and Notice of Intent to Rely on Case Law*, and is otherwise fully advised in the premises. The Court finds as follows:

1. Plaintiff filed the instant action for breach of an insurance contract as a result of Defendant's alleged failure to properly pay to Plaintiff no-fault benefits for medical services provided by Plaintiff to Sonia Pita as a result of an automobile accident that allegedly occurred on or about December 4, 2009.

2. Plaintiff's alleges that the charges for the following CPT Codes / services are at issue in the case at bar: G0283, 72040, 72100, 97010, 97012, 97035, 97112, 97124, 97140, 97530, 99203 and 99213.

3. The Plaintiff asked the court to take judicial notice of the following separate actions against Defendant: (1) *New Medical Group, Inc. (Claudette Fernandez) v. State Farm Mutual Automobile Ins. Co.*, Case #15-5282-SP-05 (the "Fernandez Action"); and (2) *New Medical Group, Inc. (Mercedes Delgado) v. State Farm Mutual Automobile Ins. Co.*, Case #15-5281-SP-05 (the "Delgado Action").

4. In addition to filing the Complaint in these actions the Plaintiff also filed copies of the Motions for Summary Judgment that were the crux of these cases alleging that the Defendant had improperly paid the medical bills at issue pursuant to the 2010A rather that the 2010B Medicare Part B Fee Schedule and also alleging that the 2.2% update was at issue in these cases.

5. Moreover, in each of the aforementioned cases the Plaintiff filed Affidavits from its corporate representative authenticating the records and offering an opinion on the reasonableness of the charges. No such affidavit was filed in the instant case by counsel for the Plaintiff.

6. In contrast, the Defendant filed the affidavit of Fernando Menendez who testified that the Defendant made a strategic business decision to resolve the aforementioned cases with confessions of judgment due to a change in the prevailing law and changes of

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circumstances, that it was a strategic business decision made to resolve the aforementioned matters based on the changes in the law and circumstances and to end the accumulation of attorney's fees on a case that was no longer viable.

7. In confessing judgment, the Defendant merely ended the litigation, it did not admit that the charges and CPT codes at issue in the cases were per se reasonable, related or necessary. That the issue of reasonableness of charges was not fully litigated in the earlier cases and the confessions of judgment did not equate to adjudications on the merits.

8. That there was not an order or final judgment entered determining the merits of the earlier cases or that Plaintiff's charges for the CPT Codes at issue in these cases were reasonable, and the cases involved different CPT Codes and different circumstances. Through its confessions of judgment, Defendant did not admit that the Plaintiff's charges were reasonable and did not waive its defenses on the issue of reasonableness of Plaintiff's charges.

9. Based on the foregoing and the evidence in the record there remains a genuine issue of material fact regarding the reasonableness of the charges.

10. In *Pearce v. Sandler,* 219 So.3d 961, 965 (Fla. 3rd DCA 2017) [42 Fla. L. Weekly D1214b] *quoting Topps v. State,* 865 So. 2d 1253, 1255 (Fla. 2004) [29 Fla. L. Weekly S21a] the Third District Court of Appeal identified the following elements that must be met for the collateral estoppel doctrine to apply:

> (1) The identical issues were presented in a prior proceeding;
> (2) There was a full and fair opportunity to litigate the issues in the prior proceeding;
> (3) The issues in the prior litigation were a critical and necessary part of the prior determination;
> (4) The parties in the two proceedings were identical; and
> (5) The issues were actually litigated in the prior proceeding.

11. Here the plaintiffs seek to employ collateral estoppel offensively, to preclude the Defendant from asserting a defense regarding the reasonableness of the Plaintiff's charges. "[T]he offensive use of collateral estoppel is a generally accepted practice in American courts,' . . . and occurs when a plaintiff seeks to prevent a defendant from litigating issues which the defendant has previously litigated unsuccessfully in an action against another party." *Pierce v. Morrison Mahoney LLP,* 452 Mass. 718, 730, 897 N.E.2d 562 (2008), quoting *Bar Counsel v. Board of Bar Overseers,* 420 Mass. 6, 9, 647 N.E.2d 1182 (1995).

12. While offensive collateral estoppel is a "generally accepted practice," the court in *Pierce* stated that courts should perform a careful evaluation of the circumstances of the prior litigation before invoking the doctrine, to ensure that it is being fairly applied in the circumstances.

13. Counsel for Plaintiff has provided very limited information to the court from the prior litigation and admitted during the hearing on the Motion for Summary Judgment that the CPT codes at issue in the Fernandez and Delgado actions included CPT codes that were not at issue in this case. Those codes include 72070, 98940 and 98941 which were the subject of extensive litigation and the 2.2% issue that is not present in the case at bar. Plaintiff readily admits that the CPT codes in these case are not identical.

14. Defendant asserts in the affidavit of Fernando Menendez that the confessions of judgment were not on the merits of the reasonableness of the charges, but were based on a business decision, a change in the law and to end the accumulation of the attorney's fees and costs in a case that was not viable. In *Gentile v. Bauder,* 718 So. 2d 781, 782, (Fla. 1998) [23 Fla. L. Weekly S488a] the issue before the district court was not identical to the issue in the subsequent case. The Florida Supreme Court held that since there were different facts outlined in the affidavits that the elements of collateral estoppel did not apply. See *Malley v. Briggs,* 475 U.S. 335, 345, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).

15. Because Defendant confessed judgment in the earlier cases for strategic reasons and not to admit the reasonableness of the Plaintiff's charges, it would be highly prejudicial, unjust, and contrary to Florida law to apply the doctrine of collateral estoppel to prohibit a reasonableness challenge. In *Pearce v. Sandler,* 219 So.3d 961, 965 (Fla. 3rd DCA 2017) [42 Fla. L. Weekly D1214b] the 2013 Action was barred by the doctrines of collateral estoppel and res judicata as the 2010 and 2013 Actions were, in fact, identical in things sued for, operative facts, parties and capacity of the parties. That is not the case here as the cased do not have the identical set of facts.

16. In the instant case the amounts at issue, the CPT codes sued for, the theory of the breach, the motions for summary judgment are all different than in the case that the Plaintiff is cites as being "identical". Application of the doctrine of res judicata rests, not only on the presence of four identities—identities of the persons or parties, of the quality or capacity of the person for or against whom the claim is made, of the cause of action, and of the thing sued for in each action—*Albrecht v. State,* 444 So.2d 8 (Fla. 1984); *Rajsfus v. Fabri,* 535 So.2d 690 (Fla. 3d DCA 1988), but also on an adjudication on the merits, which did not happen in either the Delgado or the Fernandez Action. The Defendant confessed judgment and did not acquiesce that the charges were reasonable.

17. According to the holding in *State St. Bank & Trust Co. v. Badra*, 765 So. 2d 251, 254 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1880a] A judgment rendered on any grounds which do not involve the merits of the action may not be used as the basis for the operation of the doctrine of res judicata.

18. The merits of the underlying cases were related to the underpayment by the Defendant who allegedly misapplied the 2010A Medicare Part B Fee Schedule as opposed to the 2010B Medicare Part B Fee Schedule and the 2.2% update as outlined in the Motions for Summary Judgment attached to the Request for Judicial Notice filed by the Plaintiff. No such allegations were put forth in this case.

19. Finally, Fla. Stat. 627.736(4)(b) (2009) contemplates the collateral estoppel argument and gives the insurer the opportunity to litigate the Plaintiff's charges, even after the medical benefits have already been paid. The statute states *inter alia*:

> This paragraph does not preclude or limit the ability of the insurer to assert that the claim was unrelated, was not medically necessary, or was unreasonable or that the amount of the charge was in excess of that permitted under, or in violation of, subsection (5). ***Such assertion by the insurer may be made at any time,*** including after payment of the claim or after the 30-day time period for payment set forth in this paragraph.

The statue gives the insurer great latitude to litigate the issue of reasonable, related and necessity and does not limit the insurer in any way because of the payment of a prior claim or even a payment in the claim that is at issue in the Complaint.

Accordingly, it is ORDERED and ADJUDGED that Plaintiff's Motion for Partial Summary is hereby **DENIED.**

* * *

Civil procedure—Failure to perfect service within 120 days—Dismissal

CAPITAL ONE BANK (USA), N.A., Plaintiff, v. RANDY NORMAN, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-024014-CC-25, Section CG01. October 5, 2020. Linda Melendez, Judge. Counsel: Shera Erskine Anderson and Ofer Shmucher, Weston, for Defendant.

ORDER GRANTING THE DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before the Court at a hearing on the Defen-

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dant's Motion to Dismiss, and the Court having considered same, having reviewed the file and being otherwise fully advised in the premises, the Court finds as follows:

Findings of Fact

1. The Plaintiff initiated the above captioned cause of action on October 29, 2018 and failed to effectuate service within 120-days therefrom.

2. The Plaintiff failed to seek an extension from this Court to effectuate service beyond 120-days from the date that the Complaint was filed.

3. The Plaintiff failed to submit a showing of good cause or excusable neglect as to why it failed to effectuate service within 120-days from the date that the Complaint was filed.

Applicable Legal Authority

4. *Fla. R. Civ. P.* 1.070(j) requires that service of an initial pleading is effectuated within 120-days after the initial pleading is filed. *Alternative Med. Ctr. of Fla., Inc. v. Navarro,* 25 Fla. L. Weekly Supp. 105a (Fla. 11th Cir. Ct. 2017).

5. Where a party is unable to effectuate service within the time set forth under *Fla. R. Civ. P.* 1.070(j), the party must obtain permission from the court to continue to attempt service after the expiration of the 120-day time frame.

6. A party seeking to extend the 120-day deadline must also submit to the Court a showing of good cause or excusable neglect in the form of an affidavit or other evidence. *Navarro, supra.*

7. Where the record is devoid of any showing of good cause or excusable neglect by the party seeking to extend the 120-day deadline, dismissal is warranted. *Unifund CCR Partners v. King,* 20 Fla. L. Weekly Supp. 157b (Fla. 17th Cir. Ct. 2012).

It is therefore ORDERED AND ADJUDGED:

8. The Defendant's Motion to Dismiss is hereby GRANTED insofar as the Plaintiff failed request from the Court an extension of time to effectuate service on the Defendant and insofar as the record is devoid of any evidence reflecting a showing of good cause of excusable neglect as to the Plaintiff's failure to effectuate service.

9. That, predicated upon the foregoing findings of fact, the above cause of action is hereby DISMISSED.

* * *

Insurance—Personal injury protection—Affirmative defenses—Accord and satisfaction—"Full and final" language on check in same size as surrounding text and not distinguished by contrasting type, font or color does not amount to conspicuous statement—Medical provider's motion for summary judgment on defense is granted

NEW MEDICAL GROUP INC., a/a/o Fernando V. Bowles, Plaintiff, v. UNITED AUTOMOBILE INSURANCE CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County, Small Claims Division. Case No. 2011-002942-SP-21, Section HI 01. January 23, 2020. Milena Abreu, Judge. Counsel: Majid Vossoughi and David J. Mannering, Majid Vossoughi, P.A., Miami, for Plaintiff. Paula Elkea Ferris, House Counsel United Auto Ins. Co., Miami Gardens, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S ACCORD AND SATISFACTION AFFIRMATIVE DEFENSE AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON ACCORD AND SATISFACTION

FACTUAL BACKGROUND:

1. This case stems from an alleged car accident that occurred on 6/9/10.

2. The claimant, Fernando V. Bowles received treatment from the Plaintiff from June 10, 2010 through December 2, 2010.

3. On or about October 13, 2010, Defendant tendered drafts to Plaintiff for the services rendered between June 10, 2010 and August 20, 2010.

4. The benefits draft tendered by Defendant contained the following language on the payee line of the check:

> "NEW MEDICAL GROUP, INC.
> for full and final pay for serv. to fernando velazco 6/11/10
> 8/20/10 red. based on fee schedule and deductible."

5. Attached to the check was the Defendant's Explanation of Review.

6. Payment was accepted by Plaintiff and the check cashed.

7. As a result, Defendant asserts Plaintiff accepted and negotiated the draft in accord and satisfaction of its bills.

8. Plaintiff subsequently filed the instant lawsuit against Defendant.

LEGAL ANALYSIS:

Pursuant to Florida Stat. 673.311, accord and satisfaction requires the Defendant to prove:

> (i) That its tender was in good faith;
> (ii) That the amount of the claim was "unliquidated" or "subject to a bonafide dispute"; and
> (iii) That the instrument (check) or an accompanying written communication contained a "conspicuous statement" to the effect that the instrument was tendered in full satisfaction of the claim.

During the hearing of January 15, 2020, the Court made factual findings the Defendant met the first two elements of accord and satisfaction; Specifically the Court found that the check was in fact tendered in good faith and the amount of the claim subject to a bonafide dispute. Thereafter, the Court focused its inquiry on the third element of the statute—whether the check in fact contains a "conspicuous statement" tendered in full satisfaction of the claim.

The Court finds the Defendant's tender of payment does not meet the statutory requirement that it be "conspicuous" as defined by Florida Statute, 671.201(10). Specifically, 671.201(10) states:

> (10) "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" is a decision for the court. Conspicuous terms include the following:
> (a) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
> (b) Language in the body of a record or display in larger type than the surrounding text or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

The Court first notes of importance that the record evidence is a black and white copy of an original check. The Court was not provided with the original check. Defense counsel did advise and the parties agreed the color of the typesetting on the entirety of the check was black.

In this case the Court finds no "heading" other than the preprinted name of the Defendant Insurance Company on the top of the check. The focus therefore is on the language in the *body of the payee line on the draft*; Specifically the Court finds with regards to the specific language/text on the draft:

> 1) The text is *not* in capital letters equal to or greater in size than any other writing on the payee line; in fact, it is the opposite: the text is all printed in *lower case*;
> 2) There appears to be no difference in font size;
> 3) No differentiating color to highlight the language;
> 4) No set off of the text by symbol or marks of any kind from any of the surrounding text;
> 5) The dates of service as written in the payee line, ("6/11/10 8/20/10") is confusing and impossible to determine whether the Defendant means only those two specific dates of service or *all* treatment rendered between the two dates of service;

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6) The check amount for $ 5,408.95 includes a date of service for June 10, 2010 pursuant to the explanation of review submitted together with the check, yet this date of service is not included within the language/text of the draft.

Plaintiff relies on the case of *Gonzalez v. Associates Life Ins., Co.*, 641 So.2d 895 (Fla. 3d DCA 1994) to support its own Motion for Summary Judgment on the issue of accord and satisfaction. The *Gonzalez* court found the language in the body of a policy was not "conspicuous" because "the language in question is in no way distinguished from the reminder of the data page provisions. The fact that this language is not highlighted, set apart, or emphasized in any way, renders it not conspicuous."

While the Defendant asserted the *Gonzalez* case was distinguishable in that the case dealt with a specific clause contained within a policy and not a check, this Court finds that argument of no consequence. As the *Gonzalez* case noted that while the language was clearly legible and not buried in the midst of dense language or fine print, the applicable statute in that case required the language to be "conspicuous."

Similarly, while the text in the payee line of the check in the instant case may be discernible, it is not *conspicuous* as defined by Florida Statute 671.201. *See also United Auto Ins. Co. v. Gables Ins. Recovery, Inc., a/a/o Laraine Marques*, 26 Fla. L. Weekly Supp. 460a (Fla. 11th Cir. Appellate, July 30, 2018); *Michael J. Delesparra, D.C., P.A., v. United Auto Ins. Co.*, 19 Fla. L. Weekly Supp. 214a (Fla. 17th Cir.Cty., Judge Lee, December 8, 2011); *Atlantic Acu-Medical Center Corp., a/a/o Guillaume Baptiste v. United Auto. Ins. Co.*, 16 Fla. L. Weekly Supp. 781a (Fla. 17th Cir. Ct., Judge Merrigan, May 26, 2009); *MRI Services I, Inc., a/a/o Kevin Henderson v. United Auto Ins. Co.*, 22 Fla. L. Weekly Supp. 856a (Fla. 17th Cir. Cty., Judge Lee, January 14, 2015); *Progressive Rehab. And Orthopedic Services, LLC a/a/o Victor Bure-Figueroa v. United Auto. Ins. Co.*, 20 Fla. L. Weekly Supp. 438a (Fla. 11th Cir. Cty., Judge King, August 31, 2015).

The Defendant also asserts accord and satisfaction under common law that requires: 1) mutual intent to effect a settlement of an existing dispute by entering into a superseding agreement; and 2) actual performance in accordance with the new agreement." Defendant argues the cashing of the check was the superseding agreement. The Court disagrees. Furthermore, accord and satisfaction has been codified in Florida pursuant to statute, 673.311, thereby eliminating the common law "meeting of the minds" and instead requiring "conspicuousness."

SUMMARY JUDGMENT

Pursuant to Fla. R. Civ. P. 1.150(c), summary judgment is warranted "if the pleadings, and summary judgment evidence on file show that there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law." *See also State Farm Mut. Auto. Co. v. Gonzalez,* 178 So.3d 448, 450 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2352a], citing *State Farm Mut. Auto. Ins. Co. v. Pressley*, 28 So.3d 105, 107 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D150b]. The party moving for summary judgment must present evidence supporting its claim and once it does, the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue." *R. Plants, Inc. v. Dome Enters.*, 221 So.3d 752, 753-54 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1319a] citing *Landers v. Milton*, 370 So.2d 368, 370 (Fla. 1979). Moreover, because the issue of "conspicuousness" is a question of law for this Court's determination, from the plain and unambiguous language of the applicable statutes in this case, the Court finds the defense of accord satisfaction fails as a matter of law.

Accordingly, Defendant's Motion for Summary Judgment as to the Defense of Accord and Satisfaction is respectfully **denied** and the Plaintiff's Motion for Summary Judgment on Defendant's Affirmative Defense of Accord and Satisfaction is **granted.**

* * *

Insurance—Personal injury protection—Discovery—Motion for protective order is granted—Testimony of litigation adjuster, pre-litigation adjuster, or corporate representative sought through discovery will not lead to admissible evidence as to purely legal issues of unbundling of CPT codes and sufficiency of demand letter

COLUMNA, INC., a/a/o Ovar Bailey, Plaintiff, v. ALLSTATE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-028305-SP-25, Section CG02. August 4, 2020. Elijah A. Levitt, Judge. Counsel: Angelica Gentile, Shamis & Gentile, P.A., Miami, for Plaintiff. Matthew J. Hier, Shutts & Bowen LLP, Miami, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR PROTECTIVE ORDER AND PLAINTIFF'S MOTION TO COMPEL DEPOSITIONS OF PRE-LITIGATION AND LITIGATION ADJUSTERS WITH THE MOST KNOWLEDGE OF CLAIM AND PLAINTIFF'S MOTION TO COMPEL DEFENDANT TO DESIGNATE A RULE 1.310(B)(6) CORPORATE REPRESENTATIVE FOR DEFENDANT

THIS CAUSE came before the Court on August 03, 2020, on Defendant's Motion for Protective Order and Plaintiff's Motion to Compel Depositions of Pre-Litigation and Litigation Adjusters with the Most Knowledge of Claim, and Plaintiff's Motion to Compel Defendant to Designate a Rule 1.310(b)(6) Corporate Representative for Defendant, and, the Court having reviewed the motions, procedural history, Defendant's Notice of Filing supplemental authority, having heard the argument of counsel, and being otherwise fully advised in the premises, does hereby makes the following findings of fact and conclusions of law:

Findings of Fact

1. On February 19, 2020, Plaintiff filed its Amended Complaint alleging a breach-of-contract action, claiming entitlement to $240.00 for personal injury protection ("PIP") benefits.

2. On March 02, 2020, Allstate answered and asserted, in part, four affirmative defenses that Plaintiff's separate billings for the professional component for MRIs 72141-26 and 72148-26, are improperly unbundled from Plaintiff's billing of code 99204, office visit. Additionally, Allstate asserted, in part, two affirmative defenses related to the deficiencies of Plaintiff's pre-suit demand, and failure to satisfy a condition precedent to filing suit.

3. In its response to Plaintiff's initial Request for Admissions, Allstate conceded relatedness and medical necessity of the treatment provided by Plaintiff. Allstate denied that Plaintiff's bills were reasonable in price.[1]

Conclusions of Law

Under Florida Rule of Civil Procedure 1.280(c), the Court may render a protective order to protect a party "from annoyance, embarrassment, oppression or undue burden or expense."

In the instant case, a protective order is warranted to protect Allstate from undue expense because the issue of whether codes 72141-26 and 72148-26 are improperly unbundled from code 99204 is a pure question of law that involves this Court's interpretation of section 627.736(5)(d), Florida Statutes, and the relevant authorities stated therein, namely the Current Procedural Terminology (CPT) Manual and the CPT Assistant. *See State Farm Auto Ins. Co. v. R.J. Trapana, M.D., P.A.*, 23 Fla. L. Weekly Supp. 98a (Fla. 17th Cir. Ct. May 14, 2015). Additionally, the issue of whether Columna, Inc. failed to comply with a condition precedent to filing suit, i.e., the sufficiency of Plaintiff's pre-suit demand is purely a legal issue.

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The Court finds that the testimony of the pre-litigation adjuster, litigation adjuster, or Corporate Representative will not lead to the discovery of admissible evidence as to the issues pled in this case. Accordingly, testimony on either issue is not appropriate at this time.

Based on the foregoing findings of fact and conclusions of law, it is hereby **ORDERED AND ADJUDGED**:

1. Defendant's Motion for Protective Order is **GRANTED**. Plaintiff's Motions to Compel are **DENIED**. Within 30 days of the date of this Order, Defendant shall file its Motions for Summary Judgment on the aforementioned issues. The parties shall then confer on a date to set the motions for hearing and set the motions on the court's special set calendar.

---

[1]See *Allstate Ins. Co. v. Orthopedic Specialists*, 212 So.3d 973 (Fla. 2017) [42 Fla. L. Weekly S38a] (holding that "Allstate's PIP policy provides legally sufficient notice of Allstate's election to use the permissive Medicare fee schedules. . .").

* * *

Insurance—Personal injury protection—Affirmative defenses—Accord and satisfaction—"Full and final" language on check in same size as surrounding text and not distinguished by contrasting type, font or color does not amount to conspicuous statement—Medical provider's motion for summary judgment on defense is granted

DOCTOR REHAB CENTER INC., a/a/o Jaime E. Moran, Plaintiff, v. UNITED AUTOMOBILE INSURANCE CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County, Small Claims Division. Case No. 2011-002979-SP-21, Section HI 01. January 23, 2020. Milena Abreu, Judge. Counsel: Majid Vossoughi and David J. Mannering, Majid Vossoughi, P.A., Miami, for Plaintiff. Paula Elkea Ferris, House Counsel United Auto Ins. Co., Miami Gardens, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S ACCORD AND SATISFACTION AFFIRMATIVE DEFENSE AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON ACCORD AND SATISFACTION

FACTUAL BACKGROUND:

1. This case stems from an alleged car accident that occurred on 4/18/10.

2. The claimant, Jaime E. Moran received treatment from the Plaintiff from April 29, 2010 through June 28, 2010.

3. On or about October 25, 2010, Defendant tendered drafts to Plaintiff for the services rendered between April 29, 2010 through June 28, 2010.

4. The benefits draft tendered by Defendant contained the following language on the payee line of the check:

"DOCTOR REHAB CENTER INC
F.A.O. JAIME ELIAS MORAN// DOS: 04/29/10-06/28/10//ACCT: JAIMELPI// FOR FULL AND FINAL PAYMENT OF PIP BENEFITS"

5. Attached to the check was the Defendant's Explanation of Review.

6. Payment was accepted by Plaintiff and the check cashed.

7. As a result, Defendant asserts Plaintiff accepted and negotiated the draft in accord and satisfaction of its bills.

8. Plaintiff subsequently filed the instant lawsuit against Defendant.

LEGAL ANALYSIS:

Pursuant to Florida Stat. 673.311, accord and satisfaction requires the Defendant to prove:

(i) That its tender was in good faith;

(ii) That the amount of the claim was "unliquidated" or "subject to a bonafide dispute"; and

(iii) That the instrument (check) or an accompanying written communication contained a "conspicuous statement" to the effect that the instrument was tendered in full satisfaction of the claim.

During the hearing of January 15, 2020, the Court made factual findings the Defendant met the first two elements of accord and satisfaction; Specifically the Court found that the check was in fact tendered in good faith and the amount of the claim subject to a bonafide dispute. Thereafter, the Court focused its inquiry on the third element of the statute—whether the check in fact contains a "conspicuous statement" tendered in full satisfaction of the claim.

The Court finds the Defendant's tender of payment does not meet the statutory requirement that it be "conspicuous" as defined by Florida Statute, 671.201(10). Specifically, 671.201(10) states:

> (10) "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" is a decision for the court. Conspicuous terms include the following:
>
> (a) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
>
> (b) Language in the body of a record or display in larger type than the surrounding text or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

The Court first notes of importance that the record evidence is a black and white copy of an original check. The Court was not provided with the original check. Defense counsel did advise and the parties agreed the color of the typesetting on the entirety of the check was black.

In this case the Court finds no "heading" other than the preprinted name of the Defendant Insurance Company on the top of the check. The focus therefore is on the language in the *body of the payee line on the draft*; Specifically the Court finds with regards to the specific language/text on the draft:

> 1) The text is ***not*** in capital letters equal to or greater in size than any other writing on the payee line; here, the text is all in the same size capital lettering.
>
> 2) There appears to be no difference in font size;
>
> 3) No differentiating color to highlight the language;
>
> 4) No set off of the text by symbol or marks of any kind from any of the surrounding text;

Plaintiff relies on the case of *Gonzalez v. Associates Life Ins., Co.*, 641 So.2d 895 (Fla. 3d DCA 1994) to support its own Motion for Summary Judgment on the issue of accord and satisfaction. The *Gonzalez* court found the language in the body of a policy was not "conspicuous" because "the language in question is in no way distinguished from the reminder of the data page provisions. The fact that this language is not highlighted, set apart, or emphasized in any way, renders it not conspicuous."

While the Defendant asserted the *Gonzalez* case was distinguishable in that the case dealt with a specific clause contained within a policy and not a check, this Court finds that argument of no consequence. As the *Gonzalez* case noted that while the language was clearly legible and not buried in the midst of dense language or fine print, the applicable statute in that case required the language to be "conspicuous."

Similarly, while the text in the payee line of the check in the instant case may be discernible, it is not *conspicuous* as defined by Florida Statute 671.201. *See also United Auto Ins. Co. v. Gables Ins. Recovery, Inc., a/a/o Laraine Marques*, 26 Fla. L. Weekly Supp. 460a (Fla. 11th Cir. Appellate, July 30, 2018); *Michael J. Delesparra, D.C., P.A., v. United Auto Ins. Co.*, 19 Fla. L. Weekly Supp. 214a (Fla. 17th Cir.Cty., Judge Lee, December 8, 2011); *Atlantic Acu-Medical Center Corp., a/a/o Guillaume Baptiste v. United Auto. Ins. Co.*, 16 Fla. L. Weekly Supp. 781a (Fla. 17th Cir. Ct., Judge Merrigan, May 26, 2009); *MRI Services I, Inc., a/a/o Kevin Henderson v. United Auto*

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Ins. Co., 22 Fla. L. Weekly Supp. 856a (Fla. 17th Cir. Cty., Judge Lee, January 14, 2015); *Progressive Rehab. And Orthopedic Services, LLC a/a/o Victor Bure-Figueroa v. United Auto. Ins. Co.*, 20 Fla. L. Weekly Supp. 438a (Fla. 11th Cir. Cty., Judge King, August 31, 2015).

The Defendant also asserts accord and satisfaction under common law that requires: 1) mutual intent to effect a settlement of an existing dispute by entering into a superseding agreement; and 2) actual performance in accordance with the new agreement." Defendant argues the cashing of the check was the superseding agreement. The Court disagrees. Furthermore, accord and satisfaction has been codified in Florida pursuant to statute, 673.311, thereby eliminating the common law "meeting of the minds" and instead requiring "conspicuousness."

SUMMARY JUDGMENT

Pursuant to Fla. R. Civ. P. 1.150(c), summary judgment is warranted "if the pleadings, and summary judgment evidence on file show that there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law." *See also State Farm Mut. Auto. Co. v. Gonzalez*, 178 So.3d 448, 450 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2352a], citing *State Farm Mut. Auto. Ins. Co. v. Pressley*, 28 So.3d 105, 107 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D150b]. The party moving for summary judgment must present evidence supporting its claim and once it does, the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue." *R. Plants, Inc. v. Dome Enters.*, 221 So.3d 752, 753-54 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1319a] citing *Landers v. Milton*, 370 So.2d 368, 370 (Fla. 1979). Moreover, because the issue of "conspicuousness" is a question of law for this Court's determination, from the plain and unambiguous language of the applicable statutes in this case, the Court finds the defense of accord satisfaction fails as a matter of law.

Accordingly, Defendant's Motion for Summary Judgment as to the Defense of Accord and Satisfaction is respectfully **denied** and the Plaintiff's Motion for Summary Judgment on Defendant's Affirmative Defense of Accord and Satisfaction is **granted.**

* * *

Declaratory judgments—Insurance—Independent medical examination—Duty of insured to attend in-person independent medical examination during COVID-19 pandemic—Motion to dismiss and motion to strike complaint as sham pleading denied

PEDRO RAMIREZ, Plaintiff, DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-028686. September 30, 2020. Michael C. Baggé-Hernández, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND MOTION TO STRIKE COMPLAINT AS A SHAM PLEADING

THIS MATTER having come before the court on September 29, 2020 on Defendant's Motion to Dismiss Plaintiff's Complaint and Motion to Strike Complaint as a Sham Pleading, Defendant's Motion for Protective Order and Plaintiff's Motion to Compel Discovery. The court having reviewed the file, considered the motions, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds as follows:

1. Defendant's Motion for Protective Order and Plaintiff's Motion to Compel Discovery are moot and have been withdrawn.

2. Plaintiff filed this Declaratory action seeking a declaration regarding the Plaintiff's doubt about his duty to attend an in-person IME during the Covid-19 pandemic.

3. Based upon the standard in ruling on a Motion to Dismiss, the Court's analysis is confined to the four (4) corners of the complaint. Further, all allegations made by Plaintiff must be accepted as true and accurate. As such, Defendant's Motion to Dismiss Plaintiff's Complaint and Motion to Strike Complaint as a Sham Pleading are both **HEREBY DENIED**.

4. Defendant shall file its answer within twenty (20) days of the date of this Order.

* * *

Declaratory judgments—Insurance—Personal injury protection—Coverage—Insurer breached PIP contract by failing to pay or deny claim within 30 days, as required by statute, or within 90 days if it invoked additional time limitation of section 627.736(4)(i)

ORLANDO THERAPY CENTER, INC., a/a/o Suchitra Chi Mum, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 19-CC-002631. September 29, 2020. Michael C. Baggé-Hernández, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS MATTER having come before the court on September 21, 2020 on Plaintiff's Motion for Final Summary Judgment. The court having considered the Motion, the arguments presented by the parties, applicable law, and being otherwise fully advised, finds,

1. This is a Declaratory action under *Florida Statutes* Chapter 86 seeking a coverage declaration based upon Defendant's failure to timely extend PIP coverage.

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

3. Regarding Plaintiff's Motion for Final Summary Judgment, the Court bases its ruling on three (3) cases. The claim must be denied or paid 30 days following the initiation of the claim. The failure to adhere to the statutorily time frame is itself a breach of contract. *Amador v. United Automobile Ins. Co.*, 748 So.2d 307 (Fla. 3rd DCA 1999) [24 Fla. L. Weekly D2437a]; The burden is clearly upon the insurer to authenticate the claim within the statutory time period. Nothing within the statute allows for the time to be arbitrarily increased by the insurer for an indefinite amount of time. *Ivey v. Allstate Ins. Co.*, 774 So.2d 679 (Fla. 2000) [25 Fla. L. Weekly S1103a]; The denial of benefits implicates subsection (4)(b) which requires insurers to pay valid claims within 30 days or face a penalty. An insurer may elect to deny a claim under subsection (4)(b), when it has reasonable proof to establish that the insurer is not responsible for the payment. *State Farm Mut. Auto. Ins. Co. v. Williams*, 824 F.3d 1311 (2014) [25 Fla. L. Weekly Fed. C771a].

4. Because the Defendant violated the PIP statute by failing to pay or deny the claim within 30 days and although the Defendant may have timely invoked the additional time limitation under Fla. Stat. 627.736(4)(i), Defendant failed to pay or deny the claim within ninety (90) days. As such, Defendant itself was in breach of contract. As such, Plaintiff's Motion for Final Summary Judgment is **HEREBY GRANTED**.

* * *

Insurance—Personal injury protection—Complaint—Amendment—Motion to amend complaint is denied—Proposed amendment challenging insurer's ability to apply Medicare fee schedules would be futile in view of well-settled case law

MICHAEL A. MARKS, P.A., d/b/a SOMERSET CHIROPRACTIC CENTER (Patient: Carol Johnson), Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for

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Palm Beach County. Case No. 502018SC002741XXXXSB (RD). January 10, 2020. Reginald Corlew, Judge. Counsel: Michael R. Prince, Ged Lawyers LLP, Boca Raton, for Plaintiff. Matthew J. Hier, Shutts & Bowen LLP, Miami, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND FIRST AMENDED COMPLAINT

THIS CAUSE, having come before the Court on January 9, 2020 on Plaintiff's Motion for Leave to Amend First Amended Complaint, the Court having reviewed the motions, heard argument of counsel, and being otherwise fully advised on the premises, this Court makes the following conclusions of law:

This Court finds that the material paragraph that Plaintiff seeks to include in its Proposed Second Amended Complaint, is paragraph 23, which states, "Consistent with its Demand Letter, Plaintiff's claim is $485.25 for all CPT Codes plus overdue interest." After examination of the contents of the Plaintiff's Demand Letter, this Court finds that paragraph 23 of Plaintiff's Proposed Second Amended Complaint is a direct challenge to Allstate's ability to apply the Medicare fee schedules. It is well-settled law that the language contained in the subject policy provides legally sufficient notice to authorize Allstate to apply the Medicare fee schedules. *See Allstate Ins. Co. v. Orthopedic Spec.,* 212 So. 3d 973 (Fla. 2017) [42 Fla. L. Weekly S38a]. Accordingly, this Court finds that Plaintiff's proposed claim is futile.

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff's Motion for Leave to Amend First Amended Complaint is **DENIED**.

*   *   *

Insurance—Personal injury protection—Affirmative defenses—Insurer is granted leave to amend answer to allege failure to submit valid demand letter

CHRIS THOMPSON, P.A., a/a/o Elmude Cadau, Plaintiff, v. GEICO INDEMNITY COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 502018SC011039XXXXMB. October 12, 2020. Melanie Surber, Judge. Counsel: Frank Noska and Cris Boyar, for Plaintiff. Manshi Shah, The Law Office of Jeffrey Hickman, West Palm Beach, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR LEAVE TO AMEND ANSWER AND AFFIRMATIVE DEFENSES

THIS CAUSE having come on to be heard on October 8, 2020, on Defendant's Motion for Leave to Amend Answer and Affirmative Defenses, the Court having reviewed the aforementioned motions, the relevant legal authority cited by the parties, heard argument of counsel, and been sufficiently advised on the premises, it is hereby :

ORDERED AND ADJUDGED AS FOLLOWS:

1. Defendant's Motion for Leave to Amend the Answer and Affirmative Defenses is **GRANTED**.

2. The Defendant shall be permitted to add the following two affirmative defenses:

(a) Defendant affirmatively alleges the Plaintiff failed to submit a valid "demand letter," as is required by section 627.736(10), Florida Statutes.

(b) Defendant states the Plaintiff and/or the Plaintiff's assignor have failed to comply with any and all conditions precedent and/or conditions subsequent to bringing this lawsuit against this Defendant. Specifically, Plaintiff has failed to state the exact amount due in its demand letter.

3. Defendant shall file an Amended Answer within 10 days of this Order.

4. The Plaintiff shall have 20 days there after to file an Amended Reply.

*   *   *

Landlord-tenant—Return of security deposit—Attorney's fees—Prevailing tenants

JAMES ROYBAL and MARIA ROYBAL, Plaintiffs, v. ARIEL & APHRODITE LLC, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 50-2019-SC-020770-XXXX-MB. August 31, 2020. Sarah L. Shullman, Judge. Counsel: Hegel Laurent, Laurent Law Office, P.L., Plantation, for Plaintiffs. Ariel & Aphrodite LLC, pro se, Defendant.

ORDER GRANTING PLAINTIFFS' ENTITLEMENT TO ATTORNEY'S FEES

This Cause came before the Court on August 13, 2020 on Plaintiffs' Motion for Attorney's Fees and Costs. Counsel for Plaintiffs appeared. Defendant did not appear. Upon review, it is hereby **ORDERED AND ADJUDGED** that

Plaintiffs' Motion is **GRANTED** as this Court concludes that the Plaintiffs are entitled to attorney's fees.

Sections 83.48, 84.49, and the respective Lease between the parties all provide for attorney's fees in this case where the Plaintiffs, residential Tenants, prevailed in obtaining a default final judgment against the Defendant, a residential Landlord, for the return of their Security Deposit.

Plaintiffs are entitled to fees and costs and may set this case for hearing, with notice to Defendant, to determine an amount of fees and costs, if any, to be ordered, if the Defendant appears at the hearing OR in advance of the hearing AND challenges the evidentiary foundations of the Plaintiff's requests then the Court will re-set the matter for an evidentiary hearing with the appearance of a fee expert to resolve the Defendant's stated or filed evidentiary objections.

*   *   *

Insurance—Personal injury protection—Complaint—Amendment—Motion to amend complaint to allege underpayment of specific CPT code is denied—Issue was not subsumed within general allegation that insurer denied coverage or withheld or reduced payments for medical bills, provider knew or should have known of CPT code issue that was apparent from explanations of benefits before filing suit, allowing amendment 15 months after complaint was filed and 4 months after trial order would prejudice insurer, and amendment would be futile since insurer has paid amount requested for CPT code in demand letter

ATLANTIC COAST ORTHOPAEDICS LLC a/a/o Mari Mazard, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE-19-007427 (56). August 18, 2020. Betsy Benson, Judge. Counsel: Sami Slim, Todd Landau, P.A., Hallandale Beach, for Plaintiff. Manuel Negron and Raul L. Tano, Shutts & Bowen LLP, Miami, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND AND GRANTING ALLSTATE'S MOTION IN LIMINE

THIS CAUSE came before the Court on August 13th, 2020, on the following Motions; Plaintiff Atlantic Coast Orthopaedic LLC's Motion for Leave to Amend its Complaint, and Defendant, Allstate Fire and Casualty Insurance Company's Motion in Limine to Strike or Exclude Issues not Pled, Improperly Pled and/or Waived by Plaintiff and Response in Opposition to Plaintiff's Motion for Leave to Amend.

After hearing argument of counsel, reviewing the Court file and all applicable case law, the Court makes the following findings of fact and conclusions of law:

Findings of Facts

Plaintiff filed this lawsuit for PIP benefits March 1, 2019. Plaintiff's Complaint alleged that Allstate breached the contract in one of three ways: "Defendant has denied coverage for, withheld or reduced the medical bills that were submitted by Plaintiff for date of service January 20, 2016 through March 9, 2016. . ."[1]. The Complaint's next sentence alleges that Allstate breached the policy because it "improperly denied reimbursement for CPT code 95851 for date of service

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March 9, 2016.". Allstate answered the Complaint, attached the subject policy, and asserted defenses based on the disclosed issue of denial of CPT Code 95851. (Cmplt. P. 13)

On February 27, 2020, following nearly eight months of record inactivity, this Court issued a Trial Order, which imposed deadlines for discovery, dispositive motions, and a joint pretrial stipulation. On June 23, 2020, Plaintiff filed a motion for summary judgment that was not predicated on the denial of 95851 alleged in Complaint; but rather a different issue: a purported underpayment of CPT Code 97535. In short, 15 months after the action was filed, and four months after the Trial Order, Plaintiff's 'MSJ' raised the 97535 issue for the first time.

Allstate objected to the issue and asserted it was not raised in the pleadings. Plaintiff sought leave to amend its complaint. Paragraph 13 of Plaintiff's proposed Amended Complaint would read as follows:

> Defendant has denied coverage for, withheld or reduced the medical bills that were submitted by Plaintiff for date of service January 20, 2016 through March 9, 2016. Specifically, Defendant improperly limited reimbursement for CPT code 97535 by paying less than 80% of 200% of the allowable amount under the participating physicians' fee schedule of Medicare Part B for that service. There, the Plaintiff is owed an addition $2.43, plus the applicable interest, for the unit of CPT Code 97535 that was underpaid. In addition, Defendant improperly denied reimbursement for CPT Code 95851. Therefore, the Plaintiff is owed $30.80, plus the applicable interest, for the unit of CPT Code 95851 that was never paid.

Plaintiff's Motion for Leave to Amend, Proposed Amended Compl. at ¶ 13.

As stated, the parties appeared before the Court August 13, 2020 on Plaintiff's Motion for Leave to Amend, and Allstate's Motion in Limine. Notably, this date is beyond the summary judgment deadline imposed by the Court.

At hearing, Plaintiff argued that (1) the 97535 issue was pled because it was subsumed within the general allegations of the Complaint; and (2) if the Court were to determine it was not pled, Plaintiff should be allowed leave to amend. As to the latter point, Plaintiff argued there was no prejudice because Plaintiff was unaware of the 97535 issue in this case until Defendant responded to discovery in June, 2020. Defendant argued that the issue was not pled, that amendment would be futile, and that allowing an amendment would be prejudicial.[2]

The parties stipulate that a trial on the merits is not necessary as the issues could be resolved by the Court via summary judgment. At hearing, Plaintiff argued that extension of the Court's trial deadlines was unnecessary, despite the fact that the Court deadline to file summary judgment motions had lapsed on August 11, 2020.

Conclusions of Law

Plaintiff's posits inconsistent arguments. On one hand, Plaintiff argues that the 97535 issue is encompassed within their March 2019 Complaint. On the other hand, Plaintiff argues that it was *unaware* of the 97535 issue until June 2020.

The Court rejects Plaintiff's claim that the 97535 issue is pled in the original Complaint. Florida law is clear that a party is bound by the issues as framed in the pleadings, and where a claim is not pled with sufficient particularity for the opposing party to prepare a defense, a party is precluded from recovery on the unpled claim. *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris v. Bowmar,* 537 So. 2d 561 (Fla. 1989). Moreover, Courts have rejected the practice of subsuming specific theories of recovery within the umbrella of a Complaint's general allegations. *See Robbins v. Newhall,* 692 So. 2d 947 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D945b], *E.I. Du Pont De Nemours and Co. v. Desarrollo Industrial Bioacuatico, S.A.,* 857 So. 2d 925 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2171a].

The plain language of Plaintiff's Complaint asserts its' sole claim; a challenge to Defendant's denial of CPT Code 95851. Plaintiff's argument that the 97535 issue was sufficiently pled within the general allegations of the Complaint is undermined by Plaintiff's contention that Plaintiff was unaware of the 97535 issue until June 2020, coupled with the proposed allegations in Plaintiff's Amended Complaint. The Amended Complaint sought to specifically include the following allegations: "Defendant improperly limited reimbursement for CPT code 97535 by paying less than 80% of 200% of the allowable amount under the participating physicians' fee schedule of Medicare Part B for that service. Therefore, the Plaintiff is owed $2.43, plus the applicable interest, for the unit of CPT code 97535 that was underpaid." (*Id., Par. 13).*

Leave to amend may be denied if "allowing the amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile." *Beanblossom v. Bay District Schools,* 265 So. 3d 657 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D237a]. The right to amend is not unlimited. *Id.* Amendments are not allowable if they would change the issue, introduce new issues, or materially vary the grounds for relief. *Warfield v. Drawdy,* 41 So. 2d 8777, 879 (Fla. 1949). There is a compelling obligation on the trial court to see to it that the end of all litigation be finally reached. *Vella v. Salaues,* 290 So. 3d 946, 949 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2553a]. The rule of liberality gradually diminishes as the case progresses to trial. *See Noble v. Martin Memorial Hosp' Ass'n, Inc.,* 710 So. 2d 567 (Fla. 4th DCA 1997) [23 Fla. L. Weekly D58a]. Leave to amend should not be granted where a party knew or should have known of the matter to be pled early in litigation, but declined to do so. *See U.S. v. State,* 179 So. 2d 890 (Fla. 3d DCA 1965), *San Martin v. Dadeland Dodge, Inc.,* 508 So. 2d 497, 498 (Fla. 3d DCA 1987) (affirming denial of leave to amend because plaintiff should have been aware of the alleged basis for the new issue long before he sought to amend the complaint).

Defendant demonstrated at hearing that given the facts and posture of this case, granting the Motion for Leave to Amend would result in prejudice to the Defendant. The amended complaint would require Defendant to file an amended Answer with new affirmative defenses, additional motion(s) for summary judgment, forcing Defendant into a position where it would have to violate the Court's scheduling order to properly defend against the new allegations.

The Court further finds that Plaintiff knew or should have known of the underlying facts regarding the 97535 issue prior to initiating this litigation because the alleged issue was apparent from the Explanations of Benefits produced before litigation commenced.

The Court's trial order makes clear that "***NO CONTINUANCES*** will be granted for reasons that should have been readily apparent to counsel when the trial order was received. . ." Despite the clear language of the Court's trial order, Plaintiff waited an additional four months before moving for leave to amend.

Lastly, amendment to assert the 97535 issue would be futile. Plaintiff's pre-suit demand letter sought 80% of Plaintiff's billed amount for all codes, including CPT Code 97535. The pre-suit demand is incorporated by reference in Plaintiff's Complaint.[3] *See South Florida Coastal Elec., Inc. v. Treasures on Bay II Condo Ass'n,* 89 So. 3d 264 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1005a] (holding that documents referenced in the pleadings are deemed incorporated therein by reference). Plaintiff's Amended Complaint claims that payment of 80% of the billed amount is improper and that Plaintiff sustained damages thereby. Unfortunately, 80% of the billed amount is precisely what Plaintiff demanded in the pre-suit demand letter. Section 10(d) of the PIP Statute expressly provides that "[i]f. . . the overdue claim specified in the [demand letter] is paid by the insurer. . . no action may be brought against the insurer."

Because the pre-suit demand asked for 80% of the billed amount for CPT Code 97535 and that exact requested amount was satisfied by

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Allstate with reference to code 97535, Section (10)(d) bars any litigation on that code. Taking these factors into consideration, the Court finds amendment would be futile. *See Beanblossom,* 265 So. 3d at 569 (finding futility where new negligence theory suffered from a notice defect).

Accordingly, it is hereby **ORDERED AND ADJUDGED:**

1. Allstate's Motion to Exclude/Strike is GRANTED.
2. Plaintiff's Motion for Leave to Amend is DENIED.

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[1]The remainder of the sentence alleged that Allstate misapplied the application of the deductible, but the subject policy does not carry a PIP deductible.

[2]Counsel for Defendant conceded that the privilege to amend was not being abused.

[3]The demand letter was also made part of the record by way of Allstate's July 7, 2020 Notice of Filing Affidavit.

* * *

Insurance—Personal injury protection—Where sole issue raised by medical provider in PIP case was sufficiency of policy to elect use of statutory fee schedules for reimbursement of PIP benefits, and only after Florida Supreme Court decided that issue adversely to provider's position did provider raise unpled issue of misapplication of 2% reduction to certain CPT codes, motion to strike or exclude unpled issues is granted

HANSBROUGH CENTER FOR FUNCTIONAL NEUROLOGY INC., a/a/o Stacey Altieri, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INS. CO., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COWE15018681, Division 83. September 17, 2020. Ellen Feld, Judge. Counsel: Erik Abrams, Landau & Associates, P.A., Sunrise, for Plaintiff. Manuel Negron and Raul L. Tano, Shutts & Bowen LLP, Miami, for Defendant.

ORDER GRANTING ALLSTATE'S MOTION TO EXCLUDE/STRIKE ISSUES NOT PLED BY THE PLAINTIFF IN ITS COMPLAINT

THIS CAUSE came before the Court on Allstate Fire and Casualty Insurance Company's ("Allstate") Motion to Exclude/Strike Issues not Pled, Improperly Pled and/or Waived by the Plaintiff ("Motion to Exclude/Strike"), and after hearing argument of counsel, reviewing the pleadings filed with the Court, and reviewing all applicable case law, the Court makes the following findings of fact and conclusions of law:

Findings of Facts

Plaintiff filed this lawsuit for PIP benefits in September, 2015. The Complaint asserted a claim for breach of contract, based on allegations that Allstate "denied coverage for, withheld or reduced the medical bill(s)." The Complaint specifically alleged that Allstate owed $1,612.49.[1] Allstate answered the Complaint, raising one defense: that Allstate's policy expressly elected reimbursement based on the fee schedule limitations authorized by the Florida PIP statute. Throughout the litigation, Plaintiff maintained the position that Allstate's policy did not properly elect the statutory fee schedules, and that Allstate was required to pay 80% of Plaintiff's charges.

On January 26, 2017, the Florida Supreme Court decided this issue in Allstate's favor. *Allstate Insurance Company v. Orthopedic Specialists*, 212 So. 3d 973 (Fla. 2017) [42 Fla. L. Weekly S38a] ("*Serridge*"). Rather than dismiss the case, Plaintiff filed two motions for summary judgment which argued that Allstate's policy **does** elect the permissive fee schedules, but did so improperly.[2] Allstate responded by filing its Motion to Exclude/Strike.

Legal Standard and Conclusions of Law

I. **Allstate's Motion to Exclude/Strike**

Florida law is clear that a party is bound by the issues as framed in the pleadings, and the Complaint must be pled with sufficient particularity to permit a defendant to prepare its defense. *See Assad v. Mendell*, 550 So. 2d 52, 53 (Fla. 3d DCA 1989). The Florida Supreme Court has held that where a claim is not pled with sufficient particularity for the opposing party to prepare a defense, the plaintiff is precluded from recovery on the unpled claim. *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A.*, 537 So. 2d 561 (Fla. 1988). Relying on *Arky Freed,* the Fourth District Court of Appeal has consistently held that parties are precluded from recovery on unpled claims tried without the consent of the parties. *E.I. Du Pont De Nemours & Co. v. Desarrollo Indus. Bioacuatico S.A.*, 857 So. 2d 925, 930 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2171a]; *Straub v. Muir-Villas Homeowners Ass'n, Inc.*, 128 So. 3d 885, 890 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2655a].

The pleadings and the record before this Court demonstrate that this case involves solely the issue decided by the Florida Supreme Court in *Serridge*. It was not until after the Florida Supreme Court decided *Serridge* in favor of Allstate that Plaintiff attempted to inject the 2% issue and billed amount issue into this litigation. Plaintiff now seeks for the Court to allow it to take a position which is contrary to the position it took in its original Complaint and for almost four years of litigation—that Allstate **can** apply the fee schedules, but somehow did so incorrectly. Florida law does not permit this. *See Noble v. Martin Memorial Hosp' Ass'n, Inc.*, 710 So. 2d 567 (Fla. 4th DCA 1997) [23 Fla. L. Weekly D58a]; *Inman v. Club on Sailboat Key, Inc.*, 342 So. 2d 1069 (Fla. 3d DCA 1977); *Bailey v. State Farm Mut. Auto. Ins. Co.*, 789 So. 2d 1181 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1739b]. "[I]t is an abuse of the legal process, and the defendant, to permit a plaintiff to sue on one legal theory and after losing because he cannot support his allegations to come back and allege the same occurrence or transaction and seek relief in a different legal theory." *Quality Type & Graphics v. Guetzloe*, 513 So. 2d 1110 (Fla. 5th DCA 1987). Here, as evidenced by its Complaint and as reflected in the docket, Plaintiff sought judgment based only on its fee schedule election theory. Plaintiff did not plead any other issue in the alternative, and the issues Plaintiff seeks to advance now are contrary to what Plaintiff pled and litigated throughout the life of this case. The fee schedule election issue is the sole issue in this case. The Court finds that the only reason Plaintiff is attempting to include a cause of action for underpayment and/or improper payment is because of the *Serridge* decision. The Court finds that to permit Plaintiff to change its position 4 years into litigation is highly prejducial to the Defendant who has been defending this action based upon soley on the fee schedule election issue. Accordingly, Allstate's Motion to Exclude/Strike Issues not Pled, Improperly Pled, and Waived by Plaintiff is hereby granted.

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[1]During the hearing, defense counsel preferred, and Plaintiff's counsel did not contest, that the amount sought in the Complaint was equal to 80% of Plaintiff's total bills, minus payments made by Allstate.

[2]Plaintiff's June 2019 motion for summary judgment pertains to purported underpayment of chiropractic codes, commonly referred to as "the 2% issue." Plaintiff's August 2020 motion for summary judgment dealt with the manner in which Allstate reimbursed Plaintiff when the billed amount was less than the statutory fee schedule, commonly referred to as "the billed amount issue."

* * *

Insurance—Personal injury protection—Where sole issue raised by medical provider in PIP case was sufficiency of policy to elect use of statutory fee schedules for reimbursement of PIP benefits, and only after Florida Supreme Court decided that issue adversely to provider's position did provider raise unpled issue of misapplication of 2% reduction to certain CPT codes, motion to strike or exclude unpled issues is granted

TAFT REHAB CENTER, LLC, a/a/o Jose Lopez, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO15-001382 (61). August 13, 2020. Jackie Powell, Judge. Counsel: Kurt T. Wilson, Landau & Associates, P.A., Sunrise, for Plaintiff. Manuel Negron and Raul L. Tano, Shutts & Bowen LLP, Miami, for

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Defendant.

ORDER GRANTING ALLSTATE'S MOTION IN LIMINE TO EXCLUDE/STRIKE ISSUES NOT PLED, IMPROPERLY PLED AND/OR WAIVED BY THE PLAINTIFF

THIS CAUSE came on to be heard on August 7, 2020 on Defendant Allstate's Motion In Limine To Exclude/Strike Issues Not Pled, Improperly Pled And/Or Waived by Plaintiff the Court having heard argument of Counsel, having reviewed the Court file, and being otherwise advised in the Premises, It is hereby **ORDERED AND ADJUDGED** as follows:

Background

On February 3, 2015, the Plaintiff filed a single-count Complaint over medical payments in connection with an automobile accident. The Complaint alleged that Plaintiff provided medical services and Defendant refuses to pay the full amount due. Allstate answered the Complaint by asserting only one affirmative defense, wherein Allstate quoted the language in its policy and asserted that Allstate's policy expressly elected reimbursement based on the fee schedule limitations authorized by the Florida PIP statute. No amendment to the Complaint has been sought since the initial filing. On June 1, 2020, more than 5 years later, Plaintiff files a motion titled "Motion For Summary Judgment and Memorandum of Law as to Whether Defendant improperly limiting reimbursement of Plaintiff's Medical Bills by Applying a 2% reduction to CPT codes 98940 and 98941."

On January 26, 2017, in *Allstate Insurance Company v. Orthopedic Specialists,* 212 So.3d 973 (Fla. 2017) [42 Fla. L. Weekly S38a] (the *"Serridge decision"*), the Florida Supreme Court held that the policy language provides "legally sufficient notice" of Allstate's election to reimburse based on the fee schedule limitations.

Legal Standard and Conclusions of Law

Florida law is well established that a party is bound by the issues framed by its own pleadings, and the Complaint must be pled with sufficient particularity to permit the Defendant to prepare its defense. *See Assad v. Mendell,* 550 So.2d 52, 53 (Fla. 3d DCA 1989). Inherent in that statement is the notion that a party should not suffer the unfair surprise and prejudice of legal claims and theories not encompassed by the pleadings. *See, e.g. Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So.2d 561, 563 (Fla. 1988) (if a claim is not pled with sufficient particularity for the opposing party to prepare a defense, the plaintiff is precluded recovery on the unpled claim); *Bank of Am. v. Asbury,* 165 So.23 808, 809 (Fla. 3DCA 2015) [40 Fla. L. Weekly D1230a] ("Litigants in civil controversies must state their legal positions within a particular document, a pleading, so that the parties and court are absolutely clear what the issues to be adjudicated are"). Furthermore, the law is clear that a judgment must be based on a claim or defense that either properly pled or tried by consent of the parties. *See Goldschmidt v. Holman,* 571 So.2d 422, 423 (Fla. 1990). This principle is so grounded in the law that the Florida Supreme Court has held that where a claim is not pled *with sufficient particularity for the opposing party to prepare a defense,* the plaintiff is precluded from recovery on the unpled claim. See *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A.* 537 So.2d at 563.

The Florida Supreme Court case of *Arky, Freed* is the seminal case holding that unpled claims and issues may not be tried. Relying on *Arky, Freed,* the Fourth District Court of Appeal has consistently held that parties are precluded from recovery on unpled claims tried without the consent of the parties. *See E.I. Du Pont De Nemours & Co. v. Desarrollo Indus. Bioacuatico S.A.* 857 So.2d 925, 930 (Fla. 4th DCA 2003 [28 Fla. L. Weekly D2171a]; see also *Straub v. Muir-Villas Homeowners Ass'n Inc.,* 128 So.3d 885, 890 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2655a] (relying on *Arky, Freed and Du Pont* to find error in trial court's consideration of an unpled defense). In *Du Pont,* the Fourth District Court of Appeal rejected a plaintiff's attempt to inject at trial, over objection, an unpled failure to warn theory of liability into a negligence action. Reversing the trial court, the Fourth District noted that the allegations in Plaintiff's complaint did not suggest that failure to warn was the basis for Plaintiff's action, and accordingly, allowing recovery to be had on that claim was reversible error. 857 So.2d at 930. Many other Florida courts have held that it is error for a trial court to allow a plaintiff to argue an unpled theory or cause of action at trial. *See Sunbeam Television Corp. v. Mitzel,* 83 So.3d 865, 875 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D183a] ("when a plaintiff pleads one claim but tries to prove another, it is error for a trial court to allow the plaintiffs to argue the unpled issue at trial"); *Bloom v. Dorta-Duque,* 743 So.2d 1202, 1203 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2532a] ("[i]t is well settled that a defendant cannot be found liable under a theory that was not specifically pled"); *Robbins v. Newhall,* 692 So.2d 947, 949 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D945b] (reversing final judgment where plaintiff had alleged three specific acts of negligence, but tried the case on a fourth alleged act that was never pled); *see also Cioffe v. Morris,* 676 F.2d 539, 543 n. 8 (11th Cir. 1982) (confirming that unpled issues tried without consent deny due process).

The pleadings and the record before this Court all make clear that this case involves solely the *Serridge* Issue. Said issue was decided in favor of Allstate by the Florida Supreme Court in *Orthopedic Specialists.*

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion In Limine To Exclude/Strike Issues Not Pled, Improperly Pled And/or Waived by the Plaintiff is **GRANTED**.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Amount—Medicare fee schedule—Where medical service at issue is reimbursable under Medicare Part B, but allowable amount for service requires a determination on an individualized basis by Medicare contractor, insurer may cap its payment for service by using workers' compensation fee schedule—Question certified: When a PIP insurer has elected the Medicare fee schedule limitation permitted by Florida Statute §627.736(5)(a)1, which provides that the insurer may limit reimbursement to "200 percent of the allowable amount under [t]he participating physicians fee schedule of Medicare Part B," and the "allowable amount" under the fee schedule is not specified in a general amount but instead must be determined on an individualized basis, is the PIP insurer entitled to limit the reimbursement to 200 percent of the workers' compensation fee schedule?

GOOD HEALTH MEDICAL REHAB, INC., a/a/o Thelizia Belfeur, Plaintiff v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE18009214, Division 53. February 12, 2020. Robert Lee, Judge. Counsel: Matthew Emanuel, Landau & Associates, P.A., Sunrise, for Plaintiff. Michael S. Walsh, Kubicki Draper, P.A., Fort Lauderdale, for Defendant.

ORDER

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT REGARDING UNDERPAYMENT

and

CERTIFICATION TO THE FOURTH DISTRICT COURT OF APPEAL AS A QUESTION AFFECTING THE UNIFORM ADMINISTRATION OF JUSTICE, PURSUANT TO FLA. STAT. §34.017(1)(b), RULES 9.030(b)(4) and 9.160, FLA. R. APP. P.[1]

THIS CAUSE came before the Court on January 16, 2020 for hearing of the Plaintiff's Motion for Summary Judgment Regarding

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Underpayment, and the Court's having reviewed the Motion, the entire Court file, and the relevant legal authorities; having heard argument; having made a thorough review of the matters filed of record; and having been sufficiently advised in the premises, the Court finds as follows:

Background: This case involves an issue currently arising in PIP cases throughout the State. Currently, in this Court's view, there is no controlling precedent on the horizon. In light of the five-year statute of limitations pertaining to PIP cases, as well as the continuing practice of PIP parties to challenge legal rulings even when a Circuit appellate decision is issued,[2] this Court respectfully submits that this is an issue that the District Court of Appeal could resolve and save a substantial amount of judicial labor in the courts below. *See State Farm Mutual Automobile Ins. Co. v. CC Chiropractic LLC*, 245 So.3d 755, 760 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D583a] (reminding county courts that the certification process is a method to seek precedent needed for the orderly administration of justice on issues that have statewide application).

This case involves a relatively narrow but common issue: when a particular medical service is payable under Medicare, but requires a determination on an individualized basis by the Medicare contractor for an allowable amount to be determined, may the PIP insurer instead resort to the workers' compensation fee schedule to limit the amount it pays for that service. In this case, the Plaintiff has billed for CPT code 97039, a non-specific code for therapy. The service rendered in this case was hydromassage table, for which there is no specific Medicare code. Under the "Medicare Physician Fee Schedule Database," CPT code 97039 is a "Status C" code which is payable under Medicare.[3] To determine the amount allowed, the service is to be priced by each contractor based on a review of the supporting information provided.[4] Importantly, in this case, State Farm does not contest that the hydromassage table was medically necessary and related to the automobile accident.

This Motion involves the interpretation of a provision of the Florida PIP statute, Florida Statute §627.736(5)(a)(1)(f). The pertinent language of this provision is as follows:

> 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 in 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 (emphasis added).

It is undisputed in this case that the CPT code at issue, 97039 (hydromassage table) is in fact "reimbursable" under Medicare. The question is what amount should the insurer use to cap its reimbursement under the statute.

It is further undisputed that the insurer in this case used the workers' compensation fee schedules to reimburse CPT code 97039. As noted, it is also undisputed that this CPT code is "reimbursable" under Medicare Part B, but that there is not an "amount" specified in the Medicare fee schedules for this modality. Rather, under a routine Medicare case, the amount payable is determined by a local contractor who has no involvement with the cosmos that is PIP.

The Plaintiff contends that because CPT code 97039 is "reimbursable under Medicare Part B," the insurer cannot resort to the safe harbor of the workers' compensation fee schedules to cap the amount payable, but must instead pay under the foundational "reasonableness" determination set forth in the Florida PIP statute.

The Defendant in turn argues that the Plaintiff is not reading the statute as a whole, and urges that the Court continue to read the statute that provides a limitation, expressed by the reference "as provided in this sub-subparagraph." Under the Defendant's argument, the "sub-subparagraph" is the entire section 627.736(5)(a)(1)(f), which addresses only portions of Medicare Part B, not the entire Medicare Part B scheme: in (f)(I) a reference to the "participating physicians fee schedule of Medicare Part B"; in (f)(II) all of "Medicare Part B" when it pertains to "ambulatory surgical centers and clinical laboratories"; and in (f)(III) the "Durable Medical Equipment Prosthetics/Orthotics and Supplies fee schedule." [736(5) would be the section, 736(5)(a) would be the subsection, 736(5)(a)(1) would be the subparagraph of the subsection, and 736(5)(a)(1)(f) would be the sub-subparagraph. This is even more clear when one looks at 736(5)(a)(1)(f)(I) which refers to itself as a "sub-sub-subparagagh."] So, according to the Defendant's reading of the statute as it now exists, when the legislature provided that the insurer could use the workers' compensation fee schedules "if such services, supplies, or care is not reimbursable under Medicare Part B, as provided in this sub-subparagraph," the legislature was referring to only those parts of Medicare Part B that are referred to in all of sub-subparagraph (1)(f), which for the instant case would only be sub-sub-subparagraph (1)(f)(I) because the treatment involved is not related to sub-sub-subparagraphs (1)(f)(II) or (III). Otherwise, there would be no reason to have included—and to have specifically amended the statute to include—the language "as provided in this sub-subparagraph." This suggests that the insurer was correct in availing itself of the workers' compensation because CPT code 97039 is not "reimbursable under Medicare Part B, **as provided in this sub-subparagraph**" (emphasis added) because there is no "participating physicians fee schedule" for CPT code 97039.

Nevertheless, the Court recognizes that the Second District Court of Appeal in an analogous case involving CPT code 99245 held that the Florida PIP statute "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." *Allstate Fire & Cas. Ins. Co. v. Perez*, 111 So.3d 960, 964 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D915a]. This would suggest that the provider's position in the instant case should be the prevailing one. However, the statute at issue in *Perez* was a different statute than in the instant case because the statute was subsequently amended to include the language "as provided in this sub-subparagraph." *See id.* at 962. *Compare* Fla. Stat. §627.736(5)(a)(2)(f) (2011) *with* Fla. Stat. §627.736(5)(a)(1)(f) (2012). Therefore, the Court agrees with the Defendant's interpretation of the statute as it now exists, rather than the version of the statute at issue in *Perez*.

The Court recognizes that it has issued a decision in another case with a contrary holding on the same issue. *See University Health Center PA v. State Farm Mutual Automobile Ins. Co.*, 27 Fla. L. Weekly Supp. 209a (Broward Cty. Ct. 2019). However, the Court does not recall the argument being made in that case concerning the added language "as provided in this sub-subparagraph," and in any event the Court's decision in that case does not address it.

In sum, under Florida PIP law, an insurer must pay a medical charge that is "reasonable," as long as the service is medically necessary and related to the accident. Fla. Stat. §627.736(1)(a) (2017). However, as pertains to the issues in this case, an insurer is permitted to limit its reimbursement by using a "schedule of maximum charges," which is equivalent to "200 percent of the allowable amount under [t]he participating physicians fee schedule of Medicare Part B." *Id.* §§627.736(5)(a)1 & 5(a)1f(I). If, however, the medical service "is not reimbursable under Medicare Part B," then "the insurer may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation." *Id.* §627.736(5)(a)1. Therefore, if a medical service is "reimbursable under Medicare Part B, as provided in this sub-subparagraph" an insurer cannot cap its payment by using the workers' compensation fee schedule. In the instant case, however,

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although CPT code 97039 is reimbursable under Medicare Part B, CPT code 97039 is *not* reimbursable under "Medicare Part B, as provided in this sub-subparagraph," the operative language of the current statute. Otherwise, the phrase "as provided in this sub-subparagraph" has no meaning. *See Brown & Brown, Inc. v. Gelsomino*, 262 So.3d 755, 759 (Fla. DCA 2018) [43 Fla. L. Weekly D2642a] (the "court is required to give effect to every part of a statute if possible and avoid construing any portion of a statute as mere surplusage"). Accordingly, it is hereby

ORDERED and ADJUDGED that the Plaintiff' Motion for Final Summary Judgment is DENIED.

However, because of the high volume of cases pending with this issue throughout the State of Florida, and the lack of a controlling precedent that would ameliorate the substantial amount of judicial labor given to this issue, the Court certifies the following question to the Florida Fourth District Court of Appeal as a question affecting the uniform administration of justice:

> **When a PIP insurer has elected the Medicare fee schedule limitation permitted by Florida Statute §627.736(5)(a)1, which provides that the insurer may limit reimbursement to "200 percent of the allowable amount under [t]he participating physicians fee schedule of Medicare Part B," and the "allowable amount" under the fee schedule is not specified in a general amount but instead must be determined on an individualized basis, is the PIP insurer entitled to limit the reimbursement to 200 percent of the workers' compensation fee schedule?**

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[1]Pursuant to Rule 9.160(b), any appeal of the Court's decision in this matter must be filed in the Fourth District Court of Appeal, and not the Circuit Court.

[2]*See* J. Sebastien Rogers, *The Chasm in Florida Appellate Law: Intra-Circuit Conflicting Appellate Decisions*, Fla. B.J., Apr. 2018, at 52-55.

[3]*See* Medicare Fee Schedule, Local Coverage Determination, AAPC Coder, Medicare Physician Fee Schedule Database, and Medicare Data attached as Exhibit B to Affidavit of Dr. Robert S. Frankl, D.C., filed by Plaintiff in Support of Plaintiff's Motion for Summary Judgment Regarding Underpayment of CPT Code 97039.

[4]*See Federal Register* 70160-61 (Vol 70, No. 223, Nov. 21, 2005) attached as Exhibit B to Affidavit of Dr. Robert S. Frankl, D.C., filed by Plaintiff in Support of Plaintiff's Motion for Summary Judgment Regarding Underpayment of CPT Code 97039. This issue is discussed from the bottom of column 3 on page 70160 through column 1 on the top of page 70161.

* * *

Insurance—Personal injury protection—Discovery—Willful and deliberate failure to comply—Sanctions

ACCUMED WELLNESS & REHABILITATION CENTER, INC., a/a/o Henry Desir, Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COWE-19-000582(83). October 9, 2020. Ellen Feld, Judge. Counsel: Abdul-Sumi Dalal, Johnson | Dalal, Plantation, for Plaintiff. Jennifer Blackmon, Hollywood, for Defendant.

ORDER ON PLAINTIFF'S MOTION TO COMPEL COMPLIANCE WITH COURT ORDERS AND FOR SANCTIONS AND MOTION TO EXTEND PRETRIAL DEADLINE

THIS CAUSE, having come before the Court upon Plaintiff's Motion to Compel Compliance With Court Order and Motion for Sanctions Pursuant to F.R.C.P. 1.380, and Plaintiff's Motion to Extend Deadlines set in Uniform Order Setting Pretrial Deadlines & Related Requirements, and the Court being fully advised in the premises, finds as follows:

1. This is an action to recover unpaid personal injury protection benefits.

2. On April 18, 2019, Plaintiff filed and served its initial discovery including a Request for Admissions, Request for Production and Interrogatories. Defendant did not respond.

3. On February 28, 2020, Plaintiff filed and served its supplemental discovery, including a Supplemental Request for Production and Supplemental Interrogatories. Defendant did not respond.

4. On May 5, 2020, this Court entered its Uniform Order Setting Pretrial Deadlines and Related Requirements. Pursuant to said Order, the parties were to complete all discovery no later than August 3, 2020.

5. On May 14, 2020, Plaintiff notified Defendant of its failure to respond to Plaintiff's initial and supplemental discovery requests.

6. Having received no response, on June 22, 2020, Plaintiff filed and served its Exparte Motion to Compel Defendant's response to Plaintiff's initial discovery and Plaintiff's Motion to Compel Defendant's response to Plaintiff's supplemental discovery.

7. On July 10, 2020, this Court entered 1) an Order Compelling Discovery (Defendant's Response to Plaintiff's initial discovery); and 2) an Order Compelling Discovery (Defendant's response to Plaintiff's supplemental discovery). Said Orders required the Defendant to respond to the outstanding discovery within 10 days. Defendant did not comply.

8. On September 2, 2020, Plaintiff filed its Motion to Compel Compliance With Court Order and Motion for Sanctions Pursuant to F.R.C.P. 1.380.

9. On September 2, 2020, Plaintiff filed its Motion to Extend Deadlines Set Forth in the Court's Uniform Order Setting Pretrial Deadlines and Related Requirements due to Defendant's failure to respond to Plaintiff's discovery requests.

10. On September 10, 2020, Plaintiff filed its second Motion to Compel Compliance With Court Order and Motion for Sanctions Pursuant to F.R.C.P. 1.380.

11. On September 23, 2020, Plaintiff coordinated and noticed a telephonic hearing on Plaintiff's Motions to be heard on October 8, 2020[1].

12. On October 6, 2020, two (2) days prior to the scheduled hearing, Defendant filed its Response to Plaintiff's Request to Produce and Supplemental Request for Production, making numerous untimely objections. Additionally, Defendant failed to provide the requested documents.

13. On October 7, 2020, less than one (1) day prior to the hearing, Defendant produced production documents which do not appear to be responsive to Plaintiff's requests (i.e. recorded statements and other documents requested relevant to Defendant's affirmative defense).

14. As of this date, Defendant has not provided its verified Answers to Interrogatories, nor its verified answers to Plaintiff's supplemental interrogatories, nor complete production responses.

15. The Court finds that sanctions are appropriate under Florida Rule of Civil Procedure 1.380 for Defendant's willful and deliberate violations of three Court Order's compelling discovery responses as well as this Court's Trial Order on discovery completion.

16. The Court notes that the Defendant failed to appear at the hearing and the Court called the Defendant multiple times on different numbers and waited over 20 minutes for counsel for the Defendant to make an appearance.

Based upon the forgoing, it is **ORDERED AND ADJUDGED** as follows:

1. Plaintiff's Motion for Sanctions is granted and the Court reserves jurisdiction to determine the amount of same.

2. Plaintiff's Motion to Compel Compliance With Court Order is Granted, Defendant shall response to all outstanding and incomplete discovery by October 09, 2020. Defendant's failure to completely respond to said discovery shall result in default in favor of Plaintiff.

3. The Parties shall file a Joint Pretrial Stipulation no later than October 16, 2020. It is the responsibility of all parties to cooperate in good faith in preparation of the Joint Pretrial Stipulation. Failure file a Joint Pretrial Stipulation will result in default in favor of Plaintiff.

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[1]The Amended Notice of Hearing was filed on October 1, 2020 to update defense counsel's telephone number at the Defendant's request.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Where PIP statute provides that charge submitted for amount less than 200% of allowable amount under Medicare Part B fee schedule may be paid in amount of charge submitted, and PIP policy at issue does not require insurer to pay full amount of such charges, insurer was entitled to pay only 80% of those charges

REAL HEALTHCARE INC., a/a/o Rick Cortez, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE19026173, Division 53. August 20, 2020. Robert Lee, Judge. Counsel: Matthew Emanuel, Landau & Associates, P.A., Sunrise, for Plaintiff. Michael S. Walsh, Kubicki Draper, P.A., Ft. Lauderdale, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This cause came before the Court on August 17, 2020 for hearing of the Plaintiff's Motion for Summary Judgment, and the Court's having reviewed the Motion and other matters of record, heard the arguments of counsel, reviewed the relevant legal authorities, and been sufficiently advised in the premises, finds as follows:

The issue in this PIP case involves application of a statute to an undisputed set of facts. For three medical services—represented by CPT codes 98941, 97110 and 97530—the Plaintiff medical provider billed an amount that was less than 200% of the applicable Medicare rate (the "statutory formulaic amount"). Because 80% of the statutory formulaic amount was more than the actual amount the Plaintiff billed, State Farm instead paid 80% of the billed amount. The Plaintiff acknowledges that it cannot receive an amount more than what it billed. However, the Plaintiff argues that State Farm should have paid the full amount billed, not 80% of the amount billed.

The applicable statute is Fla. Stat. s627.736(5)(a)5, which provides in part, "If a provider submits a charge for an amount less than the amount allowed in subparagraph 1., the insurer *may* pay the amount of the charge submitted" (emphasis added).

The Fifth DCA addressed this issue in the context of a billed amount that was, similar to the instant case, less than 80% of the statutory formulaic amount. *Geico Indemnity Company v. Accident & Injury Clinic, Inc.,* 290 So.3d 980 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D3045b]. State Farm argues that the decision does not, however, apply to the instant case because in the DCA case, Geico had placed language in the policy that changed the "may" of the statute to "shall." In other words, Geico was giving up its "option" to pay a lesser amount if it believed the lesser amount was a reasonable amount to pay.

In the Court's view, the Plaintiff reads the Fifth DCA decision too broadly. In the *Geico* case, the issue was whether the provider was "entitled to full reimbursement of the billed amount upon the plain language of Geico's policy." *Id.* at 982. The Geico policy, unlike the State Farm policy in the instant case, *required* the insurer to pay the full amount of the charge when it was less than 80% of the fee schedule amount. *See id.* The Geico policy language ("shall be paid") differs materially with the statutory language ("may pay") on this issue, with Geico providing broader coverage than that required by the statute.

State Farm argues that the linchpin of the Fifth DCA decision was the contractual policy language rather than the statutory language. This Court agrees. Under the PIP statute, an insurer is obligated to pay only 80% of a reasonable charge. Fla. Stat. §627.736(1)(a) (a PIP insurer is responsible for "eighty percent of all reasonable expenses"). The statute provides a safe harbor formula that an insurer can elect which shields the insurer from a challenge that the amount billed is reasonable. If the amount billed is less than the statutory formulaic amount, the insurer "may" elect to pay the full billed amount, unless the language in the policy makes it mandatory to pay the lesser amount. Here, State Farm chose not to elect the option. By acknowledging then that the amount billed was a reasonable amount, State Farm was within the statutory language to pay only 80% of that amount when the policy had no language requiring it to pay the full amount. *See State Farm Mutual Automobile Ins. Co. v. MRI Associates of Tampa, Inc.*, 252 So.3d 773, 778 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1149a] (PIP insurer may limit its payment based on the fee schedule formula, while at the same time engaging in a fact-dependent analysis of reasonableness; this is not an improper "hybrid" method of payment).

The Court acknowledges that this raises the issue of why would the Legislature place this provision in the statute. To be sure, it is hard to imagine an insurance voluntarily paying more than it is required to pay. Perhaps the Legislature determined that it would be a means of reducing litigation, and the resulting attorney's fees, if an insurer simply paid the full amount billed. Indeed, had State Farm simply paid the fairly small difference at issue, this case never would have happened. And perhaps the Legislature felt the insurer should be able to do so without facing a challenge from another provider that the insurer is improperly depleting or exhausting insurance benefits, a common defense in a PIP case. But in any event, it is not for this Court to do anything other than interpret the statute as written. *See* W. Reynolds, Judicial Process §5.3 (1980) ("The task of judges in not to rewrite the statute as they would have written it."). And clearly, "may" does not mean "shall." Accordingly, it is hereby

ORDERED that the Plaintiff's Motion for Summary Judgment is DENIED.

* * *

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Volume 28, Number 8
December 31, 2020
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MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Civic organizations—Lobbying, activist, and advocacy groups—Specific social, fraternal, sororal or religious groups—Canon 7 does not prohibit a judge from becoming a dues paying member of the NAACP because NAACP does not fall within Code of Judicial Conduct's definition of a "political organization"—Judge must comply with Canons 2A, 2B, 3E(1), and 5A to ensure that prestige of judicial office is not lent to a private organization and that membership is otherwise consistent with judge's impartiality

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number 2020-22. Date of Issue: October 22, 2020.

ISSUE

May a judge become a dues paying member of the NAACP?

ANSWER: Yes.

FACTS

The inquiring judge states that a member of the local chapter of the National Association for the Advancement of Colored People (NAACP) has urged several judges to become dues paying members of the organization. There are several levels of membership, each with its required donation; however, the base level annual membership for an adult is less than fifty dollars. The judge intends to join, but is concerned that the NAACP may be a political organization, and that if it is, the Code of Judicial Conduct may prohibit membership. The inquiring judge notes that the NAACP has many roles, some of which may be viewed as political activity. We answer the inquiry based on the assumption that the inquiring judge will not be personally involved in fundraising, act as a leader, serve as an officer or engage in political campaign activity on behalf of the NAACP.

DISCUSSION

The Florida Code of Judicial Conduct, Canon 7, advises that a judge must refrain from inappropriate political activity. With certain exceptions, a judge is not to act as a leader or hold office in a political organization. Fla. Code Jud. Conduct, Canon 7A(1)(a). Nor may a judge make speeches on behalf of a political organization, attend political party functions, solicit funds, pay an assessment to or contribute to a political organization or candidate, or purchase tickets for political party functions. Fla. Code Jud. Conduct, Canon 7A(1)(c, d, e). Judges are permitted to engage in political activity as otherwise authorized by the Code of Judicial conduct "on behalf of measures to improve the law, the legal system or the administration of justice, or as expressly authorized by law." Fla. Code Jud. Conduct, Canon 7D(ii-iii).

The foregoing prohibitions found in Canon 7 apply only if the NAACP is a "political organization" which the Code states, "denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office." Fla. Code Jud. Conduct, Definitions. While some of the NAACP's activities may be viewed as political, there seems to be no basis for saying that, at this time, its principal purpose is political.

The JEAC has previously analyzed whether an organization that has multiple roles, some of which are political, is a "political organization." In Fla. JEAC Op. 09-13 [16 Fla. L. Weekly Supp. 1003a], this Committee considered whether a judge may become a member of the National Rifle Association because proof of current NRA membership was a condition precedent to membership in the local gun club the judge wished to join. The Committee answered that question, in part, by reference to Fla. JEAC Op. 00-22 in which it concluded that, although "the NRA is involved in political matters, it is neither a 'political party' nor a 'political organization' as defined in the Definitions of the Code of Judicial Conduct."

We conclude that the NAACP does not meet the Code's definition of political organization. Thus, dues paying membership in the NAACP is not prohibited by Canon 7.[1] However, the answer to the judge's inquiry does not end there. We again refer to JEAC Op. 09-13 which contains an informative review with summaries of earlier JEAC opinions that dealt with judicial membership in various organizations that have multifaceted roles which included political activity. That opinion does such a good job of pointing out that judges must be mindful of other relevant provisions of the Code of Judicial Conduct, that we quote from it at length:

> Canon 2A states, "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 5A provides, in pertinent part, "A judge shall conduct all of the judge's extrajudicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) undermine the judge's independence, integrity, or impartiality; (3) demean the judicial office; (4) interfere with the proper performance of judicial duties; (5) lead to frequent disqualification of the judge; or (6) appear to a reasonable person to be coercive." Canon 3E(1) requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."
>
> This Committee has consistently cautioned judges against lending the prestige of the judicial office to further the interests of advocacy groups, and it has specifically opined that judges cannot be personally involved with any lobbying activities for such organizations. However, the Committee has historically taken the position that mere membership in an organization which is well-known for its positions on political or controversial issues or promotes a particular legislative agenda is not prohibited by the Code of Judicial Conduct.
>
> . . . .
>
> The judge is reminded of the commentary to Canon 5C(3)(a) which provides, in pertinent part, "The changing nature of some organizations and their relationship to the law makes it necessary for a judge to regularly reexamine the activities of each organization with which the judge is affiliated in order to determine if it is proper for the judge to continue the affiliation." This comment has equal relevance to any consideration of Canon 2A's command that a judge act in a manner that promotes public confidence in the impartiality of the judiciary, Canon 2B's directive that a judge not lend the prestige of judicial office to advance the private interests of another, Canon 2B's proscription that a judge not convey the impression that others are in a special position to influence the judge, or Canon 5A's cautions that a judge be circumspect in the judge's extra-judicial activities. Thus, the inquiring judge must continually monitor membership in this, or any, organization to ensure that the organization's activities and the public perception of the organization have not changed to the extent that continued membership implicates any of the various provisions of the Code of Judicial Conduct.

REFERENCES

Fla. Code Jud. Conduct, Canons 2A, 2B, 3E(1), 5A, 5C(3)(a), 7 Fla. JEAC Op. 09-13 [16 Fla. L. Weekly Supp. 1003a], 00-22.

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[1]The inquiring judge must ensure that dues paid by the judge to the NAACP are not used principally to finance events for elected officials or for the election of political officers, as that might well change the analysis. *See* JEAC Op. 13-20.

* * *

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Judges—Judicial Ethics Advisory Committee—Disclosure, recusal, or disqualification—Attorney-client relationship—A judge is not disqualified from involvement in proceedings in which one of the attorneys is a former client of the judge or is a member of a law firm formerly represented by the judge—Disclosure of the representation should be made for a reasonable period of time after the representation terminated

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 20-23. Date of Issue: November 13, 2020.

ISSUES

1. Is a judge disqualified from involvement in proceedings in which one of the attorneys is a former client of the judge or is a member of a law firm formerly represented by the judge?

ANSWER: No.

2. If disqualification is not required, must the judge disclose that an attorney for one of the parties was previously represented by the judge?

ANSWER: Yes, disclosure of the representation should be made for a reasonable period of time after the representation terminated.

FACTS

The inquiring judge had a legal practice that included the representation of attorneys, their law firms, or both the attorneys and their firms. Some of those clients were statewide law firms which employ many attorneys or were attorneys employed by such firms. It is possible that some of the attorneys whose conduct was at issue could appear before the judge, and likely that attorneys from some of the statewide firms would appear before the judge The judge requests guidance on whether disqualification is required under such circumstances and, if not, whether disclosure of the relationship is required. The judge further inquires about the length of time which must pass after the representation before disqualification or disclosure is no longer required, should either be necessary.

DISCUSSION

The Florida Code of Judicial Conduct, Canon 3E, requires a judge to disqualify himself or herself from a proceeding in which the judge's impartiality might reasonably be questioned.

Some existing opinions of this committee deal with the issue of former clients appearing before a judge as parties. Others involve attorneys who are representing or formerly represented a judge appearing before that judge, but none appear to deal with instances where a former client appears before the judge in his or her capacity as an attorney representing one of the litigants.

In *Perona v. Fort Pierce/Port St. Lucie Tribune*, 763 So. 2d 1188 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D255c], it was held that prior representation of one of the parties by a judge, without more, is not a ground for disqualification of the judge. This committee, in Fla. JEAC Op. 17-17 [25 Fla. L. Weekly Supp. 683a] and Fla. JEAC Op. 05-05 [12 Fla. L. Weekly Supp. 507b], likewise stated that a judge need not self-disqualify from a case merely because one of the parties was a former client. It has, conversely, been held that a judge must disqualify himself or herself from proceedings in which the attorney for one of the parties currently represents the judge or a family member, or has done so recently. Fla JEAC Ops. 12-37 [20 Fla. L. Weekly Supp. 193a], 99-13, and 05-15 [12 Fla. L. Weekly Supp. 1200a]. Fla. JEAC Op. 86-09 suggests that a judge should continue to disqualify himself or herself from cases in which a party is represented by the same attorney who formerly represented the judge for several months after the representation has ended.

Taking such prior opinions into consideration, the situation described by the inquiring judge appears to be more similar to those in which a party to the proceeding is a former client of the judge than to those in which an attorney appearing before the judge is currently representing, or has recently represented, the judge. In the instances where either the party or the attorney is a former client, the person whose relationship is in question is merely a person whom the judge was employed to represent, rather than a person sought out by the judge to use his or her legal expertise to aid the judge. The concern about a possible conflict of interest would thus be more remote when a former client is the attorney for a party than when the attorney is, or was, also counsel for the judge in a matter personally affecting the judge. Accordingly, the committee believes that the same standard should be used when considering cases involving former clients, regardless of whether the former client is a party to a proceeding before the judge, or is appearing as an attorney before the judge in a proceeding. The judge should not be required to disqualify himself or herself from a proceeding merely because one of the attorneys for the litigants was once represented by the judge. In the absence of any other factor that might give rise to a reasonable question as to the judge's impartiality, no need for disqualification exists. The judge must, of course, consider each case individually to ensure that no special circumstances exist that would make disqualification appropriate.

Though no requirement of mandatory disqualification exists, the committee believes that the judge should disclose the former attorney-client relationship until a reasonable period of time has passed after the judge's representation of the former client ceased. The committee has never created a bright-line rule as to what that reasonable length of time might be, but some opinions of the committee have suggested time periods ranging from several months to one year. Fla. JEAC Ops. 01-17 [9 Fla. L. Weekly Supp. 345a], 12-37 [20 Fla. L. Weekly Supp. 193a].

The same rules for disclosure apply whether it was an individual attorney or the law firm which was previously represented by the judge. Prior decisions of the committee have made no distinction between large law firms, small law firms, or individual attorneys concerning issues of disqualification and disclosure of possible conflicts. Fla. JEAC Ops. 17-20 [25 Fla. L. Weekly Supp. 765a], 20-08 [28 Fla. L. Weekly Supp. 171b]. No reason exists to make such a distinction in this instance. The judge should make the disclosure of his representation for a reasonable period of time as described above in any case involving either an attorney or a member of the law firm which he or she represented.

REFERENCES

96

The Florida Bar v. Perona v. Fort Pierce/Port St. Lucie Tribune, 763 So.2d 1188 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D255c]
Fla. Code Jud. Conduct, Canon 3E
Fla. JEAC Ops. 20-08 [28 Fla. L. Weekly Supp. 171b], 17-20 [25 Fla. L. Weekly Supp. 765a], 17-17 [25 Fla. L. Weekly Supp. 683a], 12-37 [20 Fla. L. Weekly Supp. 193a], 05-15 [12 Fla. L. Weekly Supp. 1200a], 05-05 [12 Fla. L. Weekly Supp. 507b], 01-17 [9 Fla. L. Weekly Supp. 345a], 99-13, 86-09

*   *   *

Judges—Judicial Ethics Advisory Committee—Disclosure, recusal, or disqualification—Friendships—A judge is not required to recuse where a friend of the judge's spouse appears as counsel of record but judge does not have a close social relationship with counsel—Judge need not disclose the nature of the relationship between the judge's spouse and counsel in all proceedings where spouse's friend appears as counsel unless judge believes that nature of the friendship is sufficient to warrant reasonable concern over judge's impartiality

Florida Supreme Court Judicial Ethics Advisory Committee. Opinion No: 2020-24. Date of Issue: November 13, 2020.

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ISSUES

Whether a judge must recuse him/herself from any cases where a friend of the judge's spouse appears as counsel of record but the judge does not have a close social relationship with the lawyer?

ANSWER: No.

If not required to recuse, must the judge disclose the nature of the relationship between the judge's spouse and the lawyer in all proceedings where the spouse's friend appears as counsel of record?

ANSWER: No, unless the judge believes that the nature of the friendship is sufficient to warrant reasonable concern over the judge's impartiality.

FACTS

The inquiring judge presides over a division to which lawyers are assigned, and those lawyers are supervised by other lawyers. A new supervising lawyer has been assigned to the division. The new supervisor is a casual social friend of the judge's spouse. For example, the new supervisor and the judge's spouse attend a weekly class and socialize after the class about once a month.

The judge has never socialized with the new supervising lawyer, other than brief interactions at 4 or 5 large charity events over the years. The new supervising lawyer also volunteered, along with many others, to assist in the judge's campaign a few years ago at a large meet and greet campaign event. The judge has not spoken with the new supervising lawyer in approximately 18 months.

DISCUSSION

The question of when a judge must recuse based on social interactions with a lawyer implicates Canon 2B of the Florida Code of Judicial Conduct ("A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment."). As we observed in Florida Judicial Ethics Advisory Opinion 93-56, "The question of when a judge must reveal his close personal relationship with an attorney is very difficult to address. Judges should certainly be aware that close social relationships with attorneys may create an appearance of impropriety. On the other hand, we are of the opinion that judges should certainly not remain socially apart from attorneys." However, the question of when a judge must reveal a mere social connection is far easier to address.

Here, the inquiring judge has, at best, a passing acquaintance with the new supervising lawyer. Even the judge's spouse cannot be considered a close social friend of the new supervising lawyer. Given this description of the attenuated relationship between judge and lawyer, we do not believe recusal is required. Nor do we believe the judge is required to disclose the judge's limited social interaction with the new supervising lawyer.

We reach our conclusion after considering the nature of the relationships that we have previously held were insufficient to require recusal or disclosure. *See* Fla. JEAC Op. 03-22 [11 Fla. L. Weekly Supp. 75b] (lawyer was member of the judge's reelection committee); Fla. JEAC Op. 99-02 (judge asked a female attorney for a social dinner, and the relationship did not evolve into a personal relationship); Fla. JEAC Op. 93-16 (lawyer was an active campaign worker, distributed leaflets, held signs on street corners, walked door to door, operated a telephone bank, threw a party to introduce the candidate, and wrote letters to clients urging a vote for the judge). The key factor is the closeness of the relationship. *See* Fla. JEAC Op. 04-35 [12 Fla. L. Weekly Supp. 267a] (disclosure required where judge is a close friend of a local attorney and the attorney's spouse, and they socialize on a regular basis).

We caution, however, that while we do not believe that the judge is required to recuse or disclose based on these facts relayed to us, "if a motion for recusal is made and it is legally sufficient, then the judge should grant the motion and recuse." Fla. JEAC Op. 93-56. Although a judge is not required to recuse merely because the judge has disclosed information that might be relevant to an issue of disqualification, "the issue should be resolved on a case by case basis." Fla. Code Jud. Conduct, Canon 3E(1), comment. *See* Fla. JEAC Op. 09-01 [16 Fla. L. Weekly Supp. 273a] ("The Committee believes the judge is in the best position to make that determination. Even if the judge does not believe disqualification is necessary due to personal bias, the inquiry does not end there. The judge must also consider whether objectively, disqualification is required.")

REFERENCES

Fla. Code Jud. Conduct, Canons 2B, 3E(1)

Fla. JEAC Op. 93-16; 93-56; 99-02; 03-22 [11 Fla. L. Weekly Supp. 75b]; 04-35 [12 Fla. L. Weekly Supp. 267a] ; 09-01 [16 Fla. L. Weekly Supp. 273a]

* * *

Judges—Judicial Ethics Advisory Committee—Matters prior to becoming judge—Sale of law office building—Judge may continue to list judge's former law office property, title to which is in a limited liability company whose name includes that of judge

Florida Supreme Court Judicial Ethics Advisory Committee. Opinion No. 2020-25. Date of Issue: December 10, 2020.

ISSUE

MAY A JUDGE CONTINUE TO LIST THE JUDGE'S FORMER LAW OFFICE PROPERTY, TITLE TO WHICH IS IN A LIMITED LIABILITY COMPANY WHOSE NAME INCLUDES THAT OF THE JUDGE, WITHOUT DISSOLVING OR RENAMING THE COMPANY?

ANSWER: YES, because the business entity is not a "Professional Corporation" organized under Chapter 621, Florida Statutes, and therefore does not place the judge in the position of violating Canon 5G.

FACTS

This inquiry comes from an individual who was recently elected to a judicial position and who will assume office in January. The Judge-Elect was previously in private practice, operating a Limited Liability Company (hereafter "LLC") whose name includes that of the Judge-Elect. The Judge-Elect is sole owner of the LLC which, in turn, owns the firm's office building subject to a mortgage. The Judge-Elect also signed the loan instruments as a personal guarantor.

The building is currently listed for sale but, of course, it cannot be known when a buyer might emerge—and so it is possible that the Judge-Elect will have been installed prior to any sale date. The inquiry asks whether there is any ethical impediment to leaving the title of the property under its current name, or whether the LLC should be dissolved and/or renamed excluding the identity of the Judge-Elect.

DISCUSSION

Under current Florida law judges at all levels of our court system must be licensed attorneys, and common sense tells us that many of those individuals come to the bench from private practice, whether as solo practitioners or members of large firms. While a number of our prior opinions discuss the steps that new judges must undertake to disengage themselves from such prior business associations, none directly addresses the issue of nomenclature posed by the current inquiry.

In Fla. JEAC Op. 2006-01 [13 Fla. L. Weekly Supp. 407a] a recently appointed judge, who had not yet taken office, was advised to disestablish a Professional Corporation (hereafter "PC") that was titleholder to the building where the judge formerly practiced law. The Committee concluded that the judge could continue to own the property *but* not through a PC. While this might suggest that the

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inquiring Judge-Elect should do the same, it is important to point out that Professional Corporations are governed by a specific statute, §621.03 *et seq.* The term is defined in §621.03(2) as one "organized . . . for the sole and specific purpose of rendering professional service and which has as its shareholders only other professional corporations, professional limited liability companies, or *individuals who themselves are duly licensed or otherwise legally authorized to render the same professional service as the corporation*" (*emphasis added*). Since judges are not permitted to practice law under Canon 5G of the Code of Judicial Conduct, the Committee reasoned that maintaining the PC was no longer appropriate and that the judge should promptly see to it that the PC's certificate of incorporation was amended to provide for some other lawful purpose. *And see* §621.13(3).

That opinion did not deal with LLC's which, though also creatures of statute, are governed by Chapter 605. This chapter is quite detailed, but it contains no restrictive provisions comparable to §621.03(2) that would limit what sort of business the LLC may conduct. Our principal opinion involving an LLC, Fla. JEAC Op. 2014-27 [22 Fla. L. Weekly Supp. 769a], though citing to Op. 2006-01, was primarily concerned with the judge's continuing participation in a *subsequent* LLC formed by the judge and some former law partners to take title to the building occupied by the firm. While such participation is not *per se* forbidden by the Code, we cautioned that the judge should at very least recuse from any subsequent cases involving those attorneys and their clients, or even end the relationship if such disqualifications would be unduly frequent. In the present inquiry the building is for sale and thus the Judge-Elect does not contemplate future ownership, with or without associating with any attorneys.

If, as we conclude, that Op. 2006-01 is limited to judges' continuing to "practice law" by the very nature of the corporation they may own, and that Op. 2014-27 is primarily intended to discourage unnecessary and burdensome disqualifications, then the actual *name* of any such corporation is irrelevant.[1] Neither we nor the Judge-Elect can predict who any prospective buyers of the building may be. Should another lawyer or law firm be interested in it, the identity of the "real" owner is highly unlikely to be a secret regardless what the LCC calls itself. Should the buyer(s) be a law firm, the Judge Elect can refer to the guidelines in Op. 2014-27 regarding disclosure and possible disqualification.

REFERENCES

Florida Statutes Chapter 605 and §§621.03 and 621.13

Florida Code of Judicial Conduct, Canon 5G

Florida JEAC Opinions 2006-01 [13 Fla. L. Weekly Supp. 407a] and 2014-27 [22 Fla. L. Weekly Supp. 769a]

[1]In fact, since the LLC is also a mortgagor, we might speculate that a dissolution or even a name change might interfere with that relationship.

* * *

Judges—Judicial Ethics Advisory Committee—Disclosure, recusal, or disqualification—Practice of law—Judge's post-judicial employer may not advertise judge's prospective employment while still a sitting judge

Florida Supreme Court Judicial Ethics Advisory Committee. Opinion No. 2020-26. Date of Issue: December 10, 2020.

ISSUE

Whether an outgoing judge may authorize a prospective employer to advertise the judge's anticipated post-judicial employment at the firm.

ANSWER: No.

FACTS

The inquiring judge will be leaving judicial office in the next few months. The judge has secured prospective post-judicial employment at a private law firm. The firm has indicated that it would like to immediately begin advertising the judge's affiliation with the firm with respect to the anticipated post-judicial employment. The inquiring judge's term ends on January 5, 2021.

The inquiring judge wishes to know whether the law firm's advertising would be prohibited by the Code of Judicial Conduct.

DISCUSSION

There are three judicial canons this inquiry appears to implicate. Canon 2A states "[a] judge . . . shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2B states "[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge." And Canon 5A provides that "[a] judge shall conduct all of the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) undermine the judge's independence, integrity, or impartiality; (3) demean the judicial office; (4) interfere with the proper performance of judicial duties; (5) lead to frequent disqualification of the judge; or (6) appear to a reasonable person to be coercive."

Our Committee has not squarely addressed the specific issue the inquiring judge has raised. However, our federal counterpart, the Committee on Codes of Conduct of the Judicial Conference of the United States, has. In Committee on Codes of Conduct Advisory Opinion No. 84: Pursuit of Post-Judicial Employment, the federal committee observed:

> Questions also may arise concerning a future employer's desire to announce or otherwise advertise a judge's post-judicial employment. On these questions, the Committee has advised that once the judge has actually resigned and joined the new employer, it is not improper for the employer's formal announcement of affiliation to identify the office and court from which the judge retired or resigned. However, that guidance assumes the announcement is made after the judge has left the bench. A post-resignation announcement avoids the appearance of impropriety because, after a judge has left the bench, the judge has no judicial position, and therefore no position to exploit. However, while a judge remains in office, this risk remains. In addition, the Committee has advised that by allowing a future employer to advertise the judge's employment while the judge remains in office, the judge unavoidably lends the prestige of judicial office to advance the private interests of the future employer. Similarly, the prospect of a pre-resignation announcement raises Canon 2 concerns for the judge. Although the judge may not enjoy any immediate profit from the announcement, the judge's future employer likely benefits from its association with a sitting judge, and the judge arguably stands to gain indirectly from the public advertisement of the judge's post-judicial employment. It follows that announcements of the judge's future employment made through interviews or contacts with the media are subject to the same restrictions.

We agree that by "allowing a future employer to advertise the judge's employment while the judge remains in office, the judge unavoidably lends the prestige of judicial office to advance the private interests of the future employer." Accordingly, we answer the inquiring judge's question in the negative.

REFERENCES

Fla. Code Jud. Conduct, Canons 2A; 2B; 5A

Committee on Codes of Conduct Advisory Opinion No. 84

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