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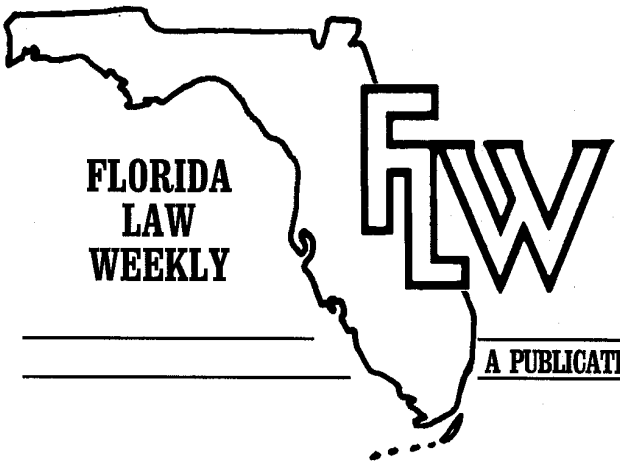

FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 1-55

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.

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Summaries of selected opinions or orders published in this issue.

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- **LANDLORD-TENANT—EVICTION—PANDEMIC-RELATED STAY. A county court judge entered a default against a tenant who claimed to be a covered person under a declaration issued by the Centers for Disease Control calling for a temporary halt to residential evictions after finding that the tenant failed to present evidence or testimony demonstrating that she was a person covered by the declaration.** *41 PROPERTY MANAGEMENT, INC. v. SPIRES. County Court, Thirteenth Judicial Circuit in and for Hillsborough County. Filed February 18, 2021. Full Text at County Courts Section, page 45a.*
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Bold denotes decision by circuit court in its appellate capacity.

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CIRCUIT COURTS—APPELLATE

MICHAEL JAMES CALOMERIS, 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. 20-000026AP-88B. UCN Case No. 522020AP000026XXXXCI. March 17, 2021. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER AND OPINION ON REHEARING

We grant Petitioner's Motion for Rehearing, filed on January 6, 2021, to the extent that we withdraw this Court's opinion rendered December 20, 2020, and issue the following opinion in its stead. No further motions for rehearing or clarification will be entertained.

(**PER CURIAM.**) Denied. *See Dep't of Highway Safety & Motor Vehicles v. Silva,* 806 So. 2d 551, 554 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D139a] (discussing how "the circumstances surrounding the incident would lead a reasonable man to believe that Silva was driving the motorcycle found lying on the road shoulder next to him"); § 322.2615(2)(b), Fla. Stat. ("Notwithstanding s. 316.066(4), the crash report shall be considered by the hearing officer."). (PAMELA A.M. CAMPBELL, LINDA R. ALLAN, and THOMAS M. RAMSBERGER, JJ.)

* * *

Counties—Code enforcement—Appeals—Appeal filed 31 days after rendition of administrative hearing officer's order was untimely filed—No merit to argument that hearing officer erred in rejecting claim that property at issue in building code violation is two separate parcels and citation was issued for wrong parcel where record does not support claim that property consists of separate parcels, existence of violation is not disputed, and appellant admits that he owns both parcels

OTTO EGEA, Appellant, v. MIAMI-DADE COUNTY, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-52 AP 01. March 1, 2021. On Appeal from an Order of Rafael A. Rodriguez, Hearing Examiner, Miami-Dade County. Counsel: Lawrence M. Shoot, for Appellant. Abigail Price-Williams, County Attorney, and Ryan Carlin, Assistant County Attorney, for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

OPINION

(PER CURIAM.) AFFIRMED.

The record reflects that the Order in this appeal was rendered on January 14, 2020. The notice of appeal was filed one day late on February 14, 2020. Accordingly, this court lacks subject matter jurisdiction over this appeal. *See Miami-Dade County v. Peart,* 843 So. 2d 363, 364 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1073b] (finding that the notice of appeal filed 31 days after the administrative hearing officer rendered her decision deprived the circuit of jurisdiction to hear the appeal)(citing *Crapp v. Criminal Justice Standards & Training Comm'n,* 753 So. 2d 787 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D822f] ("[a]n appellate court cannot exercise jurisdiction over a cause where a notice of appeal has not been timely filed")).

However, Appellee did not file a motion to dismiss premised on lack of jurisdiction and the case proceeded to oral argument on February 25, 2021. Having heard oral argument and reviewed the parties' briefs, notwithstanding that we lack subject matter jurisdiction we reach the merits of the appeal because the record does not require reversal in any event.

STANDARD OF REVIEW

In an appeal of a decision of an administrative agency, this court reviews whether procedural due process was accorded, whether the essential requirements of law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a], *citing City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982); *Dusseau v. Metropolitan Dade County Bd. of C'ty Comm'rs,* 794 So. 2d 1270, 1274 (Fla. 2001) [26 Fla. L. Weekly S329a].

Procedural due process requires that the agency provide reasonable notice and a fair opportunity to be heard. *Housing Authority of the City of Tampa v. Robinson,* 464 So. 2d 158, 164 (Fla. 2d DCA 1985). A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. *Jennings v. Dade County,* 589 So. 2d 1337, 1340-41 (Fla. 4th DCA 1991). Here, Appellants received procedural due process as they were given the opportunity to present their own evidence and testimony and to cross-examine the County's witnesses.

A departure from the essential requirements of the law occurs when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice. *Combs v. State,* 436 So. 2d 93, 96 (Fla. 1983). Appellants cite to no such violation.

Nor does the record support Appellants' factual position. Appellants were cited for violating section 8-1 of the Code of Miami-Dade County ("County Code") and section 105.1 of the Florida Building Code for work done without a permit. The County's witnesses testified that the citation was issued based on the Miami-Dade County Property Appraiser's records indicating that the property is one parcel owned by both Appellants. Appellants argue that the hearing officer erred in rejecting counsel's testimony that the Appellant's property involves two parcels and that the citation for violation of the County Code was issued to the wrong parcel.

While counsel argued that the County should have reviewed two separate deeds of record which allegedly exist for the property, the record below does not include any deeds indicating that the property at issue is comprised of two separate parcels. Furthermore, Appellants do not contest the existence of the code violation for which they were cited and admit that Appellant, Otto Egea does own both parcels.

As procedural due process and the essential requirements of the law were observed, and the hearing officer's decision is supported by competent substantial evidence, the Order is AFFIRMED. (TRAWICK, WALSH and SANTOVENIA, JJ. concur.)

* * *

Counties—Utility bills—Certiorari challenge to hearing officer's order upholding water and sewer bills is denied where challenged bills were voluntarily paid by petitioner and there is competent substantial evidence to support hearing officer's decision—Argument that hearing officer should have recused herself is rejected where petitioner failed to show how alleged issue regarding impartiality required recusal and did not raise issue before petition was filed

ANA ARELLANO, Petitioner, v. MIAMI-DADE COUNTY, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-168 AP 01. March 16, 2021. On Petition for Writ of Certiorari from an administrative decision by Miami-Dade County. Counsel: Avelino Gonzalez, Avelino Gonzalez, P.A., for Petitioner. Abigail Price Williams, County Attorney and Sarah E. Davis, Assistant County Attorney, Office of the County Attorney, for Respondent.

OPINION

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

(PER CURIAM.) Affirmed.

The petition for writ of certiorari seeks to quash the Hearing Officer's Findings of Fact and Conclusions of Law rendered on April 12, 2019 ("Decision") upholding the Miami-Dade Water & Sewer Department's water and sewer bills challenged by Petitioner as

excessively high.

STANDARD OF REVIEW

In an appeal of a decision of an administrative agency, this court reviews whether procedural due process was accorded, whether the essential requirements of law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a], *citing City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982); *Dusseau v. Metropolitan Dade County Bd. of C'ty Comm'rs*, 794 So. 2d 1270, 1274 (Fla. 2001) [26 Fla. L. Weekly S329a].

Procedural due process requires that the agency provide reasonable notice and a fair opportunity to be heard. *Housing Authority of the City of Tampa v. Robinson*, 464 So. 2d 158, 164 (Fla. 2d DCA 1985). A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. *Jennings v. Dade County,* 589 So. 2d 1337, 1340-41 (Fla. 4th DCA 1991).

Petitioner argues that the Decision should be quashed because the hearing officer did not offer to recuse herself despite an alleged issue regarding impartiality. However, Petitioner fails to show how the alleged issue requires disqualification and did not raise the issue at any time before the Petition was filed.

We find that there was no due process violation as Petitioner was properly noticed and afforded an opportunity to testify, present evidence, and cross-examine at the April 12, 2019 hearing. *Richard v. Bank of America, N.A.*, 258 So. 3d 485, 489 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2531a] (citation omitted) ("[g]enerally due process requires fair notice and a real opportunity to be heard and defend in an orderly procedure before judgment is rendered").

We further find that there was no departure from the essential requirements of the law. *Haines*, *supra*., 658 So. 2d at 530 (". . .Applied the correct law" is synonymous with "observing the essential requirements of law.")

The County aptly points out that while Petitioner now contests the high water bills for the period between August, 2016 and January 2018, those bills were paid voluntarily by Petitioner. In addition, there was competent, substantial evidence to support the hearing officer's decision. *Bagarotti v. Reemp't Assistance Appeals Comm'n*, 208 So. 3d 1197, 1199 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D159a] ("an administrative hearing officer's findings of fact may not be disturbed by a reviewing court if those findings are supported by competent, substantial evidence").

As procedural due process was accorded, the essential requirements of the law were observed, and the administrative findings and judgment are supported by competent substantial evidence, the Order is AFFIRMED. (TRAWICK, WALSH, and SANTOVENIA, JJ., concur.)

* * *

Criminal law—Driving under influence—Search and seizure—Consensual encounter—Welfare check—Where deputies were responding to report of person slumped over and breathing shallowly in parked running vehicle, initial encounter with defendant was consensual welfare check—Deputy's act of reaching into vehicle through open window to shake defendant after he failed to respond to verbal attempts to rouse him was continuation of welfare check—Encounter was still consensual when deputy observed open container of alcohol in vehicle and began questioning defendant as to whether he was okay—Consensual encounter transitioned to investigatory stop supported by reasonable suspicion when deputies observed that defendant had odor of alcohol and slurred speech and was unsteady on his feet—No error in denying motion to suppress

KEVIN CASEY, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 12th Judicial Circuit (Appellate) in and for Manatee County. Case No. 2019-AP-000246. L.T. Case No. 2019-CT-000001. December 8, 2020. Appeal from the County Court for Manatee County, The Honorable Renee Inman, County Court Judge. Counsel: Carly J. Robbins-Gilbert, Assistant Public Defender, Bradenton, for Appellant. Deanna Cipriano, Assistant State Attorney, Bradenton, for Appellee.

OPINION

(**SMITH, J**.) Appellant, Kevin Casey, appeals the trial court's "Order Denying Defendant's Motion to Suppress," filed August 28, 2019. Following this ruling, Defendant entered a plea of *nolo contendere* to Driving Under the Influence After Prior Conviction(s). On November 18, 2019, the Court adjudicated Defendant guilty and sentenced him as follows: twelve months of probation, six months of driver's license suspension, attend and complete advanced DUI School within 120 days, attend and complete a victim impact panel within 120 days, perform 50 hours of community service, and install an ignition interlock device on his vehicle for two years. Defendant argues on appeal that the trial court's Order should be reversed because the court erred as a matter of law when it concluded that the motion to suppress should be denied.

Mr. Casey entered his plea with the reservation of his right to appeal the trial court's ruling on the dispositive motion to suppress evidence.[1] Thus, the Court has jurisdiction pursuant to § 26.012(1), Fla. Stat.; Fla. R. App. P. 9.030(c)(1); and Fla. R. App. P. 9.140(b)(2)(A)(i). *See England v. State,* 46 So. 3d 127, 128-129 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D2302c].

For the reasons set forth below, the trial court is affirmed.

Testimony Presented at the Suppression Hearing

On January 2, 2019, Deputy Logan Wilson was called to the community pool area of a residential neighborhood after a concerned citizen reported a man in a car, slumped back, unconscious, and breathing shallowly.[2] Deputy Wilson classified the call both as a suspicious person report and a welfare check.[3] When Deputy Wilson arrived, Mr. Casey was in the car, not conscious, with the engine running.[4] Deputy Wilson could see that he was breathing, but could not tell whether he was sleeping, passed out, or unconscious.[5] After calling to him and receiving no response, Deputy Wilson reached through Mr. Casey's open window and shook his shoulder.[6] When Mr. Casey still did not respond, Deputy Wilson applied a sternum rub and successfully woke him.[7]

Before he began to speak to Mr. Casey, Deputy Wilson saw a container inside the vehicle labeled "Mike's Hard Lemonade," which he knew to be an alcoholic drink.[8] He could not tell if there was anything in the container, but the container was opened. [9] Deputy Wilson began asking Mr. Casey some "simple questions," such as inquiring whether he was okay.[10] When Mr. Casey spoke, his speech was slurred and he was initially confused.[11] Deputy Wilson then smelled an odor of alcohol coming from the car.[12]

While Deputy Wilson was speaking with Mr. Casey inside his car, Deputy Christopher Sheffield arrived, having been dispatched to a "suspicious circumstance call."[13] Deputy Sheffield stated that a suspicious circumstance call is not specific in nature and requires the deputies to assess the situation when they arrive at the scene to determine "whether or not a crime has occurred, whether or not [there is] a medical emergency," etc.[14] When Deputy Sheffield arrived, he noticed that Mr. Casey had watery, bloodshot eyes and had an open container in his vehicle.[15]

Mr. Casey asked Deputy Wilson if he could exit his vehicle, which Deputy Wilson allowed.[16] Upon exiting the vehicle, Mr. Casey was off balance and needed to lean on his car for support.[17] Deputy Wilson identified the smell of alcohol coming directly from Mr. Casey's breath.[18]

The deputies then initiated a DUI investigation.[19]

Trial Court Ruling

The trial court denied Mr. Casey's motion to suppress evidence via an Order issued on August 26, 2019.[20] The Order indicates that the court reached its decision based on the arguments and presentations of the parties, the case law submitted by the parties, and the case file.[21]

Standard of Review

An appellate court reviews the denial of a motion to suppress by deferring to the trial court's findings of fact that are supported by competent substantial evidence, and reviewing *de novo* the trial court's application of law to the facts. *Waterman v. State,* 255 So. 3d 980, 984 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2211b]. Furthermore, when a trial court makes no explicit findings of fact, the appellate court must "construe the factual record in the light most favorable to the denial of the motion." *Falcon v. State,* 230 So. 3d 168, 170 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D2301a].

Analysis

"The Fourth Amendment to the United States Constitution and section 12 of Florida's Declaration of Rights guarantee citizens the right to be free from unreasonable searches and seizures." *Golphin v. State,* 945 So. 2d 1174, 1179 (Fla. 2006) [31 Fla. L. Weekly S845a]. However, not all encounters between a citizen and law enforcement officer are a "seizure" warranting constitutional constraints. *Greider v. State,* 977 So. 2d 789, 792 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D949b]. Our courts have recognized three levels of police-citizen encounters: (1) consensual encounter, which implicates no constitutional safeguards; (2) investigatory stop, which requires reasonable articulable suspicion that a person has committed, is committing, or is about to commit a crime; and (3) arrest, which requires probable cause that a crime has been or is being committed. *Popple v. State,* 626 So. 2d 185, 186 (Fla. 1993); *Dermio,* 112 So. 3d at 555; *Gentles v. State,* 50 So. 3d 1192, 1196-97 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2900a]. Police encounters with citizens in order to assess their welfare have generally fallen within the first category and have no constitutional implications. *Dermio,* 112 So. 3d at 555.

In the case before the Court, Mr. Casey argues that law enforcement was never conducting a welfare check, but was sent out to investigate the possible crime of DUI. He argues that, upon arriving at the scene, the deputies could see that he was not suffering a medical emergency and had no reasonable suspicion that he had or was about to commit a crime. Therefore, he contends that the deputies had no reason to wake him and conduct an investigatory seizure of his person. Mr. Casey asserts that the trial court erred as a matter of law when it failed to conclude that he had been illegally seized.

The State responds that, upon approaching the car, Deputy Wilson could not tell if Mr. Casey was sleeping or unconscious, and Mr. Casey did not respond when Deputy Wilson first tried to rouse him. Therefore, the State contends that the encounter began as a valid welfare check. Upon interacting with Mr. Casey for the welfare check, the deputies then developed a reasonable suspicion that a crime had or was being committed, due primarily to the open container of alcohol visible in his car and the smell of alcohol coming from his breath.

In this case, the Court must first determine whether the initial encounter between Mr. Casey and the deputies was a consensual welfare check or an investigatory stop. If it was a consensual welfare check, the Court must then determine when the encounter transitioned to an investigatory stop, and if Mr. Casey was unlawfully seized before the transition occurred.

According to Deputies Wilson and Sheffield, they were responding to a suspicious circumstance call, which does not specify whether there is criminal activity, a medical emergency, or something else, and requires the law enforcement officers to assess the situation once they arrive. The only information that the deputies had before arriving on the scene is that a concerned citizen called in to report an unconscious man slumped in a car, breathing shallowly.

"It is well established that an officer does not need to have a founded suspicion to approach an individual to ask questions." *Popple,* 626 So. 2d at 187; *see also Florida v. Royer,* 460 U.S. 491, 497 (1983). Likewise, "[i]t is well recognized that police officers may conduct welfare checks and that such checks are considered consensual encounters that do not involve constitutional implications." *Dermio,* 112 So. 3d at 555. Here, Deputy Wilson responded to a concerned citizen's report of a person in a parked and running car, slumped over, and breathing shallowly. Although it may have been classified as a "suspicious circumstance" call, both deputies indicated that they considered it a welfare check, based on the description provided by the caller and the need to assess the person's breathing. Therefore, Deputy Wilson's initial encounter with Mr. Casey—where he approached the vehicle and tried to wake him verbally—was a consensual encounter and a welfare check.

Next, after receiving no response to his verbal attempt to rouse Mr. Casey, Deputy Wilson reached into Mr. Casey's open window and shook him. Deputy Wilson did not have to open the door or order Mr. Casey to roll down his window. However, Deputy Wilson did touch Mr. Casey without his explicit consent. Deputy Wilson testified that he was unable to tell if Mr. Casey was asleep, passed out, or unconscious. Although Deputy Wilson testified that Mr. Casey was breathing and there were no obvious signs of a medical emergency, the Court finds that, under the circumstances of this case, the welfare check continued, as Deputy Wilson was still investigating whether Mr. Casey was okay after he failed to respond to verbal contact.

"Although there is no litmus-paper test for distinguishing a consensual encounter from a seizure, a significant identifying characteristic of a consensual encounter is that the officer cannot hinder or restrict the person's freedom to leave or freedom to refuse to answer inquiries, and the person may not be detained without a well-founded and articulable suspicion of criminal activity." *Popple,* 626 So. 2d at 187-88. Therefore, "[a] seizure under the Fourth Amendment will only occur 'when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.' " *Caldwell v. State,* 41 So. 3d 188, 195 (Fla. 2010) [35 Fla. L. Weekly S425b] (quoting *Terry v. Ohio,* 392 U.S. 1 (1968)). Additionally, the person must be aware that his or her liberty is being restrained in order to constitute a seizure. *See G.M. v. State,* 19 So. 3d 973, 983 (Fla. 2009) [34 Fla. L. Weekly S568a] (finding that activated police lights did not constitute a per se seizure of the defendant because he was unaware of the lights and therefore unaware of the show of authority being displayed by law enforcement); *Dermio,* 112 So. 3d at 556 (finding that the defendant was not initially seized when the officer blocked his vehicle and activated police lights because he was asleep and therefore unable to submit to the show of authority).

Here, Mr. Casey was asleep when Deputy Wilson reached in his window and shook his shoulder. Mr. Casey failed to respond, and so Deputy Wilson then rubbed his sternum and successfully woke him up. Waking Mr. Casey is not, in and of itself, a show of authority. And, while Deputy Wilson touched Mr. Casey to wake him, he did not restrain Mr. Casey or otherwise hinder his freedom to leave once he woke. Mr. Casey was unaware that Deputy Wilson was reaching into his car, and there is no indication from the evidence presented at the suppression hearing that Deputy Wilson continued to touch him after he woke up. Thus, the Court finds that Deputy Wilson was still performing the welfare check when he reached into Mr. Casey's car and touched him to wake him up. But even if those actions were not part of the welfare check, they did not constitute a seizure because Mr. Casey was unaware of any restraint or show of authority demonstrated by the officer.

Deputy Wilson testified that after he woke Mr. Casey but before they began to speak, he noticed an open container in the car labeled "Mike's Hard Lemonade," which is an alcoholic beverage. He then asked Mr. Casey some questions, inquiring whether he was okay. Again, "an officer does not need to have a founded suspicion to approach an individual to ask questions." *Popple,* 626 So. 2d at 187. Thus, the encounter was still consensual at this point.

When Mr. Casey began to speak, Deputy Wilson noticed the odor of an alcoholic beverage coming from the car and that Mr. Casey's speech was slurred. Deputy Sheffield had arrived by that point, had also noticed the open container of alcohol, and had noticed that Mr. Casey had bloodshot and watery eyes. Deputy Wilson did not direct Mr. Casey to exit the vehicle, but Mr. Casey asked to step out, and when he did, he was unsteady on his feet and his breath smelled distinctly of alcohol. At this point, the consensual encounter appropriately transitioned to an investigatory stop, as there was a reasonable articulable suspicion that Mr. Casey had committed, was committing, or was about to commit a crime based on the open container, the smell of alcohol, and Mr. Casey's behavior and appearance.

Conclusion

When construing the factual record in the light most favorable to the denial of the motion, this Court finds that the trial court reached the correct result. Therefore, the trial court's "Order Denying Defendant's Motion to Suppress" is **AFFIRMED.**

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[1]R. at 102-103
[2]R. at 82-83
[3]R. at 82-83, 85-86
[4]R. at 83-84
[5]R. at 87-89
[6]R. at 84
[7]*Id.*
[8]*Id.*
[9]R. at 91
[10]R. at 84
[11]R. at 84-85
[12]*Id.*
[13]R. at 112
[14]*Id.*
[15]R. at 115
[16]R. at 85
[17]*Id.*
[18]*Id.*
[19]*Id.*
[20]R. at 55
[21]*Id.*

* * *

Prohibition—Jurisdiction—Municipal corporations—Petition for writ prohibiting city council from conducting hearing on suspension of alcohol sales license of petitioner that was cited for violation of executive order requiring wearing of masks is denied—City council has jurisdiction to conduct hearing—No merit to argument that conviction by court is prerequisite to proceedings for suspension or revocation of license—Administrative finding of noncompliance is sufficient to support license suspension or revocation

HERIBERTO ORLANDO RODRIGUEZ MANDULEY, d/b/a YBOR CIGARS PLUS, Petitioner, v. CITY OF TAMPA, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Circuit Civil Division. Case No. 21-CA-1111, Division C. February 10, 2021. Counsel: Luke Charles Lirot, Luke Charles Lirot, P.A., Tampa, for Petitioner.

ORDER DENYING PETITION FOR WRIT OF PROHIBITION

(CARL HINSON, J.) This case is before the Court on Petition for Writ of Prohibition filed February 8, 2021, by Petitioner Heriberto Manduley d/b/a Ybor Cigars Plus. This Court has reviewed the Petition, appendix, and applicable law.[1] Because this Court finds that the petition does not show that the City is acting in excess of its jurisdiction, the petition is denied.

The petition seeks the writ to prevent City Council from taking up proceedings related to suspending Petitioner's alcohol sales permit.[2] A hearing is scheduled February 18, 2021. Because the City has not yet undertaken an enforcement or revocation hearing, this Court may consider the petition. *Sparkman v. McClure,* 498 So. 2d 892, 895 (Fla. 1986)(Prohibition is appropriate to prevent a public official from exceeding his jurisdiction and is intended to be preventative, not corrective. It is not appropriate where the challenged act has already occurred).

Petitioner operates an establishment, Ybor Cigars Plus, which serves alcoholic beverages pursuant to wet zoning authorized by the City of Tampa. The establishment was cited on December 17, and December 20, 2020, for violating the Mayor's Executive Order 20-42, requiring business operators to take reasonable steps to enforce the wearing of masks and social distancing to prevent the spread of COVID-19. The December 17, 2020, citation was issued pursuant to Exec. Ord. 20-42(3)(b) for violations of the City's mask requirements by the establishment's employees and further provides payment and challenge instructions. The second citation is identical to the first, except that it cites violations of the mask requirements by patrons of the establishment. The citation directs an alleged violator who wishes to challenge the citation to contact the City to request a hearing, which would take place in the county court. Petitioner contends he elected not to pay the fine and, instead, sought a hearing, but a hearing has not been held.

In addition to the two citations already mentioned, the City also issued a notice of intent to suspend ability to engage in sales of alcoholic beverages under section 27-318 of the City's land development code. The January 7, 2021, notice sets forth the relevant health and safety directives issued by state, county, and city authorities to curb the spread of COVID-19. It addressed the current situation as a state of emergency, and it specified the December 17, and December 20, 2020, violations as grounds for taking the proposed action.

Petitioner contends Exec. Ord. 20-42 divests the City of jurisdiction to conduct the suspension hearing before a court's adjudication of guilt and asks this court for a writ to stop the suspension hearing. In support of this contention, Petitioner relies on a provision in Exec. Ord. 20-42, which expressly invokes section 23-5, City of Tampa Code, for enforcement, allegedly to the exclusion of other enforcement proceedings. The City's Exec. Ord. 20-42 paragraph 6, states:

> **Enforcement**. . . . in the event voluntary compliance is not achieved then, as a last resort, pursuant to Sec. 252.46, Florida Statute, this Order shall have the full force and effect of a law of the City of Tampa, and shall be a noncriminal civil infraction, *enforceable under Ch. 23.5, City of Tampa Code,* as a Class II violation, which carries a maximum civil penalty of up to a $500 fine. . . . (emphasis added.)

Section 23-5 of the Tampa City Code is entitled "Supplemental Proceedings." Section 23-5.2, sets forth the proceedings for which it is applicable, saying:

> Sec. 23.5-2. **- Applicability; nonapplicability**.
>
> The provisions of this chapter shall apply to all violations of city codes or ordinances *which are expressly declared by the City Council to be governed by the provisions of this chapter.* This chapter shall not apply to the enforcement pursuant to F.S. §§ 553.79 and 553.80 of building codes adopted pursuant to F.S. § 553.73 as they apply to construction. . . (Emphasis added.)

As the above language shows, supplemental proceedings apply *only* if expressly declared by City Council to be governed by the provisions of the code's chapter 23, and the Executive Order did so. The Executive Order is intended to have the effect of an ordinance adopted by City Council, and to include the supplemental enforcement

proceedings under section 23-5 as an additional enforcement option. Nothing in the Executive Order's language negates other enforcement mechanisms such as those found in section 27-318, however. Section 27-318(c)(1) and 27-318(c)(1)(f) provides for the revocation or suspension of alcohol sales under certain circumstances, including:

> Sec. 27-318 (c)(1) **Revocation or suspension of sales for cause.** Revocation or suspension of sales for cause. The City Council, after conducting a public hearing as provided for in section 27-318(d) is authorized to suspend or revoke the ability to sell alcoholic beverages from property which has previously been granted an approval. In order for city council to suspend or revoke, it must determine that the property owner, holder of the alcoholic beverage license, operator of the establishment, or any agent or employee thereof, *have been found to have violated or have been convicted of* any one (1) or more of the following:
>
> (f) Failing to comply with any of the provisions of the health and sanitation ordinances of the city, the county or laws of the state after having received reasonable notice to eliminate or correct any condition existing on the property that is in violation of such ordinances or laws; [or]. . .
>
> (2) For purposes of this section, the terms "convicted" or "conviction" shall mean being found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a violation of a municipal or county ordinance or state or federal law, as provided herein. The terms "violation" or "violated" shall mean *being found in non-compliance with any part of this Code and shall include the terms "convicted" or "conviction," as determined by the reviewing city department.* (Emphasis added.)

Exec. Ord. 20-42 was not required to expressly invoke enforcement proceedings under 27-318, and the Executive Order did not negate City Council's ability to conduct proceedings under the code's section 27-318 merely by adopting supplemental enforcement proceedings. To the extent Petitioner contends a conviction by a court is a prerequisite to conducting suspension or revocation proceedings under section 27-318, he is mistaken. An administrative finding of noncompliance also supports the suspension or revocation of the ability to engage in alcohol sales. Sec. 27-318(2), Tampa City Code. Because the petition does not show that City Council intends to act in excess of, or without jurisdiction, the petition is denied without need for a response.

Thus it is ORDERED that the petition is DENIED on the date imprinted with the Judge's signature.

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[1]The court appreciates Petitioner's inclusion of copies of all municipal authority cited to in the petition, which greatly facilitated the court's review.

[2]The ability to engage in the sale of alcoholic beverages is also referred to as "wet zoning."

* * *

Licensing—Driver's license—Suspension—Lawfulness of arrest—Where officer was outside his jurisdiction when he acted under color of law to obtain licensee's information and process it through police database, arrest was not lawful, and breath test was not incident to lawful arrest—Petition for writ of certiorari is granted

ISAAC SANDY, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-018309 (AW). DL No. S530401620020. February 23, 2021. Petition for Writ of Certiorari from a decision by the Department of Highway Safety and Motor Vehicles, Lauderdale Lakes. Counsel: Michael A. Catalano, Michael A. Catalano, P.A., Miami, for Petitioner. April M. Haile, Department of Highway Safety and Motor Vehicles, Miami, for Respondent.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

(PER CURIAM.) Having carefully considered the Petition, Response, and Reply, the record, and applicable law, this Court dispenses with oral argument and finds that:

Officer Stoner, a law enforcement officer who was outside of his jurisdiction, was acting under the color of law when he asked for Petitioner's license, registration, and proof of insurance. *State v. Phoenix,* 428 So. 2d 262, 265-266 (Fla. 4th DCA 1982). Officer Stoner ran the information through a police data base, thereby obtaining evidence only available to him in his capacity of a law enforcement officer. *State v. Mattos,* 199 So. 3d 416, at 420-421 [41 Fla. L. Weekly D1974b]; *Rebalko v. City of Coral Springs,* 19-60569-CIV, 2020 WL 6446042, at *6 (S.D. Fla. Nov. 3, 2020). As the arrest was under the color of law, the Hearing Officer should not have found the breathalyzer test incident to a lawful arrest.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that:

1. The Petition for Writ of Certiorari is **GRANTED**.

2. The Department of Highway Safety and Motor Vehicles Hearing Officer's August 6, 2019 "Finding of Fact, Conclusions of Law" is **QUASHED**.

3. The Petitioner's "Amended Motion for Attorney's Fees is **DENIED**. (J. BOWMAN, M. ROBINSON, and T. COLEMAN, JJ., concur.)

* * *

826 N. DIXIE, INC.; A Florida Corporation, Appellant, v. CITY OF HOLLYWOOD, A Municipal Corporation and Subdivision of the State of Florida, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-000781 (AP). L.T. Case No. V18-10399. February 18, 2021. Appeal from the City of Hollywood, Florida Code Compliance Division, Special Magistrate. Counsel: Mark F. Butler, Mark F. Butler, P.A., Hollywood, for Appellant. Doug R. Gonzales, Office of the City Attorney City of Hollywood, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the initial briefs, the record, and the applicable law, the December 12, 2018 Order of the Special Magistrate of the City of Hollywood Code Compliance Division is hereby AFFIRMED. (BOWMAN, ROBINSON, and COLEMAN, JJ., concur.)

* * *

824 N. DIXIE, INC.; A Florida Corporation, Appellant, v. CITY OF HOLLYWOOD, A Municipal Corporation and Subdivision of the State of Florida, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-000757 (AP). L.T. Case No. V18-10406. February 18, 2021. Appeal from the City of Hollywood, Florida Code Compliance Division, Special Magistrate. Counsel: Mark F. Butler, Mark F. Butler, P.A., Hollywood, for Appellant. Doug R. Gonzales, Office of the City Attorney City of Hollywood, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the initial briefs, the record, and the applicable law, the December 12, 2018 Order of the Special Magistrate of the City of Hollywood Code Compliance Division is hereby AFFIRMED. (BOWMAN, ROBINSON, and COLEMAN, JJ., concur.)

* * *

RAM REALTY INVESTMENTS INC., Appellant, v. CITY OF WEST PARK, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE20-007895 (AP). L.T. Case No. 19-000071. February 18, 2021. Appeal from a decision by a City of West Park Code Enforcement Special Magistrate. Counsel: Mark Goldstein, Miami, for Appellant. Burnadette Norris-Weeks, Burnadette Norris-Weeks, P.A., Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, the Special Magistrate's Code Enforcement Magistrate Order Certifying Fine rendered on March 26, 2020 is hereby **AFFIRMED**. (BOWMAN, ROBINSON, and COLEMAN, JJ., concur.)

* * *

JIM/BOB - WILL PUT THE FAMILY LAW PDF AD ON THE
BACK OF PAGE 5 (WILL RUN PLATE TO THE PRINTSHOP)

Volume 29, Number 1
May 28, 2021
Cite as 29 Fla. L. Weekly Supp. ____

CIRCUIT COURTS—ORIGINAL

Dissolution of marriage—Child custody—Medical treatment—Vaccinations—Where parents with shared parental responsibility for minor child disagree on whether to have child vaccinated, parents are ordered to jointly confer with child's pediatrician and attempt to reach agreement on vaccination—If no agreement is reached, expedited final hearing will be set

CYEDA PALMQUIST, Wife/Petitioner, and KENNETH POTTER, Husband/Respondent. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 20-DR-386. March 6, 2021. David Frank, Judge. Counsel: Cyeda Palmquist, Pro se, Petitioner. Jeffrey Richardson, Tallahassee, for Respondent.

ORDER ON WIFE'S OBJECTION TO CHILDHOOD VACCINATIONS

This cause came before the Court for hearing on March 5, 2021 on the wife's motion for a court order prohibiting immunizations of the minor child, and the Court having reviewed the motion, response, and court file, heard argument of counsel, and being otherwise fully advised in the premises, finds

The Wife in this case, Cyeda Palmquist, filed a petition for dissolution of marriage in Pinellas County on November 23, 2019. The court transferred the case to Gadsden County on May 4, 2020. The Husband, Kenneth Potter, answered the petition on May 26, 2020. They have one child who was born on January 7, 2019. The wife is pro se and the husband is represented by counsel.

On November 20, 2020, the wife filed an "Ex Parte Emergency Motion Objection to stop Immunization." The motion states that the husband will be taking their child for immunizations at some unspecified time so the child may attend day care. The wife asks the Court to prohibit this because the child has a "religious exemption" issued by the Florida Department of Health.

At the hearing, the Court explained to the wife that the Department of Health exemption excuses the child from the immunization requirement for entry into a public school but does not stop the husband from requesting their child be vaccinated. The wife stated that she understood and that she was prepared to present evidence supporting a court order to prohibit the immunizations on other grounds within the context of the dissolution case.

The Evidence Presented

The wife entered into evidence the child's Florida Department of Health Form DH 681, "Religious Exemption From Immunization," signed by the wife on March 11, 2019. She also attempted to enter several documents for which the Court sustained relevance and hearsay objections.

The wife testified that according to her religion, Urantian, the "fragment of god" or "thought adjuster" brings a follower to spiritual truth or cosmic reality if the person is "normal minded," and immunizations would prevent her child from being deemed "normal minded."

When asked about specific evidence that would tend to prove that the specific immunizations at issue would harm her child, she stated two concerns. First, she has read that immunizations are harmful because they are, "run through monkey brain tissue." And second because doctors who oppose immunizations have suspiciously disappeared.

The husband entered three documents into evidence: *Vaccines Work*, U.S. Department of Health and Human Services; *Vaccine Safety*, U.S. Department of Health and Human Services / CDC; *White Paper—Safety of Childhood Immunizations*, U.S. Department of Health and Human Services / CDC.

The husband testified that, initially, he agreed with the wife regarding the decision to not seek immunizations for their child, but that he changed his mind. He now believes it is important to get the immunizations in a timely manner, (at two years old), for their daughter's health and so she can get good doctors and participate in activities such as childcare.

Both wife and husband testified that their daughter's current pediatrician is Carlos Hidalgo. M.D. and that they have confidence in him.

The Right to Refuse Medical Care

The logical place to start is a review of the law that governs a competent adult's right to refuse medical care. The Florida Supreme Court addressed the issue in *Matter of Dubreuil*:

> We begin our analysis with the overarching principle that article I, section 23 of the Florida Constitution guarantees that "a competent person has the constitutional right to choose or refuse medical treatment, and that right extends to all relevant decisions concerning one's health." *In re Guardianship of Browning*, 568 So.2d 4, 11 (Fla.1990); see also *In re T.W.*, 551 So.2d 1186 (Fla.1989); *Public Health Trust of Dade County v. Wons*, 541 So.2d 96 (Fla.1989). In cases like this one, the privacy right overlaps with the right to freely exercise one's religion to protect the right of a person to refuse a blood transfusion because of religious convictions. Art. I, §§ 3, 23, Fla. Const.; *Wons*.

629 So.2d 819, 822 (1993).

A Parent's Right to Make Medical Care Decisions for a Minor Child

Our state and federal constitutions guarantee the right of parents to raise their children without government intrusion, with very limited exceptions. *Von Eiff v. Azicri*, 720 So.2d 510, 514 (Fla. 1998) [23 Fla. L. Weekly S583a] ("Neither the legislature nor the courts may properly intervene in parental decision-making absent significant harm to the child threatened by or resulting from those decisions."). See Fla. Stat. §743.0645(1)(c) (2020) (" 'Person who has the power to consent as otherwise provided by law' includes a natural or adoptive parent, legal custodian, or legal guardian.").

Exceptions arise where there is a compelling need for the state as *parens patriae* to usurp parental decisions or prerogative in the interest of protecting minor children. *Kirton v. Fields*, 997 So.2d 349, 353 (Fla. 2008) [33 Fla. L. Weekly S939a]. For example, a parent's right to make health care decisions can be abrogated where there is abuse, neglect, or abandonment. See Fla. Stat. §743.0645(2) and (3) (2020).

"While courts have consistently overturned restrictions on exposing a child to a parent's religious beliefs and practices, they make an exception where there is 'a clear, affirmative showing that these religious activities will be harmful to the child.' *Mesa v. Mesa*, 652 So.2d 456, 457 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D730a] (citation omitted)." *Winters v. Brown*, 51 So.3d 656, 657 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D175a].[1]

The exception that applies to the present matter is parental responsibility under Chapter 61, Florida Statutes.

Where parents agree, the law and procedure discussed above would apply and court intervention would not be necessary. However, during dissolution of marriage cases, when parents do not agree on a course of action for a minor child, it becomes necessary for courts to address parental responsibilities and decision-making:

> Trial courts must order shared parental responsibility unless the court finds it would be detrimental to the child. § 61.13(2)(c) 2., Fla. Stat. (2015). Shared parental responsibility "contemplates that the parties will mutually confer on major decisions (e.g., medical, religious,

> educational) affecting the child's welfare and will reach agreement." If it is in a child's best interest, the court may award ultimate decision-making authority over specific aspects of the child's welfare to just one parent. § 61.13(2)(c)2.a., Fla. Stat. (2015).

Neville v. McKibben, 227 So.3d 1270, 1272-73 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D2119a] (citations omitted).

In *Winters*, the trial court determined that, "the issue . . . is not one of simply exposing the minor child to the mother's religious beliefs and practices, it involves an issue that could cause physical and serious harm to the minor child. When parents cannot agree, the court is called upon to break the impasse, and that decision must be made in the best interests of the minor child." *Id*. After hearing conflicting expert testimony, the *Winters* trial court determined that it was in the best interests of the minor child to award the father ultimate responsibility to make decisions regarding the minor child's health care and vaccinations.[2] *Id*. The Fourth District affirmed because the trial court's decision was supported by competent, substantial evidence. *Id*.

Here, the husband asks the Court to modify shared parental responsibility and to give him sole decision-making authority for immunization decisions.[3] While one parent's concerns regarding the other parent's approach to a minor child's medical care may be sincere, shared parental responsibility will not be modified unless, ". . .competent, substantial evidence [is] introduced to support the trial court's findings that [the parent's] parenting decisions were dangerous or contrary to normal medical care." *Id*.

"One would hope that parents committed to successful co-parenting, as they should be, would resolve these disputes between themselves or with the informal assistance of counselors or advisors." *Angeli v. Kluka*, 190 So.3rd 700 (1st DCA 2016) [41 Fla. L. Weekly D1223a].

Conclusion

The Court is not convinced that either party met the evidentiary burden to demonstrate the type of harm that would support a modification of shared parental responsibility for the minor's child's immunizations. If the timing was such that a ruling had to be entered today, the father's position likely would prevail. But the timing does not demand a ruling today. Accordingly, it is

ORDERED and ADJUDGED that the husband and wife will jointly confer with their minor child's pediatrician, Carlos Hidalgo, M.D., and after listening to his professional opinions and advice regarding the advantages and disadvantages of immunizations, will use their best efforts to reach an agreement on which course to take. The consultation should include a discussion of any underlying health conditions or allergies that could make standard childhood immunizations contraindicated for the minor child. The consultation will occur no later than 30 days from the date of this order. If an agreement is reached using shared responsibility, the wife will file a notice of withdrawal of her motion. If not, the parties will contact the Court's Judicial Assistant and set an expedited final hearing on the matter.

[1]"The end result of a court battle over the provision of medical treatment depends on the type of objection—religious or secular, the proposed treatment and the prognosis for survival with and without treatment. Religious objection to standard medical therapy is often legally valid when the treatment is more likely to fail than succeed. Respect for religion has forced courts to recognize that medical decisions are not always scientific—many people rely on faith to heal them. On the other hand, the right to refuse treatment based on religious objection is not absolute. In cases where adherence to religious tenets that prohibit standard, life-saving care, e.g., blood transfusion, would almost certainly lead to a child's death, the courts have decided that parents cannot make martyrs of children who are too young to have consented to embrace the faith." American Medical Association Journal of Ethics, Limiting Parents' Rights in Medical Decision Making, Lee Black, LLM, October 2006.

[2]In *Winters*, one medical expert testified that, "[C]hildren who do not get vaccinated not only are at increased risk themselves, studies have indicated that they put other children at risk in the schools and where they play." Another medical expert testified that, "it's less harmful for a child not to be vaccinated than it is for a child to be vaccinated."

[3]The Court will be issuing an order granting the wife's motion for reconsideration of the temporary parenting plan under separate cover. The order will include shared parental responsibility for all decisions and that is the posture assumed for the present matter.

* * *

Torts—Negligence—Automobile accident—Failure to use reasonable care—Defendants' motion for summary judgment is denied where record evidence supports several reasonable inferences of negligence in conduct of defendant driver who bottomed out trailer while making u-turn on interstate median, resulting in trailer protruding into travel lane and causing several vehicle crashes

DAVID EDENFIELD, et al., Plaintiffs, v. PROFESSIONAL HIGHWAY MAINTENANCE, INC., et al., Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 19-CA-157. March 11, 2021. David Frank, Judge. Counsel: Robert M. Scott and J. Clint Wallace, Tallahassee, for Plaintiff. Steven M. Puritz and Christina L. Pardieck, Tallahassee, for Defendant.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This cause came before the Court for hearing on March 10, 2021 on defendants,' Professional Highway Maintenance, Inc. ("PHM") and Patrick Clements ("Clements") Motion for Summary Judgment, and the Court having reviewed the motion, the response, the reply, and the court file, heard argument of counsel, and being otherwise fully advised in the premises, finds

While working for PHM and attempting to make a U-turn across the I-10 median, Clements bottomed out the vehicle he was driving, a F-450 truck towing an 18-foot trailer weighing approximately 26,000 pounds, that was then stuck in a position protruding approximately 4.5 feet onto the eastbound lane of travel. The reaction of eastbound drivers to the sight of the vehicle on the highway resulted in two vehicle crashes, one involving the vehicle plaintiff was driving. Plaintiff is seeking compensation for personal injuries and his wife for loss of consortium.

Summary Judgment Cautiously Granted in Negligence Cases

"In negligence suits particularly, summary judgments should be cautiously granted. If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it. Summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." *Collias v. Gateway Acad. of Walton Cty., Inc.*, No. 1D19-262, 2021 WL 79775, at *1 (Fla. 1st DCA, Jan. 11, 2021) [46 Fla. L. Weekly D140c], citing *Brookie v. Winn-Dixie Stores, Inc.*, 213 So.3d 1129, 1131 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D752a] (citations and internal quotations omitted); See also *Lindsey v. Bill Arflin Bonding Agency Inc.*, 645 So.2d 565, 566-67 (Fla. 1st DCA 1994) ("Particular caution should be employed when granting summary judgment in negligence actions."). A party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought. *Davis v. Bruhaspati, Inc.*, 917 So.2d 350, 351 (Fla. 1st DCA 2005) [31 Fla. L. Weekly D102a].

Defendants' Approach to Summary Judgment

Defendants do not appear to be challenging the allegation that the intrusion onto the highway *caused*, or at least started the events that resulted in, the eventual collisions. Instead, they are focused on the breach of duty element—the failure to use reasonable care.

In a nutshell, defendants' argument is that sometimes things happen even when a person has not done anything wrong and, thus, has not been "negligent." They contend that Clement's actions really

weren't that bad. He wasn't speeding, he wasn't distracted. A minor additional twist of the steering wheel and the vehicle might not have gotten stuck. They contend there simply is no evidence that Clement's actions were taken without reasonable care; no evidence that Clements was negligent. In other words, regardless of his training, regardless of what brought Clements to his stuck position, and regardless of what resulted because of it, plaintiff must prove that Clements' driving, standing alone, without context, was imprudent or he cannot be deemed negligent. To support their argument, defendants pointed out that their expert opined that Clements acted prudently and carefully.

The Court is not familiar with such a sterilized approach and finds that a determination of reasonable care cannot be artificially restricted to a point in time. Nor can a defendant's alleged negligent action or inaction be analyzed in isolation, it must be reviewed within the greater context of the event at hand.

A defendant's actions do not have to be intrinsically egregious or risky to be negligent. They can, and often are, innocuous actions taken without any improper motive. But when analyzed within the context of the specific situation, e.g., getting a vehicle stuck on a highway, the actions can be considered imprudent or careless. Moreover, to prevail, plaintiff is not required to produce witnesses who will simply state that Clements was negligent, as defendants' expert essentially opined that he was not. Indeed, it would be improper for an expert to opine that someone was or was not negligent. *See Gutierrez v. Vargas*, 239 So.3d 615, 622 (Fla. 2018) [43 Fla. L. Weekly S143b], citing *Estate of Murray v. Delta Health Group, Inc.*, 30 So.3d 576, 578 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D425a] (expert may testify to ultimate issue, but may not "render an opinion that applies a legal standard to a set of facts").

Reasonable Inferences of Negligence

We do not need to pull Prosser or the Restatement of Torts to know that actionable negligence is legal duty, breach of the duty, legal cause, and damages. We also know that courts are at times called upon to determine legal duty, where it is not clear, but the other elements generally are the sole and exclusive province of the jury. However, for summary judgment purposes, the Court must review the record evidence, not to weight it, but to determine whether it supports reasonable inferences of negligence and, thus, is sufficient to defeat summary judgment and get to the jury.

The logical starting point is the standard courts and juries alike must use when determining whether certain facts constitute negligence or inferences of negligence. Sometimes the best statement of the law is the jury instruction:

> Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

Florida Standard Instruction (Civil) 401.4.

In *Collias*, our First District gives us an example of inferences that support this standard. In that case a seven-year-old second grader was distracted while on her third lap of a makeshift running course during gym class and ran into a pedestal table with a glass edge at mouth level, causing the loss of her permanent teeth. 2021 WL 79775, at *1. She and her parents sued the school alleging various negligence theories including: the breach of a legal duty to maintain safe premises, creating a hazardous condition by using the auditorium for running and placing the glass top table in the children's running course, failing to warn the children of the risk the table created, failing to properly supervise the children's indoor running class, and more. *Id*.

The actions of the defendant's employees, standing alone, were not egregious or risky. They were not throwing things at the students. They were not running behind the students and pushing on their backs. It was record evidence of the context—young children and the adequacy of the physical environment—that precluded summary judgment. "At a basic level, a dispute exist[ed] whether the school was negligent in allowing second-graders to be running in a room not designed for such use in the first place." 2021 WL 79775, at *3.

Another appellate court recently addressed reasonable inferences of negligence in a personal injury elevator case:

> In light of this evidence, it was for a jury, rather than the trial court, to determine whether Cornerstone had used reasonable care to learn of the existence—or lack thereof—of a dangerous condition on its premises. As in Greenberg, a jury could reasonably infer that Cornerstone negligently failed to examine the elevator—or to have it examined by an experienced technician—to determine what was causing the intermittent problem and correct it. It is possible that a jury could reasonably determine that Dr. Robson's check of the elevator—uneducated as it was—was a reasonable response to the "Out of Order" signs. However, it is also possible that a jury could determine that a reasonable owner would have contacted ThyssenKrupp to have the elevator checked rather than taking the matter into its own hands. Therefore, Dr. Robson's testimony creates a genuine issue of material fact as to whether Cornerstone's response to the patient complaints of an intermittent elevator problem was reasonable.

Vogel v. Cornerstone Drs. Condo. Ass'n, Inc., 299 So.3d 1170, 1175 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D1630a].

The nature of such inferences is precisely why Florida appellate courts instruct trial courts to be <u>*cautious*</u> when deciding whether summary judgment is appropriate in negligence cases. It is the juries we empanel, and the collective wisdom and life experiences they bring with them, that are best suited to evaluate such evidence and inferences.

Applying the Law to the Record Evidence in This Case

In response to defendants' motion, plaintiff pointed to a myriad of record evidence—material facts — that a jury could rely upon for a finding of negligence. They included: the decision to attempt a U-turn, the decision to attempt a U-turn at the specific point in the median, the decision to attempt to traverse a concrete culvert with a heavy load, driving (inputs), actions to minimize the danger once it was clear the vehicle was stuck in a dangerous position, actions that were contrary to the company's own training and policies, and actions that constitute violations of statutes.

Plaintiff has met his burden of filing and describing in his response the record evidence that supports several reasonable inferences of negligence on the part of Clements. As such, and because PHM's negligence is vicarious, defendants' motion must fail; the case must be decided by the jury.

Accordingly, it is ORDERED and ADJUDGED that defendants' motion is DENIED.

* * *

Criminal law—Evidence—Identification—Suggestiveness—Repeated use of defendant's photo in multiple lineups with the same witness—Statements by detective intended to strengthen certainty of victim's identification of defendant—Motion to suppress identifications by victim is granted—Victim's identification of defendant as being present during victim's attack and identification of defendant as shooter were only made possible as the result of due process violations on the part of law enforcement

STATE OF FLORIDA, v. SAMMIE COOPER, Defendant. Circuit Court, 7th Judicial Circuit in and for Marion County. Case No. 2018-303743-CFDB. March 30, 2021, nunc pro tunc to March 26, 2021. James R. Clayton, Judge. Counsel: R.J. Larizza, State Attorney, and Kevin Sullivan, Assistant State Attorney, State Attorney's Office, Daytona Beach, for Plaintiff. Jeffrey Higgins, DaytonaDefense.com, Daytona Beach, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS IN-COURT AND OUT-OF-COURT IDENTIFICATION

THIS MATTER has come before the Court on the Defendant's Motion to Suppress Identification. The Defendant, having been charged with Aggravated Battery with a Firearm, alleged in his motion that any in-court or out-of-court identification of him by the victim, Jonathan Cory Shepard, should be suppressed as a violation of his right to due process, which violation he attributed to unnecessarily suggestive police procedures in the investigation of Shepard's shooting, and claimed that such procedures resulted in the substantial likelihood of his irreparable misidentification by Shepard.

Having been fully advised on the relevant facts and law at hearing held March 24, 2021, through testimony from Daytona Beach Police Detectives David Dinardi and Michael Jaeger, and civilians Deborah Barrs-Dix, Alicia Cooper, and Jonathan Cory Shepard, as well as the review of audio recordings of interviews with Shepard on August 12, 2018 and August 13, 2018, and video recordings of a photo lineup shown to Shepard on August 12, 2018 and a conversation between Shepard and Det. Jaeger on August 15, 2018, the Court enters this Order granting the Defendant's motion.

BACKGROUND

1. Sometime around 11:00 p.m. on the evening of August 11, 2018, Jonathan Cory Shepard arrived at his home and was accosted by a small group of black males. He fought them and was eventually shot one time, in the leg. Police and EMTs were called, and shortly after the shooting Shepard was taken to a local hospital.

2. One shell casing was found at the scene and taken into evidence by the Daytona Beach Police Department.

3. In addition to his gunshot wound, Shepard was determined to have suffered a broken arm and dislocated shoulder, as well has having both eyes swollen shut during the fight.

4. After his arrival at the hospital, in a recorded interview with Det. Dinardi Shepard said that three men approached him as he entered his home. He stated that one of the men had a gun. Shepard did not provide a description of the gun, but reported that two of the three men were the nephews of Alicia Cooper, the mother of his child; and that he knew the nephews because he had seen them on several occasions prior to that night. Shepard believed one of the nephews was named "Sam". Shepard said he did not know the third male.

5. Shepard also reported that he had been drinking that night. Although he testified at the suppression hearing that he had two drinks sometime after 7:00 p.m., Ms. Cooper testified that she had seen him drinking between 5:00 and 6:00 p.m. and described him as "on his way to drunk".

6. Ms. Cooper also testified that Shepard sounded drunk in his interview with Det. Dinardi. That opinion was based on Ms. Cooper having known Shepard for five years, testifying that she had seen him drunk on at least 20 occasions, and having had the chance to review said interview before the hearing.

7. For purposes of clarity in that first interview, Det. Dinardi referred to the three men as "the older one, the younger one, and the other guy". In that interview, Shepard alleged that the "older one" had a gun initially but put the gun down at Shepard's request so the two could fight. As the fight unfolded, the two combatants traveled from the side of Shepard's home to some bushes near the street. Shepard said he fell into those bushes and was ultimately shot in the leg. Shepard later estimated the distance from his door to the bushes to be 35 feet.

8. When Det. Dinardi asked Shepard who shot him, Shepard said he did not think the "older one" shot him because they were continuously engaged in a fight. He then speculated to Det. Dinardi that the "third guy" (the one who was not a nephew of Ms. Cooper) shot him. Ultimately, Shepard concluded that he did not know who shot him.

9. When asked to describe the "older one", Shepard described a tall, fit, black male with "knotty hair". Shepard provided the same description for the "younger one".

10. Armed with that account, detectives determined that the Defendant was the oldest of Ms. Cooper's three nephews.

11. Det. Dinardi testified that he used the Defendant's driver's license photo and to manually assemble a photo lineup for Shepard's review. Det Dinardi, who spoke to the Defendant later on the night of the shooting, testified that the Defendant's hair was "close cut" at the time of the shooting, and not "knotty" as Shepard had described.

12. Nevertheless, Det. Dinardi filled the remainder of his lineup with five photos of individuals who looked like the Defendant, rather than people who matched the description given by Shepard. Det. Dinardi testified he did not know or keep track of the identities of the individuals included in the filler photos.

13. Approximately two hours after the shooting, in the early morning hours of August 12, Shepard was shown Det. Dinardi's lineup by an independent lineup administrator. Shepard was given multiple opportunities to view each photo but was unable to identify the Defendant.

14. On August 13, Det. Jaeger took over the case for Det. Dinardi. One of the first things he did was to assemble a second lineup for Shepard to review.

15. This second lineup was assembled using the same photo of the Defendant, and five filler photos selected by a computer software program that were different than the filler photos used in the first lineup.

16. The Defendant was the only individual whose photo was included in both the first and second photo lineups.

17. Det. Jaeger's lineup was presented to Shepard by an independent lineup administrator, and Shepard identified the Defendant's photo as the individual who first had the gun.

18. Shepard indicated during the second lineup and in his testimony at the motion hearing that he had reviewed Facebook photos of the Defendant between the first and second lineups.

19. During the second lineup he claimed to the lineup administrator that the Facebook aided his identification of the Defendant. However, he denied that the Facebook photos were any help during his hearing testimony.

20. After the second lineup, Shepard completed a written statement for Det. Jaeger, In it he discussed his fight with the nephews but failed to identify the Defendant by name or identify any specific individual as the person who shot him.

21. On August 15, Det. Jaeger and two uniformed officers visited Shepard's home to arrest him on a separate matter. At least one of the officers was wearing an activated body camera for the duration of the visit.

22. During the visit, Det. Jaeger began discussing the shooting with Shepard. That discussion was recorded by the body camera.

23. During that discussion, Det. Jaeger informed Shepard that he had obtained an arrest warrant for the Defendant on the charge of Aggravated Battery with a Firearm.

24. After introducing the topic, Det. Jaeger can then be clearly heard and seen on video telling Shepard, "Unfortunately—when the state attorney contacts you—you actually didn't see him pull the trigger, but you saw him with a gun."

25. Shepard responded by demonstrating for Det. Jaeger what he believed he saw of the Defendant and the gun, ending his reenactment with an inconclusive "So . . whatever happened . . ." At which point Det. Jaeger interjected, "He shot you. Let's be real."

26. Later in that same conversation, Del. Jaeger told Shepard he

had spoken to the Defendant's grandmother about the shooting and in Det. Jaeger's opinion, "I think she knows he did it."

27. The Defendant's grandmother, Deborah Barrs-Dix testified at the hearing that she had never met Det. Jaeger and had never discussed Shepard's shooting with him.

28. Prior to Shepard's August 15 conversation with Jaeger, Shepard had never claimed that the Defendant shot him. In fact, the only person he had identified as having possibly shot him was the "other guy", back in his first interview with Det. Dinardi.

29. However, in a deposition transcript and in testimony before this Court, Shepard clearly and repeatedly claimed that the Defendant shot him.

30. Further, Shepard testified at deposition and at hearing that he had been attacked by a group of four men who were all wearing masks, and that the Defendant lifted his mask because he wanted Shepard to know who was attacking him.

31. Shepard also testified at hearing that the Defendant never put the gun down but stuck it in his waistband before the two men fought, and that he was "getting the best of" the two nephews during their bout.

32. Despite Shepard's supposed improved clarity concerning the details of the Defendant's alleged involvement in the shooting and Shepard's perception of his own success in that fight, Shepard was either unable to recall or unwilling to testify about basic details about the fight itself, such as where he had been punched or where punches he threw may have landed on the Defendant, and many other questions posed by defense counsel.

33. In addition to his own inconsistencies, Shepard's confidence in his identification of the Defendant as the man who shot him was further contradicted by the testimony of Ms. Cooper, who testified that she had been present when Shepard recently accused another individual of being the person who shot him.

34 . On the night of the shooting, the Defendant participated in an in-person interview with Det. Dinardi. Det. Dinardi testified that during that interview he did not observe any physical evidence to indicate that the Defendant had been in a fight with anyone.

35. Barrs-Dix was also present for the Defendant's interview with Det. Dinardi and corroborated Det. Dinardi's testimony that there was no visible physical evidence that the Defendant had been involved in a fight earlier that night.

ANALYSIS

At its core, the Defendant's motion alleged two separate identifications of him in this case: one identifying him as being present during Shepard's attack and the other identifying him as the actual shooter. The Defendant further claimed that each identification was only made possible as the result of due process violations on the part of law enforcement. This Court agrees on both points.

"Due process is a general principle of law that prohibits the government from obtaining convictions 'brought about by methods that offend a sense of justice.' " *Rochin v. California,* 342 U.S. 165, 173, 96 L. Ed. 183, 72 S. Ct. 205 (1952). As the Supreme Court has recognized, a "witness' recollection , . . can be distorted easily by the circumstances or by later actions of the police," *Manson v. Brathwaite,* 432 U.S. 98, 112 (1977), and " '[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined.' " *United States v. Wade,* 388 U.S. 218, 229 (1967). Consequently, testimony concerning pretrial identifications that are "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" are constitutionally inadmissible. *Simmons v. United States,* 390 U.S. 377, 384 (1968) (dictum).

To ensure that such suggestive identifications do not violate an individual's right to due process, the Florida Supreme Court adopted a two-prong test to determine whether an identification procedure would render the pretrial photo lineup inadmissible: (1) whether law enforcement employed an unnecessarily suggestive procedure to obtain the out-of-court identification; and (2) that as a result there exists a substantial likelihood of misidentification. *Fitzpatrick v. State,* 900 So.2d 495, 517 (Fla. 2005) [30 Fla. L. Weekly S269a] (citing *Rimmer v. State,* 825 So.2d 304, 316 (Fla. 2002) [27 Fla. L. Weekly S633a] quoting *Neil v. Biggers,* 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)).

Regarding the first prong of the test—whether law enforcement employed an unnecessarily suggestive procedure to obtain the out-of-court identification—the Defendant correctly argues that the issue of suggestiveness can be raised on not just one—but two—of law enforcement's procedures in this case: the use the Defendant's photo as the only repeat candidate in two separate lineups, and the detective's comments to Shepard concerning accusations against the Defendant.

On the issue of the Defendant's photo being the only one used in both photo lineups, it is difficult to see how that inclusion could be perceived as anything other than unnecessarily suggestive. In fact, the suggestiveness resulting from that measure is precisely the point of providing a witness multiple opportunities to view a suspect's photo.

The effectiveness of that inclusion was proven at hearing, where Shepard testified that he knew the Defendant from prior meetings and had just seen him during the fight just hours before the first lineup, yet was completely unable to select him when given that first opportunity on August 12. Only after a repeat exposure to the Defendant's photo on August 13, with a completely different set of filler photos, was Shepard able to identify the Defendant as being present during his attack. As a result, this Court finds the repeated use of the Defendant's photo in multiple lineups with the same witness to be an unnecessarily suggestive identification procedure.

As to the discussion between Det. Jaeger and Shepard a few days after the shooting, the Court finds the detective's comments both unnecessarily suggestive and troublesome. Prior to and during that discussion, Shepard exhibited uncertainty as to the identity of the shooter. Nevertheless, without any corroborating evidence, Det. Jaeger openly declared to Shepard that the Defendant was the individual responsible for the shooting. Specifically saying to Shepard, "He shot you. Let's be real." In the same conversation, when speaking of an alleged conversation with Barrs-Dix, the Defendant's grandmother, Det. Jaeger later added, "I think she knows he did it."

Subsequent to his discussion with Det. Jaeger, Shepard's story changed in a material fashion. In the earliest stages of the investigation of his shooting, Shepard had been unsure who shot him. In fact, at times during his first interview with Det. Dinardi, Shepard seemed sure that the Defendant did not shoot him. However, after the unnecessarily suggestive statements by Det. Jaeger that the Defendant shot him, Shepard's recall of events became more consistent with the detective's assertions.

This Court finds that each of Det. Jaeger's statements was inappropriate and an unnecessarily suggestive action on the part of law enforcement. The statements were intended to and did, in fact, strengthen the certainty of Shepard's identification of the Defendant, and plant the idea with Shepard that the Defendant was the shooter, an accusation he had not made up to that point.

Consequently, the facts of this case establish that the first prong of the test is satisfied. Specifically, through its photo lineup procedures and Det. Jaeger's comments to Shepard, the Daytona Beach Police Department employed unnecessarily suggestive procedures to obtain the out-of-court identification of the Defendant. This identification was made in photo arrays, at deposition, and in open court at the

suppression hearing.

Moving to the second prong of the test—that as a result of the unnecessarily suggestive procedures, there exists a substantial likelihood of misidentification—a court is required to consider: (1) the opportunity of the witness to view the suspect at the time of the crime; (2) the witness' degree of attention; (3) the witness' prior description of the suspect; (4) the level of certainty demonstrated by the witness at the identification procedure; and (5) the length of time between the crime and the identification procedure. *Fitzpatrick,* 900 So.2d at 518.

This Court is convinced that the police actions in this case create a clear and substantial likelihood of misidentification because the influence of the unnecessarily suggestive procedures can be seen taking root in real time as the case progressed. In particular, Shepard evolved from a witness who—prior to improperly suggestive police procedures—was unable to name who shot him or visually identify any suspects, to a witness who—subsequent to such procedures—clearly identified the Defendant and provided a version of events not only inconsistent with his original recitation of events but, perhaps more disturbingly, remarkably consistent with suggestions made to him by Det. Jaeger.

As to the first of the five criteria listed above, the opportunity to view the suspect, testimony and supporting facts lead to the conclusion that Shepard did not have much of an opportunity to witness the suspects at the time of the attack. He admitted to having been drinking prior to the attack, testified that there were no porch lights on at his door when he was approached by his attackers, and failed or was inconsistent in the details he provided about the attack, such as the number of suspects, whether they wore masks, what their hairstyles were, and where the original gunman put his gun before the fight. Those inconsistencies raise serious questions as to Shepard's credibility and lead to the deduction that Shepard's lack of opportunity to view the suspect contributes to the likelihood that he misidentified the Defendant.

Regarding the second and third criteria, which gauge the witness' degree of attention and prior description of the suspect, Shepard has claimed all along that he paid attention and knew exactly who he was fighting the night he got shot. Yet, he gave a physical description that was inconsistent with the Defendant's appearance at the time of the shooting, was unable to provide a description of the gun, and was unable to pick the Defendant out of a photo array immediately after the shooting. The State has argued that that inability is irrelevant because Shepard knew the Defendant before the attack took place. However, this Court finds that Shepard's prior knowledge of the Defendant combined with the inability to make a positive ID contributes to the substantial likelihood that the Defendant was misidentified.

The fourth factor considers the witness' level of certainty during the identification procedure. As discussed, at the August 12 photo lineup, Shepard offered no certainty whatsoever, as he was unable to positively identify anyone as having been at the scene, even though the suspect he named (the Defendant) was included in that lineup. Further, it was clear from the recorded interview provided to Det. Dinardi on the night of the shooting that Shepard did not know who shot him, and actually concluded at one point that the Defendant could not have been the person who shot him. Finally, Ms. Cooper offered uncontested testimony that Shepard had accused an individual other than the Defendant of shooting him in the months leading up to the suppression hearing. Hearing Shepard's story change so dramatically raises substantial concerns that, in his uncertainty and search for answers, Shepard has misidentified the Defendant as the individual who shot him.

Finally, the fifth criteria takes into account the length of time between the crime and the witness' identification of the suspect. In the present case, Shepard was given an opportunity to identify the Defendant approximately two hours after the shooting, but failed to do so. Additionally, in the days immediately following his shooting Shepard participated in multiple interviews and photo lineups, and even submitted a sworn written statement, yet did not accuse the Defendant of being the shooter in any of them. Not until after Det. Jaeger's unnecessarily suggestive remarks to Shepard regarding the Defendant's suspected role did he claim that the Defendant was responsible for the shooting. Prior to the detective's comments, Shepard said he did not know who shot him. After the detective's comments and the passage of almost a year, he claimed it was the Defendant.

Both the significant change in Shepard's account of events and the claimed improvement of his memory regarding certain details of the attack bring into question the accuracy of his report and the credibility of his testimony. As such, the passage of so much time combined with the subtle influence of the Daytona Police Department's unnecessarily suggestive identification procedures created a substantial likelihood of irreparable misidentification of the Defendant.

Having concluded that there were unnecessarily suggestive procedures that created a substantial likelihood of the irreparable misidentification of the Defendant, it is important to note that either of the suggestive procedures employed in this case could, on its own, support the same ruling. *See Walton v. State,* 208 So.3d 60 (Fla. 2016) [41 Fla. L. Weekly S587a] (denial of suppression reversed where a police officer's statements called direct attention to a suspect's photo after the witness was unable to identify any suspects in a photo lineup); *Harris v. State,* 857 So.2d 317 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D2325b] (holding that a witness' repeated exposure to a suspect's lineup photo was impermissibly suggestive and gave rise to the substantial likelihood of misidentification). However, the combined effect of multiple unnecessarily suggestive procedures in the same investigation leaves no question whether a substantial likelihood of misidentification of the Defendant exists and makes this Court's ruling unavoidable. *See State v. Sepulvado,* 362 So.2d 324 (Fla. 2d DCA 1978) (upholding suppression where the defendant was the subject of a repeat lineup and that lineup was found to augment the suggestiveness of other police procedures); *Hamilton v. State,* 303 So.2d 656 (Fla. 2d DCA 1974) (reversing a denial of suppression where a witness was given the opportunity to view the same photo lineup twice, and after making her selection at the second lineup the police officer encouraged her to change her selection by telling her she made the right choice in the first lineup).

On that basis, the Defendant's motion is hereby GRANTED.

* * *

Insurance—Automobile liability—Personal injury protection—Rescission of policy—Material misrepresentations on application—Failure to disclose that insured vehicle was being used for commercial or business purposes to provide delivery services—Misrepresentation was material where insurer established it would not have accepted risk or issued policy had this information been disclosed—Policy void ab initio, and insurer has no duty to defend and/or indemnify insured for any claims made under policy, including claims for personal injury protection benefits arising from accident

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. BEECHRAM LIVINGSTONE BURKE, Defendant. Circuit Court, 9th Judicial Circuit in and for Osceola County. Case No. 2020-CA-001713-OC. February 1, 2021. Robert J. Egan, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Beechram Livingstone Burke, Pro se, Orlando, Defendant.

ORDER ON PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AS TO DEFENDANT, BEECHRAM LIVINGSTONE BURKE

THIS CAUSE having come before this Court at the hearing on

January 28, 2021, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendant, BEECHRAM LIVINGSTONE BURKE, and the Court having considered the same, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby **GRANTED**, as follows:

Factual Background

Plaintiff, Direct General Insurance Company brought the instant Declaratory Action against the named insured, Beechram Livingstone Burke, regarding the policy rescission as a result of the insured's material misrepresentation on the application for insurance dated November 25, 2019. Plaintiff rescinded the policy of insurance on the basis that Beechram Livingstone Burke failed to disclose that he was using the insured vehicle for commercial or business purposes on the application for insurance dated November 25, 2019. Specifically, Beechram Livingstone Burke failed to disclose on the application for insurance that the insured vehicle was being utilized to provide delivery services for Courier Express. Had Beechram Livingstone Burke disclosed that the insured vehicle was being utilized for business or commercial purposes on the application for insurance dated November 25, 2019, Direct General Insurance Company would not have assumed the risk nor issued the insurance policy due to the unacceptable risk.

On the application for insurance dated November 25, 2019, Beechram Livingstone Burke, answered "No" to the following application question, which provides:

> Is any vehicle listed on this application used for deliveries (including pizza) or transportation networks like Uber/Lyft or other commercial use other than an approved artisan business?

In addition, Beechram Livingstone Burke signed the application for insurance, which provides in pertinent part as follows:

> I hereby acknowledge that I have read and understood all the questions, statements, and information set forth in the application, including this Applicant's Statement. I hereby represent that my answers and all information provided by me or on my behalf contained in this application is accurate and complete.

Plaintiff determined that had Beechram Livingstone Burke provided the proper information at the time of the insurance application dated November 25, 2019, then Plaintiff would not have assumed the risk and would not have issued the insurance policy. Specifically, had Beechram Livingstone Burke disclosed that the insured vehicle was being utilized for business or commercial purposes to provide delivery services on the application for insurance dated November 25, 2019, Direct General Insurance Company would not have issued the policy due to the unacceptable risk. Therefore, Direct General Insurance Company declared the policy void *ab initio* due to material misrepresentation and returned the paid premiums to Beechram Livingstone Burke. Due to the policy being declared void *ab initio,* the Plaintiff denied coverage for the subject motor vehicle accident.

Pursuant to the policy of insurance issued to Beechram Livingstone Burke, Direct General Insurance Company may void the insurance policy as follows:

> **FRAUD AND MISREPRESENTATION**
>
> The statements made by you in any application for insurance or policy change are deemed your representations. A misrepresentation; omission; concealment of fact; or incorrect statement may prevent recovery under this policy if:
>
> 1. The misrepresentation, omission, concealment, or statement is fraudulent or is material either to the acceptance of the risk or to the hazard assumed by **us**; or
>
> 2. Had **we** known the facts, we in good faith would not have:
>
> a. Issued the policy;
>
> b. Issued the policy at the same premium rate;
>
> c. Issued the policy with the limits shown;
>
> d. Issued this policy with these terms and conditions; or
>
> e. Provided the coverage with respect to the hazard resulting in the accident or loss.
>
> We will not provide coverages to any person who conceals or misrepresents any material fact or circumstance or who engages in fraudulent conduct related to this insurance.
>
> 1. At the time application is made;
>
> 2. At any time during the policy;
>
> 3. In connection with the presentation or settlement of a claim.
>
> *See page 9 of Florida Amendatory Endorsement, FL028A (01-13), attached to the Motion for Final Summary Judgment as Exhibit "B."*

Further, Florida Statute § 627.409(1) provides:

> (1) Any statement or description made by or on behalf of an insured or annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and not a warranty. Except as provided in subsection (3), ***a misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only if any of the following apply***:
>
> (a) The misrepresentation, omission, concealment, or statement is fraudulent or is material to the acceptance of the risk or to the hazard assumed by the insurer.
>
> (b) ***If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith*** would not have issued the policy or contract, ***would not have issued it at the same premium rate,*** would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.

Analysis Regarding Whether the Undisclosed Business Use or Commercial Use was Material

The Court hereby finds that the question of materiality is considered from the perspective of the insurer. The Court finds 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 finds that the failure to disclose that the insured vehicle was being utilized for business or commercial purposes to provide delivery services on the application for insurance, which would have resulted in a denial of the application due to an unacceptable risk, is sufficient to support a rescission. *See Privilege Underwriters Reciprocal Exch. v. Clark,* 174 So. 3d 1028, 1031 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1810a]. Additionally, the Court finds that as Defendant, Beechram Livingstone Burke failed to provide testimony to contradict Plaintiffs claim that the disclosure would have resulted in an unacceptable risk, then Plaintiff was entitled to rescind. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen,* 999 F.2d 1532 (1993).

The Court hereby finds that the affiant, Rose Chrustic, provided sworn testimony to knowledge of the application for insurance and administration of the underwriting guidelines for the insurance policy issued to Beechram Livingstone Burke, and could claim personal knowledge from a review of the records, therefore, Plaintiff's affiant, Ms. Chrustic, satisfied the threshold to satisfy the business records exception. *See Nationstar Mortg., LLC v. Berdecia,* 169 So. 3d 209, 213. Consequently, Plaintiff established without contrary evidence that the misrepresentation was material, as set forth in the Affidavit of Rose Chrustic.

Analysis Regarding the Florida Statute Governing Policy Rescissions

The Court hereby finds that the subject insurance policy was

rescinded void *ab initio* pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy issued by Direct General Insurance Company. Where an insurer seeks to rescind a voidable policy, it must both give notice of rescission and return or tender all premiums paid within a reasonable time after discovery of the grounds for avoiding the policy. Accordingly, the Court hereby finds that the PIP statute (Florida Statute § 627.736) does not govern policy rescissions nor the amount of time to rescind an insurance policy. Specifically, F.S. § 627.736(4)(i) does not apply to policy rescissions based on a material misrepresentation at the inception of the contract. The provisions of F.S. § 627.736(4)(i) pertain solely to investigating a "fraudulent insurance act," not a material misrepresentation on an application for insurance.

Conclusion

This Court hereby finds that the Plaintiff, Direct General Insurance Company's application for insurance unambiguously required Beechram Livingstone Burke to disclose that the insured vehicle was being utilized for business or commercial purposes to provide delivery services on the application for insurance dated November 25, 2019, that Plaintiff provided the required testimony to establish that Defendant, Beechram Livingstone Burke's failure to disclose the business use or commercial use of the insured vehicle on the application for insurance dated November 25, 2019 was a material misrepresentation because Plaintiff would not have accepted the risk nor issued the subject policy due to the unacceptable risk, and thus Plaintiff properly rescinded the subject policy of insurance. Consequently, Plaintiff properly denied coverage for the loss at issue.

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

a. Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment is hereby **GRANTED**;

b. This Court ***hereby enters final judgment*** for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendant, BEECHRAM LIVINGSTONE BURKE;

c. This Court hereby reserves jurisdiction to consider any claim for attorney's fees and costs;

d. The Court finds that the facts alleged by the Plaintiff, DIRECT GENERAL INSURANCE COMPANY, in its Complaint for Declaratory Judgment, Motion for Final Summary Judgment, and in the Affidavit of Rose Chrustic, are not in dispute, which are as follows:

i. The Defendant, BEECHRAM LIVINGSTONE BURKE, failed to disclose and failed to report any business use or commercial use of the insured vehicle at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # FLPAXXXXX1306, issued by DIRECT GENERAL INSURANCE COMPANY;

ii. The Defendant, BEECHRAM LIVINGSTONE BURKE breached the insurance policy contract and application for insurance, under the policy of insurance, bearing policy # FLPAXXXXX1306, issued by DIRECT GENERAL INSURANCE COMPANY;

iii. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # FLPAXXXXX1306, is rescinded and is void *ab initio;*

iv. The material misrepresentation of Defendant, BEECHRAM LIVINGSTONE BURKE on the application dated November 25, 2019 for insurance, occurred prior to any Assignment of any personal injury protection ("PIP") Benefits to any medical provider, doctor and/or medical entity, under the policy of insurance, bearing policy # FLPAXXXXX1306, issued by DIRECT GENERAL INSURANCE COMPANY;

v. There is no insurance coverage for the named insured, BEECHRAM LIVINGSTONE BURKE for any property damage liability coverage, bodily injury liability coverage, uninsured motorist liability coverage or personal injury protection coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306;

vi. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, BEECHRAM LIVINGSTONE BURKE, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306;

vii. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify BEECHRAM LIVINGSTONE BURKE for any bodily injury claim for Luis Garcia arising from the accident of December 11, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306;

viii. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify BEECHRAM LIVINGSTONE BURKE for any property damage claim for Carlos Badia arising from the accident of December 11, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306;

ix. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify BEECHRAM LIVINGSTONE BURKE for any property damage claim for Florida Transport & Courier, Inc. arising from the accident of December 11, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306;

x. There is no personal injury protection ("PIP") insurance coverage for BEECHRAM LIVINGSTONE BURKE for the accident which occurred on December 11, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306;

xi. There is no bodily injury insurance coverage for Luis Garcia for the accident which occurred on December 11, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306;

xii. There is no property damage insurance coverage for Carlos Badia for the accident which occurred on December 11, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306;

xiii. There is no property damage insurance coverage for Florida Transport & Courier, Inc. for the accident which occurred on December 11, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306;

xiv. There is no obligation to provide Personal Injury Protection benefits coverage to any medical provider, doctor and/or medical facility for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on December 11, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX1306;

xv. There is no obligation to provide Personal Injury Protection benefits coverage to Osceola Regional Hospital, Inc. d/b/a Osceola Regional Medical Center for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on December 11, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306;

xvi. There is no obligation to provide Personal Injury Protection benefits coverage to Osceola County EMS for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on December 11, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306;

xvii. The Defendant, BEECHRAM LIVINGSTONE BURKE, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306, for the December 11, 2019 accident;

xviii. Luis Garcia is excluded from any insurance coverage under

the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306, for the December 11, 2019 accident;

xix. Carlos Badia is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306, for the December 11, 2019 accident;

xx. Progressive American Insurance Company is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306, for the December 11, 2019 accident;

xxi. Osceola Regional Hospital, Inc. d/b/a Osceola Regional Medical Center is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306, for the December 11, 2019 accident;

xxii. Osceola County EMS is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306, for the December 11, 2019 accident;

xxiii. Florida Transport & Courier, Inc. is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306, for the December 11, 2019 accident;

xxiv. Blue Cross and Blue Shield of Florida, Inc. is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306, for the December 11, 2019 accident;

xxv. Since DIRECT GENERAL INSURANCE COMPANY is not obligated to provide any coverages or indemnity to any of the potential claimants, Blue Cross and Blue Shield of Florida, Inc. shall have no rights of subrogation against DIRECT GENERAL INSURANCE COMPANY;

xxvi. Since DIRECT GENERAL INSURANCE COMPANY is not obligated to provide any coverages or indemnity to any of the potential claimants, Progressive American Insurance Company, shall have no rights of subrogation against DIRECT GENERAL INSURANCE COMPANY under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX1306, for the December 11, 2019 motor vehicle accident;

xxvii. There is no insurance coverage for the motor vehicle accident which occurred on December 11, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306;

xxviii. There is no personal injury protection ("PIP") insurance coverage for the accident which occurred on December 11, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306;

xxix. There is no property damage liability coverage for the accident which occurred on December 11, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306;

xxx. There is no bodily injury liability coverage for the accident which occurred on December 11, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306;

xxxi. There is no uninsured motorist liability coverage for the accident which occurred on December 11, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1306;

xxxii. Since the policy of insurance issued to the Defendant, BEECHRAM LIVINGSTONE BURKE, bearing policy # FLPAXXXXX1306, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from BEECHRAM LIVINGSTONE BURKE to any medical provider, doctor and/or medical entity is void;

xxxiii. Since the policy of insurance issued to the Defendant, BEECHRAM LIVINGSTONE BURKE, bearing policy # FLPAXXXXX1306, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from BEECHRAM LIVINGSTONE BURKE to Osceola Regional Hospital, Inc. d/b/a Osceola Regional Medical Center is void;

xxxiv. Since the policy of insurance issued to the Defendant, BEECHRAM LIVINGSTONE BURKE, bearing policy # FLPAXXXXX1306, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from BEECHRAM LIVINGSTONE BURKE to Osceola County EMS is void.

* * *

Attorney's fees—Claim or defense unsupported by facts or law—Insurance—Automobile—Insured's conduct in filing affirmative defenses and filing/serving sworn interrogatory answers which were inaccurate and contradicted insured's prior recorded statement warranted award of section 57.105 attorney's fees to insurer

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. BEECHRAM LIVINGSTONE BURKE, Defendant. Circuit Court, 9th Judicial Circuit in and for Osceola County. Case No. 2020-CA-001713-OC. March 8, 2021. Robert J. Egan, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Beechram Livingstone Burke, Pro se, Orlando, Defendant.

ORDER GRANTING PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR SANCTIONS PURSUANT TO F.S. § 57.105 AGAINST DEFENDANT, BEECHRAM LIVINGSTONE BURKE

THIS CAUSE having come before this Court at the hearing on February 23, 2021, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Sanctions Pursuant to F.S. § 57.105 against Defendant, BEECHRAM LIVINGSTONE BURKE, after hearing arugment of counsel, and the Court having considered the same, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby **GRANTED**, as follows:

a. Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Sanctions Pursuant to F.S. § 57.105 against Defendant, BEECHRAM LIVINGSTONE BURKE, is hereby **GRANTED**.

b. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY is entitled to its attorneys' fees against the Defendant, BEECHRAM LIVINGSTONE BURKE. This Court hereby retains jurisdiction to asses attorneys' fees.

c. The Court finds the following in support of its ruling:

i. On December 17, 2019, during the investigation of the subject claim, BEECHRAM LIVINGSTONE BURKE provided a recorded statement to DIRECT GENERAL INSURANCE COMPANY, in which BEECHRAM LIVINGSTONE BURKE stated that he obtained the insurance policy to use the insured vehicle to provide delivery services for Courier Express at the time of the policy inception.

ii. On April 2, 2020, Plaintiff, DIRECT GENERAL INSURANCE COMPANY provided notice of the coverage denial and policy rescission to BEECHRAM LIVINGSTONE BURKE.

iii. On June 16, 2020, Plaintiff, DIRECT GENERAL INSURANCE COMPANY provided BEECHRAM LIVINGSTONE BURKE with the premium refund for the policy due to the policy rescission.

iv. On July 7, 2020, Plaintiff, DIRECT GENERAL INSURANCE COMPANY filed the Complaint for Declaratory Judgment in this matter regarding the coverage dispute with BEECHRAM LIVINGSTONE BURKE as a result of the policy rescission.

v. On July 29, 2020, Defendant, BEECHRAM LIVINGSTONE BURKE obtained counsel who filed an Answer and Affirmative Defenses to the Complaint.

vi. The Defendant's Affirmative Defenses contained allegations that were not supported by the facts and law, and thus, there was no basis to set forth the Affirmative Defenses.

vii. Further, the Defendant filed sworn Answers to the Interrogatory questions in which he contradicted his prior statement in this matter. Specifically, the Defendant, BEECHRAM LIVINGSTONE BURKE, provided the following inconsistent sworn interrogatory answers:

i. Interrogatory #2: Defendant did not physically sign the application that is attached to Plaintiff's complaint and the insured vehicle was not being used for business or commercial use on November 25, 2019.

ii. Interrogatory #3: Defendant objects to this Interrogatory on the basis that said Interrogatory is vague. Subject to and without waiving said objection, Defendant states that he has never been employed by Courier Express nor has he ever received any money from Courier Express.

iii. Interrogatory #4: Defendant applied to work with Courier Express but was never hired.

viii. On October 22, 2020, Plaintiff served counsel for BEECHRAM LIVINGSTONE BURKE with its 21-day safe harbor correspondence and proposed Motion for Sanctions pursuant to Florida Statute § 57.105, which included a copy of the transcript of the recorded statement of BEECHRAM LIVINGSTONE BURKE. In addition, Plaintiff provided BEECHRAM LIVINGSTONE BURKE with a proposed Stipulation for Consent Judgment to resolve the Action for Declaratory Judgment without further litigation since there is no dispute as to the facts which led the Plaintiff to rescind the insurance policy.

ix. On October 26, 2020, counsel for the Defendant, BEECHRAM LIVINGSTONE BURKE filed a Motion to Withdraw, which provided that irreconcilable differences have arisen between the attorney and the Defendant such that the attorney can't continue to represent the Defendant in this matter. Thereafter, the Court entered an Order granting the Motion to Withdraw.

x. On November 6, 2020, Plaintiff re-served Defendant, BEECHRAM LIVINGSTONE BURKE with its 21-day safe harbor correspondence and proposed Motion for Sanctions pursuant to Florida Statute § 57.105, which included a copy of the transcript of the recorded statement of BEECHRAM LIVINGSTONE BURKE. In addition, Plaintiff provided BEECHRAM LIVINGSTONE BURKE with a proposed Stipulation for Consent Judgment to resolve the Action for Declaratory Judgment without further litigation since there is no dispute as to the facts which led the Plaintiff to rescind the insurance policy.

xi. On January 12, 2021, Plaintiff filed its Motion for Sanctions pursuant to Florida Statute § 57.105 with the Court.

xii. On February 1, 2021, the Court entered an Order granting Plaintiff's Motion for Final Summary Judgment as to Defendant, BEECHRAM LIVINGSTONE BURKE. Specifically, the Court ruled that the insurance policy was properly rescinded void *ab initio* as a result of the material misrepresentation by BEECHRAM LIVINGSTONE BURKE on the application for insurance.

xiii. At the Summary Judgment hearing, the Court found that the Carrier properly rescinded the insurance policy based on the information provided by BEECHRAM LIVINGSTONE BURKE during his recorded statement, which unequivocally confirmed that the insured vehicle was being used for business purposes at the time of the application for insurance. Specifically, BEECHRAM LIVINGSTONE BURKE confirmed during his recorded statement that he obtain the insurance policy from DIRECT GENERAL INSURANCE COMPANY so he could go back to Courier Express and demonstrate that he had automobile insurance to delvier packages for Courier Express.

xiv. On February 3, 2021, the Court entered a Final Judgment against BEECHRAM LIVINGSTONE BURKE and in favor of the Plaintiff, DIRECT GENERAL INSURANCE COMPANY.

d. Therefore, the Defendant, BEECHRAM LIVINGSTONE BURKE's conduct by filing his Affirmative Defenses and by filing/serving his sworn interrogatory answers which were inaccurate and contradicted the Defendant's prior recorded statement from December 17, 2019, were baseless and frivolous amounting to sanctions pursuant to Florida Statute § 57.105.

* * *

Insurance—Property—Summary judgment—Factual issues preclude entry of summary judgment on issues of coverage and standing

ALRON CONSTRUCTION, LLC, a/a/o Julio Maureira, Plaintiff, v. FEDERATED NATIONAL INSURANCE COMPANY, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2017-CA-005302-O. February 22, 2021. Reginald K. Whitehead, Judge. Counsel: Katie S. Monroe, Hale, Hale & Jacobson, P.A., Orlando, for Plaintiff. Carolin A. Pacheco, Marshall, Dennehey, Warner, Coleman & Goggin, Orlando, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE came on for consideration on Defendant's Motion for Final Summary Judgment and Memorandum of Law filed on January 22, 2020. The Court has considered the Motion and applicable responses, the relevant statutory authority and case law, and has been otherwise fully advised.

A. FACTS & PROCEDURAL HISTORY

On June 6, 2018, Plaintiff filed a two-count Amended Complaint on an alleged Breach of Contract and Declaratory Judgment claim.

On January 22, 2020, Defendant filed the Motion which is the subject matter of this Order. Defendant bases its Motion on two issues—(1) the Assignment of Benefits Contract is invalid and lacks consideration as no work has been performed and there are no benefits for Plaintiff to recover and therefore Plaintiff lacks standing to bring the lawsuit, and (2) there is no wind and/or hail damage to the roofing structure.

On February 12, 2021, Plaintiff filed a response to Defendant's Motion for Summary Judgment. Plaintiff response is based on the argument(s) that—(1) the Assignment of Benefits is between Julio Maureira and Alron Construction, LLC and Defendant who is neither a party to the contract nor in privity with the contract cannot attack the validity and consideration of the Assignment of Benefits; and (2) there are damages to be recovered, including but not limited to, the cost for replacement of the damaged property, difference in deductibles between the hail claim and hurricane claim, nominal damages, and/or interest dating back to the date of loss; and (3) Arthur Grandinetti, a qualified and licensed independent adjuster, determined that the damage to the roofing structure was caused by hail and wind from the hailstorm and not from age, wear and tear, deterioration, and lack of maintenance.

On February 18, 2021, this Court held a hearing on the Motion and Response.

ORDERED AND ADJUDGED:

1. The Court finds there is a genuine issue of material fact.

2. As such, Defendant's Motion for Final Summary Judgment is hereby DENIED.

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Where insured failed to disclose that insured vehicle would not be garaged at policy address and fact that she was single, and disclosure of correct information would have caused insurer to charge higher premium, misrepresentations were material—Insurer properly rescinded policy and denied coverage for loss

IMPERIAL FIRE & CASUALTY INSURANCE COMPANY, Plaintiff, v. NORA HUICE, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-012047-CA-01, Section CA08. February 22, 2021. Lourdes Simon, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Nora Huice, Pro-se, Tampa, Defendant.

ORDER ON PLAINTIFF, IMPERIAL FIRE & CASUALTY INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AGAINST DEFENDANT, NORA HUICE

THIS CAUSE having come before this Court at the hearing on February 17, 2021, on the Plaintiff, IMPERIAL FIRE & CASUALTY INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendant, NORA HUICE, and the Court having considered the same, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby **GRANTED**, as follows:

Factual Background

Plaintiff, Imperial Fire & Casualty Insurance Company brought the instant Action for Declaratory Judgment against the insured, Nora Huice, regarding the policy rescission as a result of the insured's material misrepresentations on the application for insurance dated October 8, 2018. Plaintiff rescinded the policy of insurance on the basis that Nora Huice failed to disclose on the application for insurance the correct garaging address for the insured vehicle(s) and failed to disclose her correct marital status as single.

On the application for insurance dated October 8, 2018, Defendant, Nora Huice, answered "NO" to the following application question #17 on page 4 of 7, which provides:

> Are any of the vehicles listed on the application not garaged at the policy address? IF there are any vehicles not garaged at the policy address, correct garaging address must be entered for each vehicle for coverage to apply.

In addition, on the application for insurance dated October 8, 2018, Defendant, Nora Huice signed the pertinent page of the Applicant's Statement, which provides:

> I hereby acknowledge that I have read and understood all the questions, statements, and information set forth in the Application, including this Applicant's Statement. I hereby represent that my answers and all information provided by me or on my behalf contained in this Application is accurate and complete.

On April 6, 2020, the named insured, Nora Huice, provided sworn testimony at her Examination Under Oath (EUO) confirming the correct garaging address for the insured vehicle(s) at the time of application for insurance and confirmed that she failed to disclose her correct marital status as single. Plaintiff determined that had Nora Huice provided the proper information at the time of the insurance application dated October 8, 2018, then Plaintiff would not have issued the insurance policy at the same premium rate. Had Nora Huice disclosed the correct garaging address for the insured vehicle(s) and her correct marital status as single on the application for insurance dated October 8, 2018, Plaintiff, Imperial Fire & Casualty Insurance Company indicated it would not have issued the insurance policy at the same policy premium. Specifically, this would have resulted in an increase to the policy premium. Therefore, Imperial Fire & Casualty Insurance Company declared the policy void *ab initio* due to a material misrepresentation and returned the paid premiums to Nora Huice. Due to the policy being declared void *ab initio*, the Plaintiff denied coverage for the subject motor vehicle accident.

Pursuant to the policy of insurance issued to Nora Huice, Imperial Fire & Casualty Insurance Company may void the insurance policy as follows:

> **MISREPRESENTATION AND FRAUD**
>
> This policy was issued in reliance on the information provided on **"your"** insurance application. **"We"** may void coverage under this policy if **"you"** or an insured person have made incorrect statements or representations to **"us"** with regard to any material fact or circumstance, or concealed or misrepresented any material fact or circumstance, or engaged in fraudulent conduct, at the time application was made or at any time during the policy period.
>
> **"We"** may void this policy or deny coverage for an accident or loss if **"you"** or any other person making a claim under this policy has concealed or mispresented any material fact or circumstance, or engaged in fraudulent conduct, in connection with the presentation or settlement of a claim.
>
> **"We"** may void this policy for fraud or misrepresentation even after the occurrence of an accident or loss. This means that **"we"** will not liable for any claims or damages, which would otherwise be covered.

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.

The Court hereby finds that the question of materiality is considered from the perspective of the insurer. The Court finds 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 finds that the failure to disclose the correct garaging address for the insured vehicle(s) and the failure to disclose the insured's correct marital status as single on the application for insurance dated October 8, 2018, which would have resulted in an increase to the policy premium at inception, 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 finds that as Defendant, Nora Huice failed to provide testimony to contradict Plaintiff's claim that the disclosure would have resulted in an increase to the policy premium, then Plaintiff was entitled to rescind. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen*, 999 F.2d 1532 (1993).

Additionally, the insured's examination under oath (EUO) transcript is admissible and proper summary judgment evidence. Although an EUO transcript is not an affidavit or deposition, it holds the same evidentiary value and fits under "other materials as would be admissible in evidence" under Florida Rule of Civil Procedure 1.510(c). *See Star Casualty Ins. Co,* 25 Fla. L. Weekly Supp. 502a (Fla. 11th Cir. Ct. October 3, 2017). Although an EUO transcript is

hearsay, it is admissible under the party admission hearsay exception [§ 90.803(18), Fla. Stat. (2014)]. *Smith v. Fortune Ins. Co.*, 44 So. 2d 821, 823 (Fla 1st DCA 1981); *Millennium Diagnostic Imaging Ctr. a/a/o Alejandro Gonzalez v. Allstate Prop. & Cas. Ins. Co.*, 14 Fla. L. Weekly Supp. 84a (Fla. 11th Cir. Ct. June 21, 2016) and *cert. denied*, 2017 WL 2561208 (Fla. 3d DCA May 25, 2017) (without opposition) (same issue) (both the instant insured's and Francisco Garay's EUO testimony was determined to be admissible to support a motion for summary judgment for material misrepresentation citing section 90.803(18), Florida Statutes, *Smith* and *Gonzalez*). Therefore, the Court finds that the Examination Under Oath (EUO) transcript of Nora Huice is admissible and proper summary judgment evidence.

The Court further finds that the affiant, Sharon Dowell, provided sworn testimony to knowledge of the application for insurance and administration of the underwriting guidelines for the insurance policy issued to Nora Huice, and could claim personal knowledge from a review of the records, therefore, Plaintiff's affiant, Ms. Dowell, satisfied the threshold to satisfy the business records exception. *See Nationstar Mortg., LLC v. Berdecia*, 169 So. 3d 209, 213. Consequently, Plaintiff established without contrary evidence that the misrepresentation was material, as set forth in the Affidavit of Sharon Dowell.

Conclusion

This Court hereby finds that the Plaintiff, Imperial Fire & Casualty Insurance Company's application for insurance unambiguously required Nora Huice to disclose the correct garaging address for the insured vehicle(s) and to disclose her correct marital status as single on the application for insurance dated October 8, 2018, that Plaintiff provided the required testimony to establish that Defendant, Nora Huice's failure to disclose the correct garaging address for the insured vehicle on the application for insurance was a material misrepresentation because Plaintiff would not have issued the insurance policy at the same policy 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, IMPERIAL FIRE & CASUALTY INSURANCE COMPANY's Motion for Final Summary Judgment is hereby **GRANTED**;

b. This Court ***hereby enters Final Judgment*** for Plaintiff, IMPERIAL FIRE & CASUALTY INSURANCE COMPANY, and against the Defendant, NORA HUICE;

c. This Court hereby reserves jurisdiction to consider any claims for reasonable attorneys fees and costs.

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Where insured failed to disclose that insured vehicle would not be garaged at policy address, and disclosure of correct garaging address would have caused insurer to charge higher premium, misrepresentation was material—Insurer properly rescinded policy and denied coverage for loss

THE RESPONSIVE AUTO INSURANCE COMPANY, Plaintiff, v. ERIKA BELOTTI, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-018972-CA-01, Section CA27. March 8, 2021. Oscar Rodriguez-Fonts, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Erika Belotti, Pro-se, Miami, for Defendant.

ORDER ON PLAINTIFF, THE RESPONSIVE AUTO INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AGAINST DEFENDANT, ERIKA BELOTTI

THIS CAUSE having come before this Court at the hearing on February 17, 2021, via Zoom video conferencing, on the Plaintiff, THE RESPONSIVE AUTO INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendant, ERIKA BELOTTI, 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, The Responsive Auto Insurance Company brought the instant Action for Declaratory Judgment against the insured, Erika Belotti, regarding the policy rescission as a result of the insured's material misrepresentation on the application for insurance dated October 14, 2019. Plaintiff rescinded the policy of insurance on the basis that Erika Belotti failed to disclose that the insured vehicle would not be garaged at the policy address ([editor's note: address redacted], Miami, Florida 33186) on the application for insurance dated October 14, 2019.

On the application for insurance dated October 14, 2019, Defendant, Erika Belotti, answered "Yes" to the following application question #11, which provides:

> Is the garaging address for each vehicle listed on this application the same as the mailing address for the applicant listed on the application?

In addition, on the application for insurance dated October 14, 2019, Defendant, Erika Belotti signed page 3 of 4 which provides as follows:

> The applicant(s) represents the statements and answers made in this application to be true, complete and correct and agrees that any policy may be issued or renewed in reliance upon the truth, completeness and correctness of such statements and answers. **The applicant(s) further understands that falsity, incompleteness, or incorrectness may jeopardize the coverage under such policy so issued or renewed in accordance with Section 627.409, F.S.**

On August 13, 2020, the named insured, Erika Belotti, provided sworn testimony at her Examination Under Oath (EUO) confirming that her garaging address on October 14, 2019 was [editor's note: address redacted], Miami, FL 33193. Plaintiff determined that had Erika Belotti provided the proper information at the time of the insurance application dated October 14, 2019, then Plaintiff would not have issued the insurance policy at the same premium rate. Had Erika Belotti disclosed that the insured vehicle was actually garaged at [editor's note: address redacted], Miami, Florida 33193 on the application for insurance dated October 14, 2019, Plaintiff, The Responsive Auto Insurance Company would not have issued the insurance policy at the same policy premium. Specifically, this would have resulted in an increase to the policy premium. Therefore, The Responsive Auto Insurance Company declared the policy void *ab initio* due to a material misrepresentation and returned the paid premiums to Erika Belotti. Due to the policy being declared void *ab initio*, the Plaintiff denied coverage for the subject motor vehicle accident.

Pursuant to the policy of insurance issued to Erika Belotti, The Responsive Auto Insurance Company may void the insurance policy as follows:

> **PART VI: GENERAL PROVISIONS**
>
> **MISREPRESENTATION AND FRAUD**
>
> Any claim may be denied or this policy may be void if an "insured":
>
> A. Conceals or misrepresents any material facts or circumstances concerning this insurance or the subject thereof; or,
>
> B. Engages in fraudulent conduct in connection with any auto accident or loss for which coverage is sought under this policy; or,
>
> C. Attempts fraud or false swearing touching upon any matter relating to this insurance or the subject thereof.

Further, Florida Statute § 627.409(1) provides:

(1) Any statement or description made by or on behalf of an insured or annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and not a warranty. Except as provided in subsection (3), ***a misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only if any of the following apply***:

(a) The misrepresentation, omission, concealment, or statement is fraudulent or is material to the acceptance of the risk or to the hazard assumed by the insurer.

(b) ***If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith*** would not have issued the policy or contract, ***would not have issued it at the same premium rate***, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.

Analysis Regarding Whether the Undisclosed Garaging Address was Material

The Court hereby finds that the question of materiality is considered from the perspective of the insurer. The Court finds 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 finds that the failure to disclose the correct garaging address for the insured vehicle on the application for insurance dated October 14, 2019, which would have resulted in an increase to the policy premium at inception, 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 finds that as Defendant, Erika Belotti failed to provide testimony to contradict Plaintiff's claim that the disclosure would have resulted in an increase to the policy premium, then Plaintiff was entitled to rescind. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen*, 999 F.2d 1532 (1993).

The Court hereby finds that the affiant, Martha Taleno, provided sworn testimony to knowledge of the application for insurance and administration of the underwriting guidelines for the insurance policy issued to Erika Belotti, and could claim personal knowledge from a review of the records, therefore, Plaintiff's affiant, Ms. Taleno, satisfied the threshold to satisfy the business records exception. *See Nationstar Mortg., LLC v. Berdecia*, 169 So. 3d 209, 213. Consequently, Plaintiff established without contrary evidence that the misrepresentation was material, as set forth in the Affidavit of Martha Taleno.

Analysis Regarding the Florida Statute Governing Policy Rescissions

The Court hereby finds that the subject insurance policy was rescinded void *ab initio* pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy issued by The Responsive Auto Insurance Company. Where an insurer seeks to rescind a voidable policy, it must both give notice of rescission and return or tender all premiums paid within a reasonable time after discovery of the grounds for avoiding the policy. Accordingly, the Court hereby finds that the PIP statute (Florida Statute § 627.736) does not govern policy rescissions nor the amount of time to rescind an insurance policy. Specifically, F.S. § 627.736(4)(i) does not apply to policy rescissions based on a material misrepresentation at the inception of the contract. The provisions of F.S. § 627.736(4)(i) pertain solely to investigating a "fraudulent insurance act," not a material misrepresentation on an application for insurance.

Conclusion

This Court hereby finds that the Plaintiff, The Responsive Auto Insurance Company's application for insurance unambiguously required Erika Belotti to disclose the correct garaging address for the insured vehicle on the application for insurance dated October 14, 2019, that Plaintiff provided the required testimony to establish that Defendant, Erika Belotti's failure to disclose the correct garaging address for the insured vehicle on the application for insurance was a material misrepresentation because Plaintiff would not have issued the insurance policy at the same policy 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. The Defendant, ERIKA BELOTI, was provided proper notice of the hearing on February 17, 2021, to occur through Zoom video conferencing. The Defendant, ERIKA BELOTTI, failed to appear at the hearing on February 17, 2021.

b. Plaintiff, THE RESPONSIVE AUTO INSURANCE COMPANY's Motion for Final Summary Judgment is hereby **GRANTED**;

c. This Court ***hereby enters final judgment*** for Plaintiff, THE RESPONSIVE AUTO INSURANCE COMPANY, and against the Defendant, ERIKA BELOTTI;

d. This Court hereby reserves jurisdiction to consider any claims for costs, and hereby instructs the Clerk of the Court to close this Action;

e. The Court finds that the facts alleged by the Plaintiff, THE RESPONSIVE AUTO INSURANCE COMPANY, in its Complaint for Declaratory Judgment, Motion for Final Summary Judgment, and in the Affidavit of Martha Taleno, are not in dispute, which are as follows:

f. The Defendant, ERIKA BELOTTI, failed to disclose the correct garaging address for the insured vehicle at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # XXX-XXXXXXX0-00, issued by THE RESPONSIVE AUTO INSURANCE COMPANY;

g. There is no insurance coverage for the named insured, ERIKA BELOTTI for any bodily injury liability coverage, property damage liability coverage, personal injury protection benefits coverage, collision coverage, or comprehensive coverage, under the policy of insurance issued by THE RESPONSIVE AUTO INSURANCE COMPANY, under policy # XXX-XXXXXXX01-00;

h. Notwithstanding the rescission of the subject insurance policy, the policy of insurance issued by THE RESPONSIVE AUTO INSURANCE COMPANY, bearing policy # XXX-XXXXXXX01-00, does not provide any uninsured motorist liability insurance coverage;

i. The Plaintiff, THE RESPONSIVE AUTO INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, ERIKA BELOTTI, for any claims made under the policy of insurance issued by THE RESPONSIVE AUTO INSURANCE COMPANY, under policy # XXX-XXXXXXX01-00;

j. There is no personal injury protection ("PIP") insurance coverage for ERIKA BELOTTI for the motor vehicle accident which occurred on July 24, 2020, under the policy of insurance issued by THE RESPONSIVE AUTO INSURANCE COMPANY, under policy # XXX-XXXXXXX01-00;

k. There is no obligation to provide Personal Injury Protection benefits coverage to any medical provider, doctor and/or medical facility for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on July 24, 2020, under the policy of insurance issued by Plaintiff, THE RESPONSIVE AUTO INSURANCE COMPANY, bearing policy # XXX-XXXXXXX01-00;

l. The Defendant, ERIKA BELOTTI, is excluded from any insurance coverage under the policy of insurance issued by THE

RESPONSIVE AUTO INSURANCE COMPANY, under policy # XXX-XXXXXXX01-00, for the July 24, 2020 motor vehicle accident;

m. There is no insurance coverage for the motor vehicle accident which occurred on July 24, 2020, under the policy of insurance issued by Plaintiff, THE RESPONSIVE AUTO INSURANCE COMPANY, under policy # XXX-XXXXXXX01-00;

n. There is no personal injury protection ("PIP") insurance coverage for the motor vehicle accident which occurred on July 24, 2020, under the policy of insurance issued by Plaintiff, THE RESPONSIVE AUTO INSURANCE COMPANY, under policy # XXX-XXXXXXX01-00;

o. There is no bodily injury liability coverage for the motor vehicle accident which occurred on July 24, 2020, under the policy of insurance issued by Plaintiff, THE RESPONSIVE AUTO INSURANCE COMPANY, under policy # XXX-XXXXXXX01-00;

p. There is no property damage liability coverage for the motor vehicle accident which occurred on July 24, 2020, under the policy of insurance issued by Plaintiff, THE RESPONSIVE AUTO INSURANCE COMPANY, under policy # XXX-XXXXXXX01-00;

q. There is no collision coverage for the motor vehicle accident which occurred on July 24, 2020, under the policy of insurance issued by Plaintiff, THE RESPONSIVE AUTO INSURANCE COMPANY, under policy # XXX-XXXXXXX01-00;

r. There is no comprehensive coverage for the motor vehicle accident which occurred on July 24, 2020, under the policy of insurance issued by Plaintiff, THE RESPONSIVE AUTO INSURANCE COMPANY, under policy # XXX-XXXXXXX01-00;

s. Since the policy of insurance issued to the Defendant, ERIKA BELOTTI, bearing policy # XXX-XXXXXXX01-00, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from ERIKA BELOTTI to any medical provider, doctor and/or medical entity is void;

t. The insurance policy issued by THE RESPONSIVE AUTO INSURANCE COMPANY, bearing policy # XXX-XXXXXXX01-00, is rescinded and is void *ab initio.*

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Where insured failed to disclose that insured vehicle would not be garaged at policy address, and disclosure of correct garaging address would have caused insurer to charge higher premium, misrepresentation was material—Insurer properly rescinded policy and denied coverage for loss

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. DANNY IMRAN RAMROOP, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-021616-CA-01, Section CA06. February 18, 2021. Charles Johnson, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Danny Imran Ramroop, Pro-se, Hollis, NY, Defendant.

ORDER ON PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AGAINST DEFENDANT, DANNY IMRAN RAMROOP

THIS CAUSE having come before this Court at the hearing on February 18, 2021, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendant, DANNY IMRAN RAMROOP, and the Court having considered the same, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby **GRANTED**, as follows:

Factual Background

Plaintiff, Direct General Insurance Company brought the instant Action for Declaratory Judgment against the insured, Danny Imran Ramroop, regarding the policy rescission as a result of the insured's material misrepresentations on the application for insurance dated October 26, 2019. Plaintiff rescinded the policy of insurance on the basis that Danny Imran Ramroop failed to disclose on the application for insurance that the insured vehicle would not be garaged in Florida for at least ten months of the policy period and/or failed to disclose the correct garaging address for the insured vehicle.

On the application for insurance dated October 26, 2019, Defendant, Danny Imran Ramroop, answered "Yes" to the following application question, which provides:

> Is each vehicle garaged at the same Vehicle Garaged Address listed above?

In addition, on the application for insurance dated October 26, 2019, Defendant, Danny Imran Ramroop signed the pertinent page of the Applicant's Statement, which provides:

> I hereby acknowledge that I have read and understood all the questions, statements, and information set forth in the Application, including this Applicant's Statement. I hereby represent that my answers and all information provided by me or on my behalf contained in this Application is accurate and complete.

On May 20, 2020, the named insured, Danny Imran Ramroop, provided a recorded statement to the Plaintiff, confirming the correct garaging address for the insured vehicle(s) at the time of application for insurance. Plaintiff determined that had Danny Imran Ramroop provided the proper information at the time of the insurance application dated October 26, 2019, then Plaintiff would not have assumed the risk nor issued the insurance policy. Had Danny Imran Ramroop disclosed the correct garaging address for the insured vehicle on the application for insurance dated October 26, 2019, Plaintiff, Direct General Insurance Company would not have issued the insurance policy. Therefore, Direct General Insurance Company declared the policy void *ab initio* due to a material misrepresentation and returned the paid premiums to Danny Imran Ramroop. Due to the policy being declared void *ab initio*, the Plaintiff denied coverage for the subject motor vehicle accident.

Pursuant to the policy of insurance issued to Danny Imran Ramroop, Direct General Insurance Company may void the insurance policy as follows:

> **FRAUD AND MISREPRESENTATION**
>
> The statements made by **you** in any application for insurance or policy change are deemed **your** representations. A misrepresentation; omission; concealment of fact; or incorrect statement may prevent recovery under this policy if:
>
> 1. The misrepresentation; omission; concealment; or statement is fraudulent or is material either to the acceptance of the risk or to the hazard assumed by **us**; or
>
> 2. Had **we** known the facts, we in good faith would not have: Issued the policy; Issued the policy at the same premium rate; Issued the policy with the limits shown; Issued this policy with these terms and conditions; or Provided the coverage with respect to the hazard resulting in the accident or loss.
>
> We will not provide coverage to any person who conceals or misrepresents any material fact or circumstance or who engages in fraudulent conduct related to this insurance:
>
> 1. At the time application is made;At any time during the policy period; In connection with the presentations or settlement of a claim.

Further, Florida Statute § 627.409(1) provides:

> (1) Any statement or description made by or on behalf of an insured or annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and not a warranty. Except as provided in subsection (3), ***a misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only if any of the following apply***:

(a) The misrepresentation, omission, concealment, or statement is fraudulent or is material to the acceptance of the risk or to the hazard assumed by the insurer.

(b) ***If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith*** would not have issued the policy or contract, ***would not have issued it at the same premium rate***, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.

Analysis Regarding Whether the Incorrect Garaging Address was Material

The Court hereby finds that the question of materiality is considered from the perspective of the insurer. The Court finds 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 finds that the failure to disclose the correct garaging address for the insured vehicle on the application for insurance dated October 26, 2019, which would have resulted in a denial of the application at inception, 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 finds that as Defendant, Danny Imran Ramroop failed to provide testimony to contradict Plaintiff's claim that the disclosure would have resulted in an unacceptable risk and a denial of the application, then Plaintiff was entitled to rescind. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen*, 999 F.2d 1532 (1993).

The Court hereby finds that the affiant, Rose Chrustic, provided sworn testimony to knowledge of the application for insurance and administration of the underwriting guidelines for the insurance policy issued to Danny Imran Ramroop, and could claim personal knowledge from a review of the records, therefore, Plaintiff's affiant, Ms. Chrustic, satisfied the threshold to satisfy the business records exception. *See Nationstar Mortg., LLC v. Berdecia*, 169 So. 3d 209, 213. Consequently, Plaintiff established without contrary evidence that the misrepresentation was material, as set forth in the Affidavit of Rose Chrustic.

Analysis Regarding the Florida Statute Governing Policy Rescissions

The Court hereby finds that the subject insurance policy was rescinded void *ab initio* pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy issued by Direct General Insurance Company. Where an insurer seeks to rescind a voidable policy, it must both give notice of rescission and return or tender all premiums paid within a reasonable time after discovery of the grounds for avoiding the policy. Accordingly, the Court hereby finds that the PIP statute (Florida Statute § 627.736) does not govern policy rescissions nor the amount of time to rescind an insurance policy. Specifically, F.S. § 627.736(4)(i) does not apply to policy rescissions based on a material misrepresentation at the inception of the contract. The provisions of F.S. § 627.736(4)(i) pertain solely to investigating a "fraudulent insurance act," not a material misrepresentation on an application for insurance.

Analysis Regarding Whether the Statements During the Recorded Statement of Danny Imran Ramroop are Admissible Evidence for Summary Judgment

The Court agreed with the Plaintiff, Direct General Insurance Company's position that the statements provided by Danny Imran Ramroop during his recorded statement on May 20, 2020 are admissible under the exception to the hearsay rule applicable to an admission by a party and as a statement by an opposing party.

The insured's recorded statement is admissible and proper summary judgment evidence. Although a transcript of a recorded statement is not an affidavit or deposition, it holds the same evidentiary value and fits under "other materials as would be admissible in evidence" under Florida Rule of Civil Procedure 1.510(c). *See Star Casualty Ins. Co,* 25 Fla. L. Weekly Supp. 502a (Fla. 11th Cir. Ct. October 3, 2017). Although a recorded statement is hearsay, it is admissible under the party admission hearsay exception [§ 90.803(18), Fla. Stat. (2014)]. *Smith v. Fortune Ins. Co.*, 44 So. 2d 821, 823 (Fla 1st DCA 1981); *Millennium Diagnostic Imaging Ctr. a/a/o Alejandro Gonzalez v. Allstate Prop. & Cas. Ins. Co.*, 14 Fla. L. Weekly Supp. 84a (Fla. 11th Cir. Ct. June 21, 2016) and *cert. denied*, 2017 WL 2561208 (Fla. 3d DCA May 25, 2017) (without opposition) (same issue) (both the instant insured's and Francisco Garay's EUO testimony was determined to be admissible to support a motion for summary judgment for material misrepresentation citing section 90.803(18), Florida Statutes, *Smith* and *Gonzalez*).

Therefore, the Court finds that the transcript of the recorded statement of Danny Imran Ramroop is admissible and proper summary judgment evidence.

Conclusion

This Court hereby finds that the Plaintiff, Direct General Insurance Company's application for insurance unambiguously required Danny Imran Ramroop to disclose the correct garaging address for the insured vehicle, that Plaintiff provided the required testimony to establish that Defendant, Danny Imran Ramroop's failure to disclose that the insured vehicle would not be garaged in Florida for at least ten months of the policy period and/or failure to disclose the correct garaging address for the insured vehicle at the time of the application for insurance was a material misrepresentation because Plaintiff would not have assumed the risk nor issued the insurance policy, and thus Plaintiff properly rescinded the subject policy of insurance. Consequently, Plaintiff properly denied coverage for the loss at issue.

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

a. Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment is hereby **GRANTED**;

b. This Court ***hereby enters final judgment*** for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendant, DANNY IMRAN RAMROOP;

c. This Court hereby reserves jurisdiction to consider any claims for costs;

d. The Court finds that the facts alleged by the Plaintiff, DIRECT GENERAL INSURANCE COMPANY, in its Complaint for Declaratory Judgment, Motion for Final Summary Judgment, and in the Affidavit of Rose Chrustic, are not in dispute, which are as follows:

e. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # FLPAXXXXX1487, is rescinded and is void *ab initio;*

f. The subject insurance policy was rescinded void *ab initio* pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy issued by DIRECT GENERAL INSURANCE COMPANY;

g. The Defendant, DANNY IMRAN RAMROOP, failed to disclose that the insured vehicle would not be garaged in Florida for at least ten months of the policy period and/or failed to disclose actual garaging address, which occurred prior to the assignment of any benefits under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX1487;

h. The Defendant, DANNY IMRAN RAMROOP breached the insurance policy contract and application for insurance, under the

policy of insurance, bearing policy # FLPAXXXXX1487, issued by DIRECT GENERAL INSURANCE COMPANY;

i. The material misrepresentation of Defendant, DANNY IMRAN RAMROOP on the application dated October 26, 2019 for insurance, occurred prior to any Assignment of any personal injury protection ("PIP") Benefits to any medical provider, doctor and/or medical entity, under the policy of insurance, bearing policy # FLPAXXXXX1487, issued by DIRECT GENERAL INSURANCE COMPANY;

j. There is no insurance coverage for the named insured, DANNY IMRAN RAMROOP for any bodily injury liability coverage, property damage liability coverage, collision coverage, comprehensive coverage, accidental death coverage, or personal injury protection benefits coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487;

k. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, DANNY IMRAN RAMROOP, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487;

l. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify Kathryn N. Singh for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487;

m. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify DANNY IMRAN RAMROOP for any bodily injury claim for Bukola B. Clark arising from the accident of October 26, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487;

n. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify DANNY IMRAN RAMROOP for any property damage claim for Bukola B. Clark arising from the accident of October 26, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487;

o. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify Kathryn N. Singh for any bodily injury claim for Bukola B. Clark arising from the accident of October 26, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487;

p. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify Kathryn N. Singh for any property damage claim for Bukola B. Clark arising from the accident of October 26, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487;

q. There is no personal injury protection ("PIP") insurance coverage for Kathryn N. Singh for the accident which occurred on October 26, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487;

r. There is no property damage insurance coverage for Bukola B. Clark for the accident which occurred on October 26, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487;

s. There is no bodily injury insurance coverage for Bukola B. Clark for the accident which occurred on October 26, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487;

t. There is no comprehensive insurance coverage for DANNY IMRAN RAMROOP for the accident which occurred on October 26, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487;

u. There is no collision insurance coverage for DANNY IMRAN RAMROOP for the accident which occurred on October 26, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487;

v. There is no comprehensive insurance coverage for TOYOTA MOTOR CREDIT CORPORATION for the accident which occurred on October 26, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487;

w. There is no collision insurance coverage for TOYOTA MOTOR CREDIT CORPORATION for the accident which occurred on October 26, 2019, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487;

x. There is no obligation to provide Personal Injury Protection benefits coverage to any medical provider, doctor and/or medical facility for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on October 26, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX1487;

y. The Defendant, DANNY IMRAN RAMROOP, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487, for the October 26, 2019 accident;

z. Kathryn N. Singh is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487, for the October 26, 2019 accident;

aa. Bukola B. Clark is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487, for the October 26, 2019 accident;

ab. TOYOTA MOTOR CREDIT CORPORATION is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487, for the October 26, 2019 accident;

ac. Geico Indemnity Company is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487, for the October 26, 2019 accident;

ad. Since DIRECT GENERAL INSURANCE COMPANY is not obligated to provide any coverages or indemnity to any of the potential claimants, Geico Indemnity Company, shall have no rights of subrogation against DIRECT GENERAL INSURANCE COMPANY under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX1487, for the October 26, 2019 motor vehicle accident;

ae. There is no insurance coverage for the motor vehicle accident which occurred on October 26, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487;

af. There is no personal injury protection ("PIP") insurance coverage for the accident which occurred on October 26, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487;

ag. There is no property damage liability coverage for the accident which occurred on October 26, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY,

under policy # FLPAXXXXX1487;

ah. There is no bodily injury liability coverage for the accident which occurred on October 26, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487;

ai. There is no collision coverage for the accident which occurred on October 26, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487;

aj. There is no comprehensive coverage for the accident which occurred on October 26, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487;

ak. There is no accidental death coverage for the accident which occurred on October 26, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX1487;

al. Since the policy of insurance issued to the Defendant, DANNY IMRAN RAMROOP, bearing policy # FLPAXXXXX1487, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from Kathryn N. Singh to any medical provider, doctor and/or medical entity is void.

* * *

Insurance—Automobile liability—Bodily injury—Coverage—Insurer is not required to await outcome of suit brought against driver of insured vehicle by person injured in motor vehicle accident to seek determination of whether it owes duty to defend and/or indemnify—Insurer has no duty to defend or indemnify insured or driver of insured vehicle for bodily injury liability claim where insured did not purchase any bodily injury liability coverage

IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, Plaintiff, v. AYLA CHLEMA BATEY and BRANDON GEUDEL SHUMAN, Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-013001-CA-01, Section CA32. March 4, 2021. Mark Blumstein, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Ayla Chlema Batey, Pro se, Miami, and Brandon Geudel Shuman, Pro se, Miami, Defendants.

FINAL SUMMARY JUDGMENT AGAINST DEFENDANTS

THIS CAUSE having come before this Court on March 3, 2021 via Zoom Video Conference on the Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY's Motion for Final Summary Judgment as to Defendants, AYLA CHLEMA BATEY and BRANDON GEUDEL SHUMAN, after hearing argument of counsel, and the Court having considered the same, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby **GRANTED**, as follows:

Factual Background

Plaintiff, Imperial Fire and Casualty Insurance Company brought the instant Action for Declaratory Judgment against the Defendants, Ayla Chlema Batey and Brandon Geudel Shuman, regarding the coverage dispute regarding the denial of bodily injury liability coverage for any claims arising from the motor vehicle accident which occurred on December 15, 2017. The policy of insurance issued to Ayla Chlema Batey, bearing policy # XXXXXX5689, provides property damage liability, personal injury protection benefits, comprehensive coverage, and collision coverage. There is no bodily injury liability insurance coverage provided by the policy of insurance bearing policy # XXXXXX5689.

On or about December 15, 2017, Brandon Geudel Shuman was operating the insured 2011 Honda Civic (VIN: 2HGFG1B66BH504940), owned by Ayla Chlema Batey, when the vehicle was involved in a motor vehicle accident with an opposing motor vehicle. The opposing motor vehicle was operated by Emily Mckenna Duncan, owned by Heidi Mees-Duncan, and insured by Illinois Farmers Insurance Company.

As a result of the December 15, 2017 motor vehicle accident, on November 11, 2019, Emily Mckenna Duncan (the driver of the opposing vehicle) filed a complaint seeking damages against Brandon Geudel Shuman and Illinois Farmers Insurance Company (Tippecanoe Circuit/Superior Court in Tippecanoe County, Indiana, under Case No.: 79D02-1911-CT-000154) (hereinafter referred to as the "underlying lawsuit").

During the investigation of the facts and circumstances surrounding the motor vehicle incident, it was determined that the named insured, Ayla Chlema Batey, was not insured for bodily injury liability coverage under the policy of insurance issued by Plaintiff, Imperial Fire and Casualty Insurance Company, bearing policy # XXXXXX5689. Specifically, Ayla Chlema Batey did not pay any premium for bodily injury liability coverage for the policy of insurance, bearing policy # 2004065689. In addition, Imperial Fire and Casualty Insurance Company did not collect any premium for bodily injury liability coverage from Ayla Chlema Batey for the policy of insurance, bearing policy # 2004065689.

Under the sections of the policy titled "Agreement" and "Definitions", states in pertinent part as follows:

AGREEMENT

Insurance hereunder is provided only with respect to those coverages for which a specific limit of liability and premium are shown in the Declarations.

In return for payment of the premium and subject to all the terms of this Policy, **"we"** agree, with **"you"** as follows:

DEFINITIONS

A. Throughout this policy, **"you"** and **"your"** refer to:

1. The named insured shown in the Declarations; and
2. The spouse, if a resident of the same household and named on the Declarations page.

B. **"We"**, **"us"** and **"our"** refer to the Company providing this insurance.

D. **"Bodily injury"** means injury to a person including resulting sickness, disease or death.

M. **"Auto Accident"** means a sudden, unexpected and unbroken chain of events or event arising out of the ownership maintenance or use of "your covered auto".

In addition, as outlined under the section of the policy titled "PART A—LIABILITY COVERAGE", under the paragraph titled "INSURING AGREEMENT", items "A" and "B" states in pertinent part as follows:

INSURING AGREEMENT

A. "**We** will pay damages for "**bodily injury"** or **"property damage"** for which any **"insured"** becomes legally responsible because of an **"auto accident"**. **"We"** will settle or defend, as **"we"** consider appropriate, any claim or suit asking for these damages. In addition to **"our"** limit of liability, **"we"** will pay all defense costs **"we"** incur. **"Our"** duty to settle or defend ends when **"our"** limit of liability for this coverage has been exhausted by payment of judgments or settlements. **"We"** have no duty to defend any suit or settle any claim for "bodily injury" or "property damage" not covered under this policy."

B. **"Insured"** as used in this Part means:

C. **"You"** or any **"family member"** for the ownership, maintenance or use of any auto or **"trailer"** except for an auto owned by **"you"** or furnished or available for **"your"** regular use which is not defined as **"your covered auto"** under the definition section of this policy.

D. Any person using **"your covered auto"** with **"your"** expressed implied permission.

E. For **"your covered auto"**, any person or organization but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under this Part.

Florida courts follow the rule of lex loci contractus. That rule, as applied to insurance contracts, provides that the law of the jurisdiction where the contract was executed governs the rights and liabilities of the parties in determining an issue of insurance coverage. *Sturiano v. Brooks,* 523 So. 2d 1126, 1129 (Fla. 1988); see also *Lumbermens Mut. Cas. Co. v. August,* 530 So. 2d 293, 295 (Fla. 1988) ("[T]he lex loci contractus rule determines the choice of law for interpretation of provisions of uninsured motorists clauses in automobile insurance policies just as it applies to other issues of automobile insurance coverage.").

Moreover, under the section of the policy titled "PART A—LIABILITY COVERAGE", under the paragraph titled "FINANCIAL RESPONSBILITY", states in pertinent part as follows:

FINANCIAL RESPONSIBILITY

When "**we**" certify this Policy as proof under any Financial Responsibility law, it will comply with the law to the extent of the coverage required.

The applicable limits of liability shown in the Declarations shall be increased to meet the Financial Responsibility requirements of a given state in which an accident or loss occurs. However, nothing contained herein shall be construed as creating or adding coverage to this Policy if such coverage was not purchased and is not reflected in the Declarations.

Claims were presented under the subject insurance policy arising from the motor vehicle accident on December 15, 2017, including but not limited to the bodily injury claim by Emily Duncan. However, bodily injury liability coverage was denied by the Carrier, Imperial Fire and Casualty Insurance Company because the policy issued to Ayla Chlema Batey does not provide any insurance coverage for bodily injury liability. Applying the facts of the loss (and the "underlying lawsuit") to the policy language, it is clear that there is no bodily injury liability coverage under the subject policy because Ayla Chlema Batey did not purchase any bodily injury liability coverage.

Analysis Regarding the Duty to Defend and/or Indemnify

Counsel for the Plaintiff argued that issue of the duty to defend and/or indemnify in this coverage Action is not based on the separate related lawsuit filed by Emily Duncan against Brandon Geudel Shuman and Illinois Farmers Insurance Company. Specifically, counsel for the Plaintiff argued that the duty to defend is not limited to the four-corners of the complaint in the "underlying lawsuit" filed by Emily Duncan.

Counsel for the Plaintiff, Imperial Fire and Casualty Insurance Company, argued that the separate related lawsuit filed by Emily Duncan does not prohibit the Carrier at this time from seeking a declaration of its rights under the policy through an Action for Declaratory Judgment regarding the coverage denial and its duty to defend and/or indemnity its insured(s) as a result of the facts giving rise to a coverage denial. Counsel for the Plaintiff argued that the duty to defend and the "four-corners test" as to the other non-relevant complaint (the Emily Duncan complaint) does not apply in this coverage Action, and that the only relevant complaint is the instant Complaint for Declaratory Judgment before this Court.

The Court agreed with the Plaintiff's argument and ruled that the other complaint filed in the separate lawsuit does not preclude this Court from determining whether there is insurance coverage under a policy of insurance based on the terms and conditions of the policy, and whether the Carrier has a duty to defend and/or indemnify its insured(s), as alleged in the instant Complaint for Declaratory Judgment. The Carrier does not need to wait for the "underlying lawsuit" to conclude for it to seek a determination of whether the Carrier owes a duty to defend and/or indemnify. Therefore, the Court finds that since the insurance policy bearing policy # XXXXXX5689 does not provide bodily injury liability coverage, there is no duty to defend and/or indemnify Ayla Chlema Batey and/or Brandon Geudel Shuman for any bodily injury liability claims arising from the motor vehicle accident which occurred on December 15, 2017.

This Court hereby finds that Imperial Fire and Casualty Insurance Company has no duty to defend and/or indemnify Ayla Chlema Batey and/or Brandon Geudel Shuman for any bodily injury liability insurance claim arising from the motor vehicle incident which occurred on December 15, 2017. Specifically, Imperial Fire and Casualty Insurance Company, has no duty to defend and/or indemnify Ayla Chlema Batey and/or Brandon Geudel Shuman, in the lawsuit filed by Emily Duncan (*Tippecanoe Circuit/Superior Court in Tippecanoe County, Indiana - under Case No.: 79D02-1911-CT-000154*).

Conclusion

This Court hereby finds that the policy of insurance issued by Imperial Fire and Casualty Insurance Company, bearing policy # XXXXXX5689, is governed by the substantive laws of the State of Florida and thus, the since insurance policy does not provide bodily injury liability coverage, there is no duty to defend and/or indemnify Ayla Chlema Batey and/or Brandon Geudel Shuman for any bodily injury liability insurance claim arising from the motor vehicle incident which occurred on December 15, 2017. Therefore, there is no coverage for any bodily injury liability claim arising from the motor vehicle accident on December 15, 2017, under the insurance policy issued by Imperial Fire and Casualty Insurance Company bearing policy # XXXXXX5689.

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

a. Based upon the properly filed Affidavit of Daniel Brownsey, and other evidence relied upon by the Plaintiff as set forth in its Complaint for Declaratory Judgment and Motion for Final Summary Judgment, there are no genuine issues of material fact in dispute, and thus, the Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY's Motion for Final Summary Judgment is hereby **GRANTED**;

b. This Court ***hereby enters final judgment*** for Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, and against the Defendants, AYLA CHLEMA BATEY and BRANDON GEUDEL SHUMAN;

c. This Court hereby resolves the coverage issue in this Action in favor of the Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY;

d. This Court hereby reserves jurisdiction to consider any claim for attorneys' fees and costs;

e. The policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, bearing policy # XXXXXX5689, is governed by the substantive laws of the State of Florida;

f. The laws of the State of Indiana do not apply to the interpretation of the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, bearing policy # XXXXXX5689;

g. The policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, bearing policy # XXXXXX5689, provides the following coverages: property damage liability coverage, personal injury protection benefits, collision coverage, and comprehensive coverage, only;

h. The policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, bearing policy

XXXXXX5689, does not provide any bodily injury liability insurance coverage;

i. AYLA CHLEMA BATEY did not pay any premium for bodily injury liability coverage for the policy of insurance, bearing policy # 2004065689;

j. BRANDON GEUDEL SHUMAN did not pay any premium for bodily injury liability coverage for the policy of insurance, bearing policy # 2004065689;

k. IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY did not collect any premium for bodily injury liability coverage from AYLA CHLEMA BATEY for the policy of insurance, bearing policy # 2004065689;

l. IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY did not collect any premium for bodily injury liability coverage from BRANDON GEUDEL SHUMAN for the policy of insurance, bearing policy # 2004065689;

m. There is no bodily injury liability insurance coverage provided by the policy of insurance, bearing policy # 2004065689;

n. The Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, owes no duty to defend and/or indemnify the insured, AYLA CHLEMA BATEY, for any bodily injury claim for Emily Mckenna Duncan for the motor vehicle accident on December 15, 2017, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX5689, in the Tippecanoe Circuit/Superior Court Sitting in Tippecanoe County, Indiana, under Case No.: 79D02-1911-CT-000154. (Emily Mckenna Duncan v. Brandon Shuman and Illinois Farmers Insurance Company);

o. Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, owes no duty to defend and/or indemnify the Defendant, BRANDON GEUDEL SHUMAN, for any bodily injury claim for Emily Mckenna Duncan for the motor vehicle accident on December 15, 2017, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX5689, in the Tippecanoe Circuit/Superior Court Sitting in Tippecanoe County, Indiana, under Case No.: 79D02-1911-CT-000154. (Emily Mckenna Duncan v. Brandon Shuman and Illinois Farmers Insurance Company);

p. The Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, owes no duty to defend and/or indemnify the insured, AYLA CHLEMA BATEY, for any bodily injury claim arising from the motor vehicle accident on December 15, 2017, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX5689;

q. The Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, owes no duty to defend and/or indemnify the insured, BRANDON GEUDEL SHUMAN, for any bodily injury claim arising from the motor vehicle accident on December 15, 2017, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX5689;

r. There is no bodily injury liability insurance coverage for Emily Mckenna Duncan, for the motor vehicle accident which occurred on December 15, 2017, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX5689, in the Tippecanoe Circuit/Superior Court Sitting in Tippecanoe County, Indiana, under Case No.: 79D02-1911-CT-000154. (Emily Mckenna Duncan v. Brandon Shuman and Illinois Farmers Insurance Company);

s. Emily Mckenna Duncan is excluded from any bodily injury liability insurance coverage under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, for the December 15, 2017 motor vehicle accident, under policy # XXXXXX5689, in the Tippecanoe Circuit/Superior Court Sitting in Tippecanoe County, Indiana, under Case No.: 79D02-1911-CT-000154. (Emily Mckenna Duncan v. Brandon Shuman and Illinois Farmers Insurance Company);

t. There is no bodily injury liability insurance coverage for the motor vehicle accident which occurred on December 15, 2017, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX5689.

* * *

Real property—Mortgage foreclosure—Sale—Surplus funds—Pending action to foreclose first mortgage does not preclude disbursement of surplus of foreclosure sale—Holder of first mortgage is not subordinate lienholder as set forth in section 45.032

VILLA BELLINI CONDOMINIUM ASSOCIATION, INC., Plaintiff, v. MARIA J. FERRERO, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-013001-CA-01, Section CA22. March 17, 2021. Beatrice Butchko, Judge. Counsel: Law Office of Alexis Gonzalez, P.A., Miami, for Plaintiff. Paul A. McKenna & Associates, P.A., Miami; and Kevin Hagen, Nation Lawyers Chartered, Sunrise, for Defendants.

ORDER GRANTING MOTION FOR RECONSIDERATION AND TO AWARD SURPLUS OF FORECLOSURE SALE

THIS MATTER having come before the Court March 16, 2021, via Zoom Meeting, on the Motion for Reconsideration and Motion to Award Surplus of Foreclosure Sale, the Court having reviewed the pleadings, heard argument of counsel and being otherwise advised in the premises,

The Court finds that, although there is a separate action pending on a first mortgage foreclosure proceeding on the subject real property, the first mortgage is not a subordinate lienholder as set forth in §45.032 of the Florida Statutes in this action, and it is thereby:

ORDERED and ADJUDGED:

1. The Motion for Reconsideration and Motion to Award Surplus of Foreclosure Sale are hereby granted.

2. The Clerk of the Court is hereby instructed to issue payment and disburse the remaining surplus funds in the court registry to NATION LAWYERS CHARTERED TRUST ACCOUNT at 10251 W. Oakland Park Boulevard, Sunrise, FL 33351, less any fees or costs to the clerk associated with the disbursement of fees.

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Where insured failed to list son who resided with her on policy application that required that all household residents be listed, and disclosure of son would have caused insurer to charge higher premium, misrepresentation was material—Insurer properly rescinded policy and denied coverage for loss

IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, Plaintiff, v. ZENIA ALONSO DIAZ, Defendant. Circuit Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 2020-CA-008156. February 22, 2021. Mark R. Wolfe, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Zenia Alonso Diaz, Pro se, Tampa, Defendant.

ORDER ON PLAINTIFF, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AGAINST THE DEFENDANT, ZENIA ALONSO DIAZ

THIS CAUSE having come before this Court at the hearing on February 22, 2021, on the Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendant, ZENIA ALONSO DIAZ, and the Court having considered the same, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same

is hereby **GRANTED**, as follows:

Factual Background

Plaintiff, Imperial Fire and Casualty Insurance Company brought the instant Action for Declaratory Judgment against the named insured Defendant, Zenia Alonso Diaz, regarding the policy rescission as a result of the insured's material misrepresentation on the application for insurance dated June 13, 2020. Plaintiff rescinded the policy of insurance on the basis that Zenia Alonso Diaz failed to disclose that her son, Hansel Esquivel Alonso, resided with her at the time of policy inception and had she disclosed this information the Plaintiff would not have issued the policy on the same terms; namely, Plaintiff would have charged a higher premium to issue the policy.

Ms. Zenia Alonso Diaz initially completed an application for a policy of automobile insurance from Imperial Fire and Casualty Insurance Company on June 13, 2020. Ms. Zenia Alonso Diaz failed to list her son, Hansel Esquivel Alonso, as a household member/resident when completing the application for insurance. Ms. Zenia Alonso Diaz answered "NO" to the following application question, which provides:

> Have you failed to disclose any household residents, whether licensed or not, including but not limited to children/step-children or dependents who may reside temporarily elsewhere?

In addition, the insured, Ms. Zenia Alonso Diaz, signed and initialed the Applicant's Statement on page 4 of the application for insurance, 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 further agree that all persons 14 years of age or older who live with me, 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 that the vehicle is in this state no less than 12 months each year. I understand the Company may rescind this Policy if said answers on this Application are false or misleading, and materially affect the risk the Company assumes by issuing the Policy. Unless otherwise specified in the Policy, I understand that I have a continuing duty to notify the Company within 14 calendar days of any changes of: (1) address; (2) garaging location of vehicles; (3) number, type, and use of vehicles to be insured under this Policy; (4) residents of my household of eligible driving age or permit age; (5) driver's license or permit status (new, revoked, suspended or reinstated) of any resident of my household; (6) operators using any vehicles to be insured under this Policy; or (7) the marital status of any resident or family member of my household. I understand the Company may rescind this policy if I do not comply with my continuing duty of advising the Company of any changes as noted above."

On July 21, 2020, the named insured, Zenia Alonso Diaz, provided a recorded statement to the Plaintiff, confirming that her son lived with her at the time of application for insurance, and still does live with her at the policy garaging address. Plaintiff determined that had Zenia Alonso Diaz provided the proper information at the time of the insurance application then Plaintiff would have charged the insured a higher premium rate. Therefore, Imperial Fire and Casualty Insurance Company declared the policy void *ab initio* due to material misrepresentation and returned the paid premiums to Zenia Alonso Diaz. Due to the policy being declared void *ab initio*, the Plaintiff denied coverage for the subject motor vehicle accidents.

Pursuant to the policy of insurance issued to Zenia Alonso Diaz, Imperial Fire and Casualty Insurance Company may void the insurance policy as follows:

> **Our right to Rescind the Policy**
>
> This policy may be deemed void from its inception, as if it never existed, as described here.
>
> **1. Voiding for Fraud or Misrepresentation**
>
> Because **we** rely on the information provided by or for **you** on **your application** when **we** agree to issue a policy to **you**, **we** have the right to void this policy from its inception if **we** learn that **you** or **your** representative, at the time of the **application**
>
> a. Made incorrect statements or representations to **us** as to any material fact of circumstance;
>
> b. Concealed or misrepresented any material fact or circumstance; or
>
> c. Engaged in fraudulent conduct.
>
> No coverage is provided for any **accident** or **loss** if **we** void this 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.

Plaintiff, Imperial Fire and Casualty Insurance Company, argued in their summary judgment that, as both the statute and the binding appellate decisions state, materiality of the risk is determined by the insurer, not the insured. *See Fla. Stat. 627.409.* As the Fla. Supreme Court ruled "[t]he statute recognizes the principals of law that a contract issued on a mutual mistake of fact is subject to being voided and defines the circumstances for the application of this principle. This Court cannot grant [**10] an exception to a statute nor can we construe an unambiguous statute different from its plain meaning." *Continental Assurance Co. v. Carroll,* 485 So. 2d 406, 409, (FLA 1986). Therefore, the insurer determines materiality. Additionally, as an insurer rates risks based on the likelihood of a future event, such as an accident, then the insurer may treat any resident/household member as a potential risk. For example, a resident relative may be covered under an automobile insurance policy if struck by a vehicle whilst walking, and thus an insurer must determine rates accordingly. *See Travelers Ins. Co. v. Furlan*, 408 So.2d 767 (5th DCA 1982). Therefore, to ensure both parties enter the contract with full understanding, the Plaintiff is entitled to all information that Plaintiff deems necessary to determine the risk. Additionally, the Legislature allows an insurer to rescind for a material misrepresentation, regardless of the insured's intent, and thus the Legislature clearly burdened the applicant with the duty to fully disclose all requested information. *See United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (3rd DCA 2009) [34 Fla. L. Weekly D1578a]. It was the Plaintiff's position was that Plaintiff properly rescinded the policy at issue based on an unlisted household member as the terms were unambiguous within the application.

Analysis Regarding Whether the Undisclosed Person in Household was Material

The Court ruled that the question of materiality is considered from the perspective of the insurer. Further, the Court found that "[a] material misrepresentation in an application for insurance, whether or

not made with knowledge of its correctness or untruth, will nullify *any policy* issued and is an absolute defense to enforcement of the policy." *United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (3rd DCA 2009) [34 Fla. L. Weekly D1578a]. The Court ruled that the failure to disclose a household member that would have caused the insurer to issue the policy at a higher rate is sufficient to support a rescission. *See Privilege Underwriters Reciprocal Exch. v. Clark,* 174 So. 3d 1028, 1031 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1810a]. Additionally, the Court found that as Defendant failed to provide testimony to contradict Plaintiff's claim that the disclosure would have caused Plaintiff to issue the policy at a higher premium rate, then Plaintiff was entitled to rescind. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen*, 999 F.2d 1532 (1993).

The Court ruled that the materiality of the risk regarding the failure to disclose a household member on an application for insurance is determined at the time of inception and/or application, not at the time of a subsequent loss. Here, the insured failed to disclose her son, Hansel Esquivel Alonso, as a household member living at the policy address at the time of the application. Therefore, it is irrelevant whether the undisclosed household member, Hansel Esquivel Alonso, was involved in the subject motor vehicle accident on July 18, 2020, for purposes of determining the materiality of the risk as to the policy premium at inception pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy.

Additionally, the Court found that the affiant, Rose Chrustic, provided sworn testimony to knowledge of the application for insurance and administration of the underwriting guidelines for the insurance policy issued to Zenia Alonso Diaz, and could claim personal knowledge from a review of the records, therefore, Plaintiff's affiant, Ms. Chrustic, satisfied the threshold to satisfy the business records exception. *See Nationstar Mortg., LLC v. Berdecia*, 169 So. 3d 209, 213. Consequently, Plaintiff established without contrary evidence that the misrepresentation was material, as set forth in the Affidavit of Rose Chrustic.

Analysis Regarding the Florida Statute Governing Policy Rescissions

The Court hereby finds that the subject insurance policy was rescinded void *ab initio* pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy issued by Imperial Fire and Casualty Insurance Company. Where an insurer seeks to rescind a voidable policy, it must both give notice of rescission and return or tender all premiums paid within a reasonable time after discovery of the grounds for avoiding the policy. Accordingly, the Court hereby finds that the PIP statute (Florida Statute § 627.736) does not govern policy rescissions nor the amount of time to rescind an insurance policy. Specifically, F.S. § 627.736(4)(i) does not apply to policy rescissions based on a material misrepresentation at the inception of the contract. The provisions of F.S. § 627.736(4)(i) pertain solely to investigating a "fraudulent insurance act," not a material misrepresentation on an application for insurance.

Analysis Regarding Whether the Recorded Statement of Zenia Alonso Diaz is Admissible Evidence for Summary Judgment

The Court agreed with the Plaintiff, Imperial Fire and Casualty Insurance Company's position that the statements provided by Zenia Alonso Diaz during her recorded statement on July 21, 2020 are admissible under the exception to the hearsay rule applicable to an admission by a party and as a statement by an opposing party.

The insured's recorded statement is admissible and proper summary judgment evidence. Although a transcript of a recorded statement is not an affidavit or deposition, it holds the same evidentiary value and fits under "other materials as would be admissible in evidence" under Florida Rule of Civil Procedure 1.510(c). *See Star Casualty Ins. Co,* 25 Fla. L. Weekly Supp. 502a (Fla. 11th Cir. Ct. October 3, 2017). Although a recorded statement is hearsay, it is admissible under the party admission hearsay exception [§ 90.803(18), Fla. Stat. (2014)]. *Smith v. Fortune Ins. Co.*, 44 So. 2d 821, 823 (Fla 1st DCA 1981); *Millennium Diagnostic Imaging Ctr. a/a/o Alejandro Gonzalez v. Allstate Prop. & Cas. Ins. Co.*, 14 Fla. L. Weekly Supp. 84a (Fla. 11th Cir. Ct. June 21, 2016) and *cert. denied*, 2017 WL 2561208 (Fla. 3d DCA May 25, 2017) (without opposition) (same issue) (both the instant insured's and Francisco Garay's EUO testimony was determined to be admissible to support a motion for summary judgment for material misrepresentation citing section 90.803(18), Florida Statutes, *Smith* and *Gonzalez*).

Therefore, the Court finds that the transcript of the recorded statement of Zenia Alonso Diaz is admissible and proper summary judgment evidence.

Conclusion

This Court finds that the Plaintiff, Imperial Fire and Casualty Insurance Company's application for insurance unambiguously required Defendant, Zenia Alonso Diaz, to disclose her son, Hansel Esquivel Alonso, as a household member, that Plaintiff provided the required testimony to establish said that Defendant, Zenia Alonso Diaz' failure to disclose her son as a person in the household was a material misrepresentation because Plaintiff would not have issued the policy on the same terms, and thus Plaintiff properly rescinded the subject policy of insurance. Consequently, Plaintiff properly denied coverage for the loss at issue.

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

a. Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY's Motion for Final Summary Judgment is hereby **GRANTED**.

b. This Court ***hereby enters final judgment*** for Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, and against the Defendant, ZENIA ALONSO DIAZ.

c. This Court hereby reserves jurisdiction to consider any claim for costs.

d. This Court previously ruled that the First Request for Admissions and Second Request for Admissions served on the Defendant, ZENIA ALONSO DIAZ, were deemed admitted. Specifically, it was deemed admitted that ZENIA ALONSO DIAZ failed to disclose her son as a household resident on the application for insurance. In addition, it was deemed admitted that ZENIA ALONSO DIAZ was not injured in the motor vehicle accident which occurred on July 18, 2020 nor did ZENIA ALONSO DIAZ seek any medical treatment as a result of the motor vehicle accident which occurred on July 18, 2020.

e. This Court finds that the facts alleged by the Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, in its Complaint for Declaratory Judgment and in the Affidavit of Rose Chrustic, are not in dispute, which are as follows:

f. The IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY Policy of Insurance, bearing policy # XXXXXX1941, is rescinded and is void *ab initio;*

g. The subject insurance policy was rescinded void *ab initio* pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY;

h. The Defendant, ZENIA ALONSO DIAZ, failed to disclose additional household residents and/or operators of the insured vehicle(s) at the time of the application, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # XXXXXX1941, issued by IMPERIAL FIRE AND CASU-

ALTY INSURANCE COMPANY;

i. The Defendant, ZENIA ALONSO DIAZ breached the insurance policy contract and application for insurance, under the policy of insurance, bearing policy # XXXXXX1941, issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY;

j. The material misrepresentation of Defendant, ZENIA ALONSO DIAZ on the application for insurance dated June 13, 2020, occurred prior to any Assignment of any personal injury protection ("PIP") Benefits to any medical provider, doctor and/or medical entity, under the policy of insurance, bearing policy # XXXXXX1941, issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY;

k. There is no insurance coverage for the named insured, ZENIA ALONSO DIAZ for any property damage liability coverage, personal injury protection benefits coverage, collision coverage or comprehensive coverage, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX1941;

l. Notwithstanding the rescission of the subject insurance policy, the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, bearing policy # XXXXXX1941, does not provide any bodily injury liability insurance coverage;

m. The Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, ZENIA ALONSO DIAZ, for any claims made under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX1941;

n. There is no personal injury protection ("PIP") insurance coverage for ZENIA ALONSO DIAZ for the accident which occurred on July 18, 2020, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX1941;

o. There is no collision coverage for ZENIA ALONSO DIAZ for the motor vehicle accident which occurred on July 18, 2020, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX1941;

p. There is no comprehensive coverage for ZENIA ALONSO DIAZ for the motor vehicle accident which occurred on July 18, 2020, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX1941;

q. There is no collision coverage for Suncoast Credit Union for the motor vehicle accident which occurred on July 18, 2020, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX1941;

r. There is no comprehensive coverage for Suncoast Credit Union for the motor vehicle accident which occurred on July 18, 2020, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX1941;

s. There is no bodily injury liability insurance coverage for Whitney Leigh Pemrick for the accident which occurred on July 18, 2020, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX1941;

t. There is no property damage insurance coverage for Whitney Leigh Pemrick for the accident which occurred on July 18, 2020, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX1941;

u. There is no property damage insurance coverage for VW Credit, Inc. d/b/a Volkswagen Credit for the accident which occurred on July 18, 2020, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX1941;

v. There is no obligation to provide Personal Injury Protection benefits coverage to any medical provider, doctor and/or medical facility for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on July 18, 2020, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, bearing policy # XXXXXX1941;

w. There is no obligation to provide Personal Injury Protection benefits coverage to AJ Therapy Center of Tampa for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on July 18, 2020, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX1941;

x. The Defendant, ZENIA ALONSO DIAZ, is excluded from any insurance coverage under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX1941, for the July 18, 2020 accident;

y. Whitney Leigh Pemrick, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX1941, for the July 18, 2020 accident;

z. Suncoast Credit Union is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX1941, for the July 18, 2020 accident;

aa. VW Credit, Inc. d/b/a Volkswagen Credit is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX1941, for the July 18, 2020 accident;

bb. AJ Therapy Center of Tampa is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX1941, for the July 18, 2020 accident;

cc. Allstate Insurance Company is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX1941, for the July 18, 2020 accident;

dd. Since IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY is not obligated to provide any coverages or indemnity to any of the potential claimants, Allstate Insurance Company, shall have no rights of subrogation against IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, bearing policy # XXXXXX1941, for the July 18, 2020 motor vehicle accident;

ee. There is no insurance coverage for the motor vehicle accident which occurred on July 18, 2020, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX1941;

ff. There is no personal injury protection ("PIP") insurance coverage for the accident which occurred on July 18, 2020, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX1941;

gg. There is no property damage liability coverage for the accident which occurred on July 18, 2020, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX1941;

hh. There is no collision coverage for the accident which occurred on July 18, 2020, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY,

under policy # XXXXXX1941;

ii. There is no comprehensive coverage for the accident which occurred on July 18, 2020, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX1941;

jj. Since the policy of insurance issued to the Defendant, ZENIA ALONSO DIAZ, bearing policy # XXXXXX1941, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from ZENIA ALONSO DIAZ to any medical provider, doctor and/or medical entity is void;

kk. Since the policy of insurance issued to the Defendant, ZENIA ALONSO DIAZ, bearing policy # XXXXXX1941, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from ZENIA ALONSO DIAZ to AJ Therapy Center of Tampa is void.

* * *

Prohibition—Jurisdiction—Municipal corporations—Petition for writ prohibiting city council from conducting hearing on revocation or suspension of alcohol sales license of petitioner cited for violation of executive orders requiring wearing of masks and prohibiting dancing on dance floor is denied—City council has jurisdiction to conduct hearing

CARLO BAY ENTERPRISE, INC., d/b/a PRANA YBOR'S PREMIER NITESPOT, Petitioner, v. CITY OF TAMPA, Respondent. Circuit Court, 13th Judicial Circuit in and for Hillsborough County, Circuit Civil Division. Case No. 21-CA-1109, Division E. February 17, 2021. Anne-Leigh Gaylord Moe, Judge. Counsel: Luke Charles Lirot, Luke Charles Lirot, P.A., Tampa, for Petitioner.

ORDER DENYING PETITION FOR WRIT OF PROHIBITION

This case is before the Court on a Petition for Writ of Prohibition filed February 8, 2021, by Petitioner Carlo Bay Enterprise, Inc. d/b/a Prana Ybor's Premier Nitespot. On review of the petition, appendix, and applicable authority, and being otherwise fully advised in the premises, the Petition is due to be denied for the reasons set forth here.

I. Jurisdiction

This Court has jurisdiction. *See* Art. V, Sec. 5, Fla. Const.

II. Legal Standard

"Prohibition is an extraordinary writ that is extremely narrow in scope and operation. It exists to prevent an inferior tribunal from acting in excess of jurisdiction but not to prevent an erroneous exercise of jurisdiction." *Panagakos v. Laufer*, 779 So. 2d 296, 297 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D801b]. The only issue relevant in a prohibition proceeding is the nature and extent of a lower court or tribunal's jurisdiction; prohibition is not intended to remedy errors that are capable of correction on an appeal from a final order. *Id.*; *Haridopolos v. Citizens for Strong Schools, Inc.*, 81 So. 3d 465 (Fla. 1st DCA 2011) [37 Fla. L. Weekly D753c].

III. Facts

On January 1, 2021, the City of Tampa issued Civil Citation number TC-20861 ("**Civil Citation 1**") to Petitioner for violation of Executive Order 2020-42(5). Civil Citation 1 described the violation as "[e]mployee not wearing a mask. No dancing on floor area." It provided two options for a response: either pay the fine of $150.00 or challenge the citation in court.

On January 8, 2021, the City of Tampa issued Civil Citation number TC-20802 ("**Civil Citation 2**") to Petitioner for violation of Executive Order 2020-42(3)(b). Civil Citation 2 described the violation as "[e]mployees and patrons observed not wearing a facemask and dancing on dance floor, observed." Like Civil Citation 1, Civil Citation 2 provided that Petitioner could either pay a fine or challenge the violation in court.

Petitioner alleges that it timely followed the procedure to challenge Civil Citation 1 and Civil Citation 2 (together, the "**Civil Citations**") in court. Petitioner further alleges that the City has implied that the court challenge provided for in the Civil Citations will not occur and in lieu of the challenge procedure, the City Council will conduct a revocation/suspension hearing to be held on February 22, 2021.

IV. Analysis

The nature of a prohibition proceeding mandates a narrow focus on the issue of whether the City Council has jurisdiction to conduct the revocation/suspension hearing on February 22, 2021. Plainly, it does. *See* Section 27-318(c)(1) and 27-318(c)(1)(f) of the City of Tampa Code (providing for the revocation or suspension of alcohol sales for cause following a public hearing). As a consequence, the petition is due to be denied.

Accordingly, it is now

ORDERED and ADJUDGED that:

1. The Petition for Writ of Prohibition is DENIED.

* * *

Municipal corporations—Development plans—Class action on behalf of tenants of apartment complex displaced by redevelopment plan, contending that city failed to provide notice and relocation plan—Certification of class—Where representative class members' claims arise from same conduct that gave rise to proposed class members' claims, namely, city's failure to provide notice and relocation assistance to tenants, commonality requirement is met—Predominance requirement is met where common questions of law and fact predominate over individual class members' claims—No merit to argument that, due to delay in moving for certification, it is impractical to certify class at current stage of proceedings—There was no deliberate delay or failure to move case forward that would justify denial of class certification—Class certification granted

DONALD CAMPEAU, et al., Individually and on behalf of all others similarly situated, Plaintiffs, v. THE CITY OF HOLLYWOOD, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE14-008722 (12). February 12, 2021. Keathan B. Frink, Judge. Counsel: Sharon Bourassa and Brittney Parks, Plantation, and Anthony Adelson, Hallandale beach, Legal Aid Service of Broward County, Inc., for Plaintiff Class. Daniel L. Abbott, Weiss, Serota, Helfman, Cole & Bierman, P.L., Fort Lauderdale, for Defendant.

ORDER GRANTING PLAINTIFFS' AMENDED MOTION FOR CLASS CERTIFICATION

THIS CAUSE came before the court on Plaintiffs' Amended Motion for Class Certification. This Court, having reviewed the motion, the record and the applicable law, having heard argument of counsel and witness testimonies on November 13, 2020, and being otherwise duly advised in the premises, rules as follows:

Findings of Fact

The Townhouse Apartments building was a ten-story high rise residence containing approximately 200 rental units located at 1776 Polk Street in Hollywood, Florida. According to witnesses, the Townhouse Apartments provided residents with a convenient and walkable location being in close proximity to shopping, dining, beaches, and parks. In 2004, Defendant, The City of Hollywood (Defendant) entered into an agreement with Block 55, LLC, which later merged with Hollywood Circle, LLC d/b/a Townhouse Apartments, to demolish and redevelop the Townhouse Apartments. It is undisputed that on September 27, 2013, tenants received individual notices requiring them to vacate permanently. Based upon witnesses' testimonies and exhibits, several tenants experienced various relocation challenges including unanticipated moving expenses, increased monthly rents, costs of new furniture, inconvenient commutes, and smaller apartment sizes, to name a few. The Plaintiffs in this suit contend that Defendant failed to provide notice and a relocation plan as prescribed by sections 163.3225 and 163.360(7)(a),

Florida Statutes, respectively. Plaintiffs now seek class certification on their behalf and all others similarly situated who resided at the Townhouse Apartments between the time of the April 2012 Amended and Restated Development Agreement and the issuance of the September 27, 2013 notices to tenants.

Class Certification:

Conclusions of Law

Under Florida law, the moving party bears the burden of establishing all of the requirements for class certification pursuant to Florida Rule of Civil Procedure 1.220. *See InPhyNet Contracting Serv. v. Soria*, 33 So. 3d 766, 771 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D880a]. The "question of whether to grant or deny certification is committed to the broad discretion of the circuit court." *Chase Manhattan Mortg. Corp. v. Porcher*, 898 So. 2d 153, 156 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D684a]. Since Florida's class action rule is based on Federal Rule of Civil Procedure 23, Florida courts may look to federal cases as persuasive authority in their interpretation of Florida Rule of Civil Procedure 1.220. *See id.* Moreover, a class should be certified at an early stage in the proceedings, prior to trial and prior to the completion of discovery. *See Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1266 (Fla. 2006) [32 Fla. L. Weekly S1a]. In determining whether to certify a class, a court should not focus on the merits of the action. *See Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 105 (Fla. 2011) [36 Fla. L. Weekly S373a]. "However, if consequential to its consideration of whether to certify a class, a trial court may consider evidence on the merits of the case as it applies to the class certification requirements." *Id.* "[A] trial court should resolve doubts with regard to certification in favor of certification, especially in the early stages of litigation." *Id.*

The threshold inquiry in a motion for class certification is whether the plaintiff/class representative has standing to bring the action. *See Olen Props. Corp. v. Moss*, 981 So. 2d 515, 517 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1297b] (citing *Ferreiro v. Philadelphia Indem. Ins. Co.*, 928 So. 2d 374, 376 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D719a]. Thus, a plaintiff must show that a case or controversy exists between the plaintiff and the defendant, and that such case or controversy continues from the commencement through the existence of the litigation. *Id.* "A case or controversy exists if a party alleges an actual or legal injury." *Sosa*, 73 So. 3d at 117. Furthermore, an "actual injury includes an economic injury for which the relief sought will grant redress." *Id.* Because standing is not at issue in the instant case, the court will not address its merits.

Once standing has been established, nevertheless, the trial court must conduct a rigorous analysis to determine whether the class representative and putative class members meet the requirements for class certification. *See Discount Sleep of Ocala, LLC v. City of Ocala*, 245 So. 3d 842, 850 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D123a]. In other words, the court must determine whether the claims and proof are amenable to class treatment. *See Olen*, 981 So. 2d at 519. This requires a showing that the requirements of Florida Rule of Civil Procedure 1.220 are met. In particular, the plaintiff must show:

> (1) The members of the class are so numerous that separate joinder of each member is impracticable; (2) the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class; (3) the claim or defense of the representative party is typical of the claim or defense of each member of the class; and (4) the representative party can fairly and adequately protect and represent the interests of each member of the class.

InPhyNet, 33 So. 3d at 771. "These requirements are commonly referred to as the numerosity, commonality, typicality, and adequacy requirements." *Id.* "A proponent of class certification, in addition to showing numerosity, commonality, typicality, and adequacy, must also satisfy one of the three subdivisions of Florida Rule of Civil Procedure 1.220(b).[1]" *Sosa*, 73 So. 3d at 106. Again, since Defendant only contests commonality, predominance, and the practicability of class certification, the court will not address the merits of the numerosity, typicality, and adequacy requirements.

Commonality and Predominance

In support of their argument for class certification, Plaintiffs contend that the commonality and predominance requirements are met because the claims of the representative parties are common in law and in fact to each putative class member. Specifically, Plaintiffs argue that the following questions of law and fact are common to each member: (1) whether Defendant violated section 163.360(7)(a), Florida Statutes, and related city ordinances by not providing a relocation plan for tenants, (2) whether Defendant violated section 163.360(7)(a), Florida Statutes, and related city ordinances by failing to provide relocation assistance to Plaintiffs and all others similarly situated, and (3) whether Defendant violated 163.3225, Florida Statutes, by failing to provide proper notice to Plaintiffs and all others similarly situated.

In response, Defendant suggests that class certification should be denied because the class is ill-defined. Essentially, Defendant argues that the class does not exist because: (1) Plaintiffs and proposed class members are not "property owners" as contemplated by section 163.3225, Florida Statutes, and (2) Defendant never mailed notices of intent and thus, the class cannot be defined by the dates between when the notices of intent were mailed to "property owners" and the September 27, 2013 notices. Furthermore, Defendant posits that the predominance element cannot be satisfied due to the varying damages alleged by Plaintiffs and the proposed class members. According to Defendant, some Plaintiffs seek the costs of the increase in rents and moving expenses while others seek the costs of new furniture and transportation. These differences in damages, Defendant asserts, do not meet the requirement for predominance and hence, precludes class certification. While Defendant's arguments are tenable, they are, nonetheless, unavailing.

"The threshold of the commonality requirement is not high." *Id.* at 107. "The primary concern in determining commonality is whether the representative members' claims arise from the same course of conduct that gave rise to the other claims, and whether the claims are based on the same legal theory." *Smith v. Glen Cove Apartments Condo. Master Ass'n, Inc.*, 847 So. 2d 1107, 1110 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1447a]. The purpose of the requirement is to determine whether "there is a need for, and benefit derived from, class treatment." *Sosa*, 73 So. 3d at 107. "The commonality prong only requires that resolution of a class action affect all or a substantial number of the class members, and that the subject of the class action presents a question of common or general interest." *Id.*

In the case at bar, the commonality requirement has been met. The representative class members' claims arise from the same conduct that gave rise to the proposed class members' claims, namely, that Defendant purportedly violated sections 163.3225 and 163.360(7)(a), Florida Statutes, by failing to provide notice and relocation assistance to tenants of the Townhouse Apartments. As the Florida Supreme Court reasoned in *Sosa*, "the focus of a court in reviewing a finding of the commonality requirement is on whether the class members predicated their claims on the *same common course of conduct by the defendant* and *the same legal theory*." *Id.* at 110. While Defendant posits a plausible challenge to Plaintiffs' section 163.3225 claims regarding notice, Defendant does not challenge Plaintiffs' section 163.360(7)(a) claims regarding relocation assistance in order to defeat class certification. In any event, the question of whether Defendant violated these statutes goes to the merits of the case, which the court

should not entertain. *See id.* at 105. As the court has broad discretion, any doubts should be resolved in favor of certification and therefore, it remains that Defendant's purported failure to provide notice and relocation assistance satisfies the commonality requirement. *See id.*

Similarly, the court finds that common questions of law and fact predominate over individual class members' claims. Though the predominance and commonality requirements parallel one another, they are not identical. *See id.* at 111. In addition to considering whether "common questions of fact predominate when the defendant acts toward the class members in a similar or common way," the court must also consider "how the resolution of the class claims will affect each class member's underlying cause of action." *Sosa,* 73 So. 3d at 112 (internal citation omitted). In doing so, the court must examine whether "common issues of fact and law impact more substantially the efforts of every class member to prove liability than the individual issues that may arise." *Id.*

In the instant case, common questions of law and fact predominate because Defendant acted in a similar way toward all class members—Defendant allegedly failed to comply with sections 163.3225 and 163.360(7)(a), Florida Statutes, by not providing notice and relocation assistance to the former tenants. The common class questions for Plaintiffs and the putative class members merely "require generalized proof and not individual inquiries or mini-trials." *Id.* at 113. By Plaintiffs proving their case, they will necessarily prove the cases for each of the proposed class members. *See InPhyNet*, 33 So. 3d at 771 ("The predominance requirement is established if the class representative can prove his own individual case and, by so doing, necessarily prove the cases for each of the other class members."). Moreover, the presence of individualized damages *does not* prevent a finding that the common issues in the case predominate. *See Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248 (11th Cir. 2003) [16 Fla. L. Weekly Fed. C720a] (emphasis added). Therefore, predominance cannot be defeated simply because Plaintiffs and proposed class members allege varying damages.

Practicality

Defendant also challenges Plaintiffs' motion on the grounds that it is impractical at this stage of the proceedings to certify the class due to the delay in moving for certification and that the claims of the putative class members are barred by the statute of limitations. However, the court finds these arguments unpersuasive. While the courts in *Osborne v. Emmer*, 184 So. 3d 637, 640 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D316a], and *Browning v. Angelfish Swim School, Inc.*, 1 So. 3d 355, 363 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D234b], found that delays in moving for certification justified denials, they are distinguishable. In those cases, the courts, in essence, reasoned that the movants had done nothing to move the cases forward including failing to take discovery and offering no valid reasons for delaying certification. Here, the record demonstrates that additional discovery took place in the form of interrogatories since the previous Order denying class certification was entered. Hence, there was no deliberate delay or failure to move the case along to justify denial of the subject class. On this basis, Defendant's statute of limitations argument likewise fails. Therefore, Plaintiffs' motion is **GRANTED**.

Accordingly, it is hereby:

ORDERED that Plaintiffs' Amended Motion for Class Certification is **GRANTED**.

[1]Florida Rule of Civil Procedure 1.220(b) states: "Claims and Defenses Maintainable. A claim or defense may be maintained on behalf of a class if the court concludes that the prerequisites of subdivision (a) are satisfied, and that: (1) the prosecution of separate claims or defenses by or against the individual members of the class would create a risk of either: (A) inconsistent or varying adjudications concerning individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications concerning individual members of the class which would, as a practical matter, be dispositive of the interests of other members of the class who are not parties to the adjudications, or substantially impair or impede the ability of other members of the class who are not parties to the adjudications to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to all the members of the class, thereby making final injunctive relief or declaratory relief concerning the class as a whole appropriate; or (3) the claim or defense is not maintainable under either subdivision (b)(1) or (b)(2), but the questions of law or fact common to the claim or defense of each member of the class predominate over any question of law or fact affecting only individual members of the class, and class representation is superior to other available methods for the fair and efficient adjudication of the controversy. The conclusions shall be derived from consideration of all relevant facts and circumstances, including (A) the respective interests of each member of the class in individually controlling the prosecution of separate claims or defenses, (B) the nature and extent of any pending litigation to which any member of the class is a party and in which any question of law or fact controverted in the subject action is to be adjudicated, (C) the desirability or undesirability of concentrating the litigation in the forum where the subject action is instituted, and (D) the difficulties likely to be encountered in the management of the claim or defense on behalf of a class."
Fla. R. Civ. P. 1.220(b)

* * *

Insurance—Uninsured motorist—Coverage—Class action—Amended complaint is dismissed with prejudice—There is no merit to claim that insured's waiver of UM coverage was ineffective because application could not be viewed in 12-point bold type on cell phone on which insured completed it—Further, insured failed to attach to complaint a copy of policy sued upon, including application—Class claim does not comply with pleading requirements of rule 1.220(c), insured lacks standing to represent putative classes, proposed class members claims lack commonality and typicality, and proposed classes are overinclusive

PHILIP C. BELIDOR, Plaintiff, v. LECRYSTAL JADE CLAY, et al., Defendants. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE18004832, Division 03. January 21, 2021. Order Denying Motion for Rehearing, March 10, 2021. Nicholas Lopane, Judge. Counsel: Kenneth D. Cooper, Fort Lauderdale, for Plaintiff. Marcy Levine Aldrich, Bryan T. West, and Scott E. Allbright, Jr., Akerman LLP, Miami, for Defendant Progressive Express Ins. Co.

FINAL ORDER DISMISSING ALL CLAIMS AGAINST DEFENDANT PROGRESSIVE EXPRESS INSURANCE COMPANY

On January 13, 2021, the Court conducted a hearing on the Motion to Dismiss or Strike the Third Amended Complaint filed by Defendant Progressive Express Insurance Company ("Progressive's Motion"). Plaintiff's counsel failed to appear at the hearing, despite being served with the Notice of Hearing on January 5, 2021. The Court heard argument from Progressive's counsel, reviewed the file, and was otherwise fully advised. It is therefore **ORDERED** and **ADJUDGED** as follows:

1. The Motion is GRANTED. The Third Amended Complaint is **dismissed with prejudice** as against Defendant Progressive Express Insurance Company ("Progressive") for the reasons set forth in Progressive's Motion and as set forth herein.

2. Plaintiff alleges that he completed his application for insurance with Progressive on his cell phone (Third Am. Compl. ¶¶ 19, 48). He also alleges that his cell phone "does not allow for the application to be viewed in 12 Point Bold type as required by the statute." (*Id.* at ¶ 49). Plaintiff contends that, because the rejection form for uninsured motorist ("UM") coverage was not visible in 12 point bold type on his cell phone, his waiver of UM coverage was ineffective and failed to comply with the UM Statute, Fla. Stat. § 627.727(1). (*see, e.g., id.* at ¶¶ 46-47). By his counts for relief against Progressive (Count II for declaratory relief, Count IV [sic] for damages, Count III for class action, and Count IV for injunctive relief), Plaintiff seeks damages and a declaration or injunction entitling him to UM coverage from Progressive.

3. ***The Court finds that Plaintiff's "typeface" theory fails to state a***

claim as a matter of law. Neither the UM Statute, Fla. Stat. § 627.727, nor the Delivery of Policy Statute, Fla. Stat § 627.421, require that application documents be visible in 12 point boldface type on a personal cell phone. Pursuant to Fla. Stat. § 627.421(5), "[a]n electronically delivered document satisfies any font, size, color, spacing, or other formatting requirement for printed documents if the format in the electronically delivered document has reasonably similar proportions or emphasis of the characters relative to the rest of the electronic document or is otherwise displayed in a reasonably conspicuous manner." Indeed, an insurer does not and cannot have control over the settings that an insured may use on a personal cell phone or other electronic device. Plaintiff does not otherwise state a cognizable claim for relief against Progressive.

4. The Third Amended Complaint also fails to comply with pleading requirements. The Third Amended Complaint is written in a manner so that is difficult to understand and otherwise contains deficiencies as detailed in Progressive's Motion and observed by the Court. In addition, Plaintiff has failed to comply with Fla. R. Civ. P. 1.130(a) by failing to attach a full copy of the policy sued upon, including the application.

5. Plaintiff's class claim (Count III) fails to comply with the basic pleading requirements of Fla. R. Civ. P. 1.220(c). The Court also finds that Plaintiff cannot have standing to represent the putative class(es) set forth in the Third Amended Complaint.

6. The Court also find that, based on Plaintiff's own allegations, ***it is clear that there is a lack of commonality and typicality pursuant to Fla. R. Civ. P. 1.120(a)(2) and (3) with regard to the members of the putative classes. See, e.g., Brown-Peterkin v. Williamson, __ So. 3d __, 45 Fla. L. Weekly D2518a (Fla. 4th DCA Nov. 12, 2020). In addition, the proposed classes are improperly overinclusive, as they include class members who chose to purchase uninsured motorist ("UM") coverage and may have paid premiums for such coverage.***

7. Plaintiff has been afforded four opportunities to state a cognizable claim for relief against Progressive. Plaintiff's Third Amended Complaint fails to state a cognizable claim for relief as against Progressive. Accordingly, the Third Amended Complaint is hereby ***dismissed with prejudice*** as against Progressive. *See, e.g.*, *Gerstein v. Int'l Asset Value Grp.*, 199 So. 3d 979, 982 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1415c] (court affirmed dismissal with prejudice of an amended complaint containing "byzantine," confusing and incoherent allegations); *Barrett v. City of Margate*, 743 So. 2d 1160, 1163 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2398a] (affirming dismissal with prejudice of third amended complaint containing disorganized, "convoluted," and "verbose" allegations).

8. Plaintiff shall take nothing from this action as against Progressive; and Progressive shall go hence without day. The Court reserves jurisdiction to consider any motion for attorney's fees and costs by Progressive.

ORDER DENYING MOTION FOR REHEARING

THIS CAUSE came before the Court for hearing on March 10, 2021, upon *Plaintiff's Supplemental and Amended Motion to Vacate the Order of Final Dismissal and Re-hear The Motion to Dismiss* and the Court after reviewing the docket, pleadings and memoranda and after hearing the arguments of both Counsel, and being otherwise duly advised in the premises, the Court finds and concludes as follows:

1. *Plaintiff's Supplemental and Amended Motion to Vacate the Order of Final Dismissal and Re-hear The Motion to Dismiss* is hereby **DENIED**. After a second consideration of both Parties' arguments in regards to Defendant's *Motion to Dismiss or Strike the Third Amended Complaint,* the Court hereby denies the motion for rehearing and otherwise readopts and incorporates its findings and conclusions as set forth in its *Final Order Dismissing All Claims Against Progressive Express Insurance Company* entered on January 21, 2021.

* * *

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COUNTY COURTS

Criminal law—Driving under influence—Equal protection—No merit to argument that defendant charged with DUI was denied right to equal protection because state attorney for judicial circuit does not offer intervention or pretrial diversion program option to first time DUI offenders—Motion to dismiss is denied

STATE OF FLORIDA, Plaintiff, v. HEATHER LYNN BIRCHFIELD, Defendant. County Court, 1st Judicial Circuit in and for Okaloosa County. Case No. 2019 CT 001923 F. January 21, 2021. Patricia S. Grinsted, Judge.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before the Court on January 7, 2021, upon defendant's motion to dismiss, seeking dismissal of the charge of DUI against defendant based upon the denial of both her substantive and procedural due process rights because the Office of the State Attorney for the First Judicial Circuit does not offer an intervention or pretrial diversion program option to first offender DUI defendants when such plans are authorized by statute and available in other jurisdictions within the State of Florida. Defendant asserts a denial of her right to equal protection.

As noted by the court in *Jackson v. State,* 137 So.3d 470, 474 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D635a]: "Equal protection does not require identity of treatment. It only requires that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate as to be wholly arbitrary."

In this case, the Court agrees with the State that defendant does not have a fundamental right to intervention or pretrial diversion; nor are persons charged with the crime of DUI a *per se* suspect class. The rationale for treating criminal defendants charged with DUI differently from defendants charged with other misdemeanor offenses is justified for the legitimate state purpose of protecting the public from the significant harm and danger posed by DUI defendants.

The value of such programs to the communities where they are offered is clear in terms of promoting treatment and education for drivers to curb impaired driving and reduce recidivism, but the reality is that not all counties have the resources to implement and operate the programs. As noted, section 948.08(2), Fla. Stat., neither mandates nor prohibits DUI defendants from participating in such programs.

Florida Law grants the elected State Attorney in each judicial circuit discretion to determine criteria for admission into such programs, in conjunction with the program administrators and with the consent of the victim and presiding judge. As noted, approximately one-half of the counties in Florida do not have a diversion program for DUI offenders.

It is, therefore, ADJUDGED that defendant's motion to dismiss is respectfully DENIED.

* * *

Landlord-tenant—Eviction—Public housing—Noncompliance with lease—Landlord who failed to initiate eviction action within 45 days of tenant's alleged noncompliance with lease waived right to evict tenant—Term "instituted" as used in section 83.56(5)(c), providing for waiver of eviction right "if action has not been instituted within 45 days of noncompliance," refers to filing eviction action in court, not to service of notice of noncompliance—Complaint is dismissed

SPOV APARTMENTS, LLC, Plaintiff, v. MELISSA THOMAS, Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2020-CC-5388, Division CC-J. December 14, 2020. Eleni Elia Derke, Judge. Counsel: Michael George Davis and Whitney H. Daly, MGFD Law Firm, P.A., for Plaintiff. James F. Tyer, Jacksonville Area Legal Aid, Inc., Jacksonville, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This matter came before the Court via ZOOM hearing on December 3, 2020 at 11:50 a.m. on Defendant's Motion to Dismiss Plaintiff's Complaint, filed August 3, 2020. The Court, having heard argument of counsel, considered Defendant's Motion, and otherwise being fully advised, makes the following findings of fact and conclusions of law:

1. Plaintiff commenced its action for possession of residential rental property by filing its Complaint for Eviction on August 3, 2020. Its action therefore commenced 145 days after service of its "Fifteen Day Notice of Noncompliance-Notice to Terminate," which was served on March 11, 2020, and 153 days after the alleged noncompliance, which allegedly occurred on March 3, 2020. The notice of termination of tenancy is attached to Plaintiff's complaint.

2. Florida Statutes, Chapter 83.56, provides for circumstances in which a landlord or tenant may waive the right to terminate a rental agreement or file a civil action for a noncompliance.

3. Fla. Stat. 83.56(5)(c) provides: "This subsection does not apply to that portion of rent subsidies received from a local, state, or national government agency or an agency of a local, state, or national government; however, *waiver will occur if an action has not been instituted within 45 days of the noncompliance"* (emphasis added).

4. Plaintiff operates a housing project that receives subsidies from the United States Department of Housing and Urban Development ("HUD") which defrays the cost of Defendant's rental payment (see Paragraph 3 of Plaintiff's complaint, as well as page 1 of its lease with Defendant which is attached to Plaintiff's complaint). The subsection of Chapter 83.56 regarding the 45 day waiver provision therefore applies to the tenancy between the Parties.

5. Plaintiff in this case argues that it did in fact timely "institute" its action by serving its noncompliance notice on March 11, 2020, within 8 days of the alleged noncompliance. Plaintiff seeks to draw a distinction between the term "institute" as used in § 83.56(5)(c) and "commence" or "initiate" as defined in Fla. R. Civ. P. 1.050 ("Every action of a civil nature shall be deemed *commenced when the complaint or petition is filed. . .*" (emphasis added)). In support if its position, Plaintiff raises the greater burden federal requirements place on subsidized housing properties in notifying tenants of their lease termination. Plaintiff contends reading "initiate" to require subsidized housing providers to discover a noncompliance, provide a federally compliant termination notice, allow the notice period to expire, and then file their lawsuit would prevent subsidized housing providers from being able to lawfully assert their right to evict tenants for a noncompliance.

6. Fla. Stat. § 83.56(5)(c) was specifically drafted to apply to subsidized housing properties like the one Plaintiff operates. This Court finds it unreasonable to suggest state legislators did not consider federal notice requirements and the effect waiver has on the right of subsidized housing providers to file evictions when distinguishing how subsidized properties may waive their right to evict tenants from when private, non-subsidized properties may waive their right. Further, this Court rejects the contention that greater federal notice requirements, meant to offer tenants greater protection from eviction, should result in weaker protection for tenants under state law against the same kind of harm § 83.56(5)(c) was drafted to prevent.

7. Rather, this Court accepts the plain language interpretation of "initiate," as proposed by Defendant, to mean "commence" as defined in Fla. R. Civ. P. 1.050, or "initiate" as used interchangeably by this Court as well as others, whereby a subsidized housing provider

"initiates" its eviction action when it files a complaint with the court. *See, e.g., KCD Investments, Inc. D/B/A Oakwood Villa, Apts. v. Hendrix*, 20 Fla. L. Weekly Supp. 524b (Fla. Duval Cty. Ct. March 12, 2013); *Riverside Presbyterian Apartments, Inc. v. Williams,* 18 Fla. L. Weekly Supp. 881a (Fla. Duval Cty. Ct. March 21, 2011); *Jacksonville Housing Authority v. McKinnon*, 17 Fla. L. Weekly Supp. 189a (Fla. Duval Cty. Ct. November 20, 2009) ("...landlords receiving rent subsidies from a government or governmental agency must *commence an eviction action* within 45 days of the tenant's noncompliance, or the right to file such an action will be waived.") (emphasis added); *Palatka Housing Authority v. Leonard-White,* 18 Fla. L. Weekly Supp. 1026b (Fla. Putnam Cty. Ct. August 8, 2011) ("This *action was filed*...49 days after the arrest constituting the non-compliance alleged in the complaint.") (emphasis added). In the aforementioned cases, relief was granted for tenants where notices were provided within 45 days of an alleged noncompliance, but where no eviction was filed within 45 days of the noncompliance. *See id.*

8. Indeed, it would be contrary to a common sense understanding of the law to suggest that a termination notice, which is a condition precedent to the lawful right to file an eviction action, be simultaneously the initiation of that same action. *See, e.g., Investment and Income Realty, Inc. v. Bentley*, 480 So.2d 219 (5DCA 1985) (explaining that a cause of action cannot be commenced until after a claimant has complied with all conditions precedent).

9. Based on the facts as alleged by the Plaintiff in its complaint filed on August 3, 2020, and in its notice provided on March 11, 2020, attached thereto, the Plaintiff failed to institute its action for possession within 45 days of the alleged noncompliance.

10. As a result of the 145 day delay between the day of the notice, assuming most generously to be the day Plaintiff discovered the alleged noncompliance, and the instituting of its action for possession, and by operation of law, Plaintiff waived its right to bring an action for possession against Defendant for the alleged noncompliance.

Therefore, it is ORDERED and ADJUDGED that:

A. Defendant's Motion to Dismiss Plaintiff's Complaint for failure to institute its action within 45 days of knowledge if the alleged noncompliance is hereby GRANTED;

B. Plaintiff's Complaint filed herein against Defendant for possession of the subject premise is hereby dismissed with prejudice;

C. Defendant is entitled to reasonable fees and costs as stipulated by the Parties; and

D. The Court reserves jurisdiction of this action to consider the amount of fees and costs to be awarded.

* * *

Insurance—Personal injury protection—Coverage—Lawfully rendered services—Where medical provider did not have requisite license at time it provided cervical traction equipment, service was not lawfully rendered, and insurer is not required to pay for service—Provider's failure to file reply to affirmative defense waived any arguments in avoidance of that defense

INTEGRATIVE PHYSICAL MEDICINE OF DEBARY, a/a/o Charles Nickle, Plaintiff, v. AUTO-OWNERS INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2016-SC-006914-O. February 26, 2021. Brian Duckworth, Judge. Counsel: Feras Hanano, for Plaintiff. Julie Lewis Hauf, Law Office of Julie Lewis Hauf, P.L., Vero Beach, for Defendant.

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

THIS CAUSE came on for consideration before this Court upon Plaintiff's Motion for Summary Judgment and Defendant's Motion for Summary Judgment, and the Court, having heard argument from counsel for both parties on December 1, 2020 on Plaintiff's Motion and January 11, 2021 on Defendant's Motion, examined the motions and supporting documents, and being otherwise fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED that Plaintiff's Motion is hereby DENIED and Defendant's Motion is hereby GRANTED for the reasons set forth below.

The Court notes initially that Plaintiff did not file a reply to the Defendant's amended answer and statement of affirmative defenses, despite the Order entered in this case requiring same within 20 days. Florida Rule of Civil Procedure 1.100(a) states that "If an answer or a third-party answer contains an affirmative defense and the opposing party seeks to avoid it, the opposing party shall file a reply containing the avoidance." The failure to file a reply with any kind of avoidance, which requires the allegation of additional facts, to the defenses presented has resulted in a waiver of such arguments. *See Kitchen v. Kitchen,* 404 So.2d 203 (Fla. 2nd DCA 1981). Plaintiff's counsel's argument at the hearing that he was not required to file a reply or that one could be filed at any time was not correct. Despite being made aware that no reply had been filed at the December 1, 2020 hearing on the Plaintiff's Motion for Summary Judgement, Plaintiff still did not file a reply, or move for leave to file a late reply, prior to the hearing on Defendant's Motion for Summary Judgment on January 11, 2021.

However, even if Plaintiff did file a timely and sufficient reply, Defendant's position that it cannot be required to pay for unlawful services is correct as a matter of law. The Court finds that the record evidence shows, when viewed in the light most favorable to the non-moving party, that Plaintiff's representatives admitted in deposition that the supply item for which suit was brought, cervical traction equipment billed as E0855, is considered Durable Medical Equipment ("DME") and that Plaintiff did not have or maintain the required license at the time such item was provided to the patient. Florida Statutes sec. 627.736(5)(b)1.b. states that an insurer or insured is not required to pay claims or charges for any service or treatment not lawful at the time rendered. Plaintiff's argument that Defendant waived the ability to make this argument is not well taken, as the plain language of F.S. sec. 627.736(4)(b)6. makes clear, that the validity of a charge may be disputed *at any time.* Defendant cannot be required to pay an unlawful charge, regardless of whether Plaintiff did or did not respond to Defendant's F.S. sec. 627.736(6)(b) request.

Finally, Plaintiff's argument that his client has no obligation to respond to the F.S. sec. 627.736(6)(b) request is also without merit. Plaintiff argued that this section of the statute indicates that a provider "shall" respond, which is not the same thing as saying that a provider "must" respond. It is well-settled that the word "shall" is an imperative, rather than optional. A plain reading of the statute permits a carrier to request additional information related to the costs of the treatment provided, and sets out the consequences for a provider that does not respond to a valid request. The request for an invoice to determine the cost of the device supplied to the patient is within the purview of this section of the statute. Although Plaintiff stated to the court that this code, E0855, could have been considered and paid pursuant to some unnamed fee schedule, no record evidence was provided to support that statement and the court disregards same.

Plaintiff INTEGRATIVE PHYSICAL MEDICINE OF DEBARY a/a/o CHARLES NICKLE shall take nothing by this action and Defendant AUTO-OWNERS INSURANCE COMPANY shall go hence without day. The Court reserves jurisdiction as to costs and attorney's fees, if any.

* * *

Insurance—Personal injury protection—Confession of judgment—Where insurer did not receive first written notice that insured had received initial care and services within 14 days of accident until after suit was filed, and insurer issued payment for charges and interest within 30 days of receipt of notice, payment did not operate as confession of judgment

HD MRI OF ORLANDO, a/a/o Edwintz Joseph, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2019-SC-007815-O. December 28, 2020. Elizabeth J. Starr, Judge. Counsel: Sam Korab, Landau & Associates, P.A., Sunrise, for Plaintiff. Julie Lewis Hauf, Law Office of Julie Lewis Hauf, P.L., Vero Beach, for Defendant.

FINAL JUDGMENT FOR DEFENDANT

THIS CAUSE came on for consideration before this Court upon Plaintiff's Motion for Summary Judgment Regarding Treatment Within 14 Days and Motion for Determination of Confession of Judgment and Defendant's Motion to Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment, and the Court, having heard argument from counsel for both parties on December 14, 2020, examined the motion and supporting documents, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that Plaintiff's Motion is hereby DENIED and Defendant's Motion is hereby GRANTED. The medical bill provided to Defendant on December 31, 2018, after suit was filed, was the first written notice provided to Defendant that Edwintz Joseph had received initial services and care within 14 days of the April 19, 2018 motor vehicle accident. Defendant issued payment for Plaintiff's charges, with interest, within 30 days of its receipt of this notice, pursuant to Florida Statute section 627.736(4)(b). Thus, Defendant's payment to Plaintiff did not operate as a confession of judgment, even though it was made after suit was filed. Plaintiff HD MRI OF ORLANDO a/a/o EDWINTZ JOSEPH shall take nothing by this action and Defendant STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY shall go hence without day, The Court reserves jurisdiction as to costs and attorney's fees, if any.

* * *

Insurance—Personal injury protection—Discovery—Documents—Election and application of deductible

PHOENIX EMERGENCY MEDICINE OF BROWARD, LLC, as assignee of Indira Nanan, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2015-SC-7985-O. September 29, 2020. Gisela T. Laurent, Judge. Counsel: David B. Alexander, Bradford Cederberg, PA, Orlando, for Plaintiff. Ronalda Stevens, Edward K. Cottrell, and Drew Krieger, for Defendant.

ORDER ON PLAINTIFF'S MOTION TO COMPEL COMPLETE AND/OR BETTER RESPONSES TO PLAINTIFF'S REQUEST TO PRODUCE TO DEFENDANT BEARING A CERTIFICATE OF SERVICE DATE SEPTEMBER 20, 2019

THIS MATTER having come before this Honorable Court on Plaintiff's Motion To Compel Complete And/Or Better Responses To Plaintiff's Request To Produce To Defendant Bearing A Certificate Of Service Date September 20, 2019, bearing a certificate of service dated March 5, 2020, and this Honorable Court having heard arguments of counsel on September 29, 2020, reviewed the Court file and authority provided by the parties, and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that:

1. Plaintiff's Motion To Compel Complete And/Or Better Responses To Plaintiff's Request To Produce To Defendant Bearing A Certificate Of Service Date September 20, 2019, bearing a certificate of service dated March 5, 2020, is hereby **GRANTED** in part and **MOOT** in part.

2. Plaintiff's Motion To Compel Complete And/Or Better Responses To Plaintiff's Request To Produce To Defendant Bearing A Certificate Of Service Date September 20, 2019, bearing a certificate of service dated March 5, 2020, is hereby **GRANTED** as to Plaintiff's requests numbered one (1.) through four (4.).

3. Defendant shall produce to Plaintiff the documentation/items requested by Plaintiff in Plaintiff's requests numbered one (1.) through four (4.). Specifically, Defendant shall produce to Plaintiff the following documentation/items within thirty (30) days from the date of this Order:

1. The entire application of insurance for the policy of insurance at issue executed by the Named Insured or Indira Nanan;

2. Any Personal Injury Protection (PIP) deductible election forms signed by the Named Insured or Indira Nanan in the possession of Defendant;

3. Any documentation signed by the Named Insured or Indira Nanan in the possession of Defendant; and

4. Any information or documentation in the possession of Defendant regarding compliance by Defendant with Fla. Stat. §627.739 surrounding application of an alleged PIP deductible in the subject claim.

4. Plaintiff's Motion To Compel Complete And/Or Better Responses To Plaintiff's Request To Produce To Defendant Bearing A Certificate Of Service Date September 20, 2019, bearing a certificate of service dated March 5, 2020, is hereby **MOOT** as to Plaintiff's request number five (5.) as Plaintiff has withdrawn from the record Plaintiff's request number five (5.) via Plaintiff's Notice of Withdrawal, bearing certificate of service dated September 22, 2020.

* * *

Consumer law—Florida Deceptive and Unfair Trade Practices Act—Complaint alleging that defendant car dealer failed to fully disclose pre-delivery service fees, that substantial portion of those fees were dealer profit that plaintiff did not owe, that dealer actually collected fees, and that plaintiff suffered financial harm by being induced to pay debt it did not owe states claim under FDUTPA—Motion to dismiss is denied

MOSHE SIMON, Plaintiff, v. LEHMAN HYUNDAI SUBARU, INC., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-012232-SP-23, Section ND06. February 23, 2021. Ayana Harris, Judge. Counsel: Joshua Feygin, Hallandale, and Darren R. Newhart, Newhart Legal, P.A., Loxahatchee, for Plaintiff. Edward Quinton, III, Quinton & Paretti, P.A., Miami, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS COMPLAINT

This cause came before the Court on January 28, 2021, on Defendant's Motion to Dismiss. The Court, having listened carefully to the arguments of counsel, reviewed the pleadings and the applicable law, and being otherwise fully advised in the premises, hereby makes the following findings:

ANALYSIS AND FINDINGS

A motion to dismiss examines the legal sufficiency of the plaintiff's complaint. *Grove Isle Association, Inc. v. Grove Isle Associates, LLLP*, 137 So. 3d 1081 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D648a]. In order to rule on a motion to dismiss, a trial court must limit itself to the four corners of the plaintiff's complaint. *Id.* While examining the four corners of the complaint, the allegations are assumed to be true and must be construed using all reasonable inferences in favor of the non-moving party. *Id.* A motion to dismiss is designed to test the legal sufficiency of the complaint, not to determine factual issues. *The Fla. Bar v. Greene,* 926 So.2d 1195, 1199 (Fla. 2006) [31 Fla. L. Weekly S212a].

In order for a consumer to claim damages under the Florida

Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. §§501.201, *et seq.*, they must prove the following three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D3148a].

The single count in the Complaint alleges that Defendant violated FDUTPA by (1) failing to fully disclose certain pre-delivery service fees, in violation of Fla. Stat. § 501.976(18), and that a substantial portion of those fees constituted dealer profit which Plaintiffs did not actually owe (Compl. ¶¶ 12, 15, 46-49); (2) that dealer actually collected the fees at issue (Compl. ¶ 18); (3) and that Plaintiffs suffered financial harm by being induced to pay a debt they did not owe (Compl. ¶ 22). Accordingly, this Court finds that Plaintiff has properly pled the necessary elements of a FDUTPA violation.

Plaintiff's FDUTPA claim alleges that Defendant violated Fla. Stat. § 501.976(18) which provides:

> (18) Charge a customer for any predelivery service without having printed on all documents that include a line item for predelivery service the following disclosure: "This charge represents costs and profit to the dealer for items such as inspecting, cleaning, and adjusting vehicles, and preparing documents related to the sale."

The plain language of the statute directs that the charges at issue be printed on all documents. Defendant's argument that it substantially complied with the statute and that Plaintiff suffered no actual damages invite this Court look beyond the four corners of the Complaint and make factual determinations inappropriate on a motion to dismiss. For these reasons, the Motion to Dismiss must be denied.

CONCLUSION

Accordingly, it is hereby **ORDERED AND ADJUDGED** that:

1. Defendant's Motion to Dismiss is **DENIED.**

2. Defendant shall file a response to the Complaint within 20 days of this Order.

* * *

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 and causes of action and were litigated in different county than current case—No merit to arguments that doctrine of collateral estoppel should not be applied because insurer did not appeal prior judgments or prior judgments were based on confessions of judgment—Provider is entitled to judgment on reasonableness issue as matter of law

WEST KENDALL REHAB CENTER, INC., a/a/o Michael Salcedo, Plaintiff, v. STATE FARM MUTUAL AUTO. INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2013-013620-SP-25, Section CG03. March 4, 2021. Patricia Marino Pedraza, Judge. Counsel: Majid Vossoughi, Majid Vossoughi, P.A., Miami, for Plaintiff. Scott Danner, Kirwan, Spellacy & Danner, P.A., Ft. Lauderdale, for Defendant.

ORDER GRANTING PLAINTIFF'S AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO REASONABLENESS OF PLAINTIFF'S CHARGES AND MOTION TO PRECLUDE DEFENDANT FROM RE-LITIGATING THE REASONABLENESS OF PLAINTIFF'S CHARGES

[Doctrine of Collateral Estoppel or Issue Preclusion]

THIS CAUSE came before the Court on February 24, 2021 on Plaintiff's Amended Motion for Partial Summary Judgment as to Reasonableness of Plaintiff's Charges and Motion to Preclude Defendant From Re-Litigating the Reasonableness of Plaintiff's Charges (Doctrine of Collateral Estoppel or Issue Preclusion).

The parties were represented by counsel at the hearing who presented arguments to this Court. Scott Danner, Esquire appeared on behalf of the Defendant, State Farm Mutual Automobile Insurance Company, and Majid Vossoughi, Esq. appeared on behalf of the Plaintiff, West Kendall Rehab Center, Inc.

The Court having reviewed Plaintiff's motion with supporting evidence, Defendant's response thereto, the entire Court file, the relevant legal authorities, and having heard argument from counsel and being otherwise fully advised in the premises, hereby enters this Order GRANTING Plaintiff's Amended Motion for Partial Summary Judgment as to Reasonableness of Plaintiff's Charges and Motion to Preclude Defendant From Re-Litigating the Reasonableness of Plaintiff's Charges (Doctrine of Collateral Estoppel or Issue Preclusion) and makes the following factual findings and conclusions of law.

BACKGROUND & FACTUAL FINDINGS

Michael Salcedo was involved in an automobile accident on October 16, 2011 and treated with Plaintiff from October 18, 2011 through March 28, 2012 in relation to injuries sustained in said accident.

Plaintiff submitted its bills for treatment of Michael Salcedo to Defendant for payment of Personal Injury Protection ("PIP") benefits containing the following charges: *97140* ($70; manual therapy), *97012* ($40; mechanical traction), *97014* ($50; electrical muscle stimulation), *97035* ($50; ultrasound), *97112* ($70; neuromuscular reeducation), *97124* ($60; massage), *98940* ($85; chiropractic adjustments), *98943* ($55; chiropractic adjustments), *99203* ($250; initial examination), *99213* ($150; follow up evaluations), *99211* ($75; brief examinations), *72040* ($250; x-rays of cervical spine), *72070* ($250; x-rays of thoracic spine), *72100* ($250; x-rays of lumbar spine), and *73030* ($250; x-rays of shoulder).

The record before this Court reflects that Plaintiff previously litigated the reasonableness of its charges for the same CPT codes noted above before a court of competent jurisdiction in the following seven (7) lawsuits against Defendant:

(i) *West Kendall Rehab Center, Inc., a/a/o Zoravis Morales v. State Farm Mutual Automobile Insurance Company,* Case No. COCE 15-007443 [27 Fla. L. Weekly Supp. 96a] ("West Kendall Lawsuit # 1");[1]

(ii) *West Kendall Rehab Center, Inc., a/a/o Carrine Paba v. State Farm Mutual Automobile Insurance Company*, Case No. COCE 15-007433 ("West Kendall Lawsuit # 2");[2]

(iii) *West Kendall Rehab Center, Inc., a/a/o Eric Maultsby v. State Farm Mutual Automobile Insurance Company,* Case No. COCE 15-007453 ("West Kendall Lawsuit # 3");[3]

(iv) *West Kendall Rehab Center, Inc., a/a/o Javier Belfiore v. State Farm Mutual Automobile Insurance Company,* Case No. COCE 15-007437 ("West Kendall Lawsuit # 4");[4]

(v) *West Kendall Rehab Center, Inc., a/a/o Ralph Amedee v. State Farm Mutual Automobile Insurance Company,* Case No. COCE 15-007485 ("West Kendall Lawsuit # 5");[5]

(vi) *West Kendall Rehab Center, Inc., a/a/o Hector Rodriguez v. State Farm Mutual Automobile Insurance Company,* Case No. COCE 15-007435 ("West Kendall Lawsuit # 6");[6]

(vii) *West Kendall Rehab Center, Inc., a/a/o Davie Towbin-Perez v. State Farm Mutual Automobile Insurance Company,* Case No. COCE 15-007380 ("West Kendall Lawsuit # 7").[7]

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 CPT codes

previously litigated between the parties and adjudicated by a court of competent jurisdiction. Plaintiff argues that since all 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 this Court should not apply the doctrine of Collateral Estoppel since the patients, mechanism of injury, accident, and/or cause of action in the prior litigation noted above are not identical to the instant action. Defendant also argues that the prior adjudications are not binding or persuasive since they were litigated in Broward County, as opposed to Miami-Dade County, and that the Defendant did not file an appeal. Defendant further argues, without citation to applicable precedent, that the doctrine of Collateral Estoppel does not apply to any of the prior adjudications that were premised upon Defendant's own confession of judgment. On this point, Defendant argues, without any record evidence in support thereof, that Defendant's confessions of judgment constitute a business decision. Finally, despite the record before this Court, Defendant argues that it did not have a full and fair opportunity to litigate the issue of reasonableness of Plaintiff's charges in the prior PIP cases between the same parties and that it should be afforded yet another bite at the proverbial apple.

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

"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); *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).

"The doctrine is intended to prevent repetitious litigation of what is essentially the same dispute". *Id.* (citing *Zimmerman v. State of Florida Office of Ins. 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[8], wrongful death[9], negligence[10], declaratory relief[11], dissolution of marriage[12], uninsured motorist claim[13], constitutional challenges[14], action for accounting and breach of fiduciary duties[15], and appeals from administrative rulings[16].

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: (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. *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 *West Kendall Lawsuit # 1*, *West Kendall Lawsuit # 2*, *West Kendall Lawsuit # 3*, *West Kendall Lawsuit # 4*, *West Kendall Lawsuit # 5*, *West Kendall Lawsuit # 6*, and *West Kendall Lawsuit # 7* 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: 97140 ($70), 97012 ($40), 97014 ($50), 97035 ($50), 97112 ($70), 97124 ($60), 98940 ($85), 98943 ($55), 99203 ($250), 99213 ($150), 99211 ($75), 72040 ($250), 72070 ($250), 72100 ($250), and 73030 ($250). As such, the first element for application of the doctrine has 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 *second and fifth elements,* "[t]he rule of collateral estoppel. . .requires that the matter sought to be interposed as a bar *must have been litigated and determined by the judgment, or if not expressly adjudicated, essential to the rendition of the judgment*." *United Auto. Ins. Co. v. Law Offices of Michael L. Libman,* 46 So. 3d 1101, 1104 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2390a] (quoting *Pa. Ins. Co. v. Miami Nat'l Bank,* 241 So.2d 861, 863 (Fla. 3d DCA 1970)); *see also Southeastern Fidelity Ins. Co. v. Rice,* 515 So.2d 240, 242 (Fla. 4th DCA 1987) ("[t]he principal involved in collateral estoppel is that [a]ny right, fact or matter in issue and *directly adjudicated, or necessarily involved in the determination of an action* before a competent court in which a judgment or decree has been rendered upon the merits, is conclusively settled by the judgment therein and cannot again be litigated between the same parties"); *R.D.J. Enterprises. v. MEGA Bank,* 600 So.2d 1229 (Fla. 3d DCA 1992) (same). The reasonableness of Plaintiff's charges is necessarily involved and/or essential to the rendition of any judgment in its favor in a PIP case since, as noted, this issue is part and parcel of Plaintiff's prima facie burden of proof. The record before this Court reflects that in the prior cases litigated between the parties they had a full and fair opportunity to litigate the issue of reasonableness of Plaintiff's charges and the issue was actually litigated through final adjudication after extensive motion practice, discovery, and/or presentation of

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 *fourth element,* the parties to the instant action are clearly the identical parties in *West Kendall Lawsuit # 1*, *West Kendall Lawsuit #* 2, *West Kendall Lawsuit # 3*, *West Kendall Lawsuit # 4*, *West Kendall Lawsuit # 5*, *West Kendall Lawsuit # 6*, and *West Kendall Lawsuit # 7* where the issue of reasonableness of Plaintiff's charges was litigated and adjudicated by a court of competent jurisdiction. 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).

Moreover, the identical issue before this Court, that is, whether an insurance carrier is precluded from re-litigating the reasonableness of a medical provider's charges under the doctrine of Collateral Estoppel (Issue Preclusion), has previously been decided by the Eleventh Judicial Circuit, sitting in its appellate capacity. *See, United Auto. Ins. Co. v. Doctor Rehab Center, Inc., a/a/o Juliet Fernandez,* 28 Fla. L. Weekly Supp. 466b (Fla. 11th Cir. App., April 14, 2020) (citing to *Pearce v. Sandler,* 219 So.3d 961 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1214b] and holding that in a PIP case an insurer is "*precluded from re-litigating the issue of reasonableness under the doctrine of collateral estoppel*").[17] Further, on petition for writ of certiorari, the Third District Court of Appeals issued an opinion denying relief and finding that the Eleventh Judicial Circuit had in fact "*applied the correct law*". *See United Auto. Ins. Co. v. Doctor Rehab Center, Inc., a/a/o Juliet Fernandez,* Case No. 3D20-737 (Fla. 3d DCA July 22, 2020) [45 Fla. L. Weekly D1766a] (citing to both *Pearce v. Sandler,* 219 So.3d 961 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1214b] as well as *R.D.J. Enters., Inc. v. Mega Bank,* 600 So.2d 1229, 1232 (Fla. 3d DCA 1992) and concluding that the "*Petitioner is not entitled to the writ because the circuit court afforded procedural due process and applied the correct law*").

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 the reasonableness of its charges for CPT codes 97140 ($70), 97012 ($40), 97014 ($50), 97035 ($50), 97112 ($70), 97124 ($60), 98940 ($85), 98943 ($55), 99203 ($250), 99213 ($150), 99211 ($75), 72040 ($250), 72070 ($250), 72100 ($250), and 73030 ($250) 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.

As to the arguments made by Defendant, this Court rejects same as more fully set forth below.

Defendant's argument that Collateral Estoppel should not be applied since the causes of action are not identical, given that the patients, mechanism of injury, and accident vary amongst the causes of action, is without merit and rejected by this Court as same mistakenly conflates the elements of Res Judicata, a separate and distinct doctrine, with that of Collateral Estoppel.

Res Judicata requires that a judgment on the merits must have been rendered in a former suit and that the following four identifies must exist between the two suits: (1) identity in the thing sued for, (2) identity of the cause of action, (3) identity of the persons and parties to the action, and (4) identity of the quality or capacity of the persons for or against whom the claim is made. *Pearce v. Sandler,* 219 So.3d 961, 966-67 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1214b].[18] Thus, Res Judicata is a separate and distinct doctrine from Collateral Estoppel with different elements. *Id.* (discussing both doctrines and the differing elements of each); *see also Topps v. State,* 865 So.2d 1253, 1255 (Fla. 2004) [29 Fla. L. Weekly S21a] (first discussing Res Judicata and then noting that "[t]he doctrine of collateral estoppel (or issue preclusion), also referred to as estoppel by judgment, *is a related but different concept*").

Contrary to Defendant's assertion, there is no element under the doctrine of Collateral Estoppel requiring that the prior action be a suit for an "identical thing" or "identical cause of action" under the same operative facts. Instead, Collateral Estoppel is specifically intended to be applied in cases where the things sued for and/or causes of action are different so long as common questions were previously litigated. *Gordon v. Gordon,* 59 So.2d 40, 44 (Fla. 1952) ("estoppel by judgment is applicable *where two causes of action are different*" if "points and questions common to both. . .were actually adjudicated in the prior litigation"). As stated in *Southern Fidelity Ins. Co. v. Rice,* 515 So.2d 240, 242 (Fla. 4th DCA 1987):

> The principal involved in collateral estoppel is that [a]ny right, fact or matter in issue and directly adjudicated, or necessarily involved in the determination of an action before a competent court in which a judgment or decree has been rendered upon the merits, is conclusively settled by the judgment therein and cannot again be litigated between the same parties and their privies, *whether the claim, demand, purpose or subject-matter of the two suits is the same or not.*

See also R.D.J. Enterprises v. MEGA Bank, 600 So.2d 1229 (Fla. 3d DCA 1992) (same); *Felder v. Fla. Dept. of Mgmt.,* 993 So.2d 1031, 1034 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2801a] ("collateral estoppel may be applied. . .even where the second claim requires proof of different essential facts than those required to be proved in the initial suit"); *United Auto. Ins. Co. v. Doctor Rehab Center, Inc. (Juliet Fernandez),* Case No. 3D20-737 (Fla. 3d DCA, July 22, 2020) [45 Fla. L. Weekly D1766a].

Accordingly, although the prior adjudications pertained to different motor vehicle accidents, patients, and/or causes of action, the question or issue of reasonableness of Plaintiff's charges was common in the previously litigated actions. It is immaterial that the prior adjudications pertained to different motor vehicle accidents, patients, 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).

Defendant's argument that the prior adjudications are neither binding nor persuasive since they were litigated in Broward County, as opposed to Miami-Dade County, is also without merit. The doctrine of Collateral Estoppel applies to prior adjudications of any "court of competent jurisdiction", not only courts within the same jurisdiction. *See e.g., Baker v. Bennett,* 633 So.2d 91 (Fla. 4th DCA 1994) (decision of Alabama Supreme Court had preclusive effect under doctrine of Collateral Estoppel in Florida); *E.I. DuPont De Nemours & Co., Inc. v. Melvin Piedmont Nursery,* 971 So.2d 897 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D2471a] (the findings of a federal district court are binding on a state trial court under principles of collateral estoppel).

Defendant's argument that the prior adjudications do not carry preclusive effect under the doctrine of Collateral Estoppel since

Defendant elected not to file an appeal are similarly without merit. Indeed, the Supreme Court of Florida has expressly rejected such an argument 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 take an appeal in any of the prior lawsuits 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*.; *see also Pearce v. Sandler,* 219 So.3d 961 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1214b] (noting that although "[t]he ruling *was not challenged on rehearing or appeal*" same "operated as a final adjudication on the merits" and "[w]ith the identities required by the doctrine having been met, *collateral estoppel bars the 2013 action*"); *Eastern Shores Sales Co. v. City of North Miami Beach,* 363 So.2d 321, 324 (Fla. 1978) (applying Collateral Estoppel and finding that "*[t]he decree is no less final because no appeal was taken*").

Defendant's argument, without citation to applicable precedent, that the doctrine of Collateral Estoppel does not apply to any of the prior adjudications that were premised upon Defendant's own confession of judgment and that any confessions were purportedly merely business decisions of the Defendant is also without merit.[19]

As an initial matter, Defendant did not provide this Court with any record evidence whatsoever as to the purported reasons for its prior confessions of judgment. The mere arguments of counsel on this issue plainly constitute inadmissible hearsay which cannot be considered by this Court. *Fla. R. Civ. P. 1.510* (on summary judgment court can only consider material "as would be admissible in evidence").

More importantly, Defendant's argument flies in the face of binding precedent directly to the contrary. Specifically, Florida courts have repeatedly affirmed that judgments entered upon consent, confession, or default are just as conclusive and binding upon the parties as any other judgments and that they carry preclusive effect. *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" and "[w]e therefore hold. . .that the doctrine of collateral estoppel does apply*"); *Hay v. Salisbury,* 92 Fla. 446, 109 So. 617 (Fla. 1926) (*"[a] judgment by default or upon confession is, in its nature, just as conclusive on the rights of the parties before the court, as a judgment upon demurrer or verdict*"); *In re Zoernack,* 289 B.R. 220 (M.D. Florida, 2003) [16 Fla. L. Weekly Fed. B43a] (federal court applying Florida law on the doctrine of collateral estoppel found that a *consent to judgment is treated the same as any other judgment and carries issue preclusion under the doctrine*); *Arrieta-Gimenez v. Arrieta-Negron,* 551 So.2d 1184 (Fla. 1989) (*rejecting argument "attempt[ing] to differentiate between a consent judgment and a final judgment entered after trial on the merits" and finding that a consent judgment is entitled to preclusive effect*); *Cabinet Craft, Inc. v. A.G. Spanos Enterprises, Inc.,* 348 So.2d 920 (Fla. 2d DCA 1977) (*"a judgment entered upon default is just as conclusive as one which was hotly contested" and carries preclusive effect*).

The Third District Court of Appeal in *E.I. DuPont De Nemours & Co., Inc. v. Melvin Piedmont Nursery,* 971 So.2d 897 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D2471a] has similarly held that the doctrine of Collateral Estoppel even applies to judgments entered as a result of sanctions:

> Contrary to the trial court's perception, *it is of no moment that the federal district court's entry of summary judgment may have been the result of a sanction. The issues are still deemed to have been adjudicated and the parties had a full and fair opportunity to be heard thereon. See In Re Docteroff,* 133 F.3d 210 (3rd Cir. 1997) (default entered as sanction against party operates to bar relitigation under collateral estoppel); *Bush v. Balfour Beatty Bahamas, Ltd. (In re Bush),* 62 F.3d 1319 (11th Cir. 1995) (collateral estoppel bars relitigation of fraud issues where default was entered against party in previous action as sanction).

Moreover, a judgment is not required to expressly state a ruling upon an issue that was litigated by the parties in order for the doctrine of Collateral Estoppel to apply since said issue need only be a "necessary and critical" part of the prior determination. *Provident Life and Accident Ins. Co. v. Genovese, M.D.,* 138 So.3d 474, 478 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D442b] (finding issue related to "onset date" was previously litigated and carried preclusive effect under Collateral Estoppel even though this issue "*was not specifically included in the judgment*"); *see also Perez v. Rodriguez,* 349 So.2d 826 (Fla. 3d DCA 1977) ("[t]he law is clear that a default judgment conclusively establishes between the parties, so far as subsequent proceedings on a different cause of action are concerned, the truth of all material allegations contained in the complaint in the first action and every fact necessary to uphold the default judgment").

Accordingly, the fact that in some of the prior cases Defendant, after much litigation, opted to confess to judgment does not make the prior final adjudications any less binding upon the parties and Plaintiff is entitled to rely upon same in this matter for purposes of the doctrine of Collateral Estoppel.

Finally, this Court rejects Defendant's argument that it did not have a full and fair opportunity to litigate the issue of reasonableness of Plaintiff's charges in the prior PIP cases. This argument constitutes nothing more than an attempt on the part of Defendant to obtain an impermissible "second bite at the apple" which has been repeatedly rejected by the courts. For instance, Defendant argues that it did not present a particular expert affidavit in the prior proceedings as it would now like to do in the instant matter, suggesting that a different result might obtain on the issue of reasonableness of Plaintiff's charges.

In Florida, a "full and fair" opportunity to litigate an issue does not require a full trial on the merits, limitless discovery, or that a party essentially put its best foot forward. That is, a litigant is not afforded multiple attempts to re-litigate the very same issue and cannot have a "second bite at the apple" merely to give different theories and/or strategies a try in the hopes that a different result might obtain the second time around. As stated in *Agripost, LLC v. Miami-Dade Cnty.,* 525 F.3d 1049 (11th Circ. 2008) [21 Fla. L. Weekly Fed. C634a]:

> *Under Florida law, a full and fair opportunity to litigate an issue does not entail a full civil trial and its accouterments. See E.I. DuPont de Nemours & Co., Inc. v. Melvin Piedmont Nursery,* 971 So. 2d 897, 898 (Fla. 3d Dist. Ct. App. 2007) [32 Fla. L. Weekly D2471a] (per curiam) (noting that collateral estoppel applies to judgment rendered as a sanction in prior litigation); *Paresky v. Miami-Dade County Bd. of County Comm'rs,* 893 So. 2d 664, 665 (Fla. 3d Dist. Ct. App. 2005) [30 Fla. L. Weekly D462b] (per curiam) (finding full and fair opportunity in "quasi-judicial hearing" before County Commission).
>
> . . .

> *Agripost contends that it did not have a full and fair opportunity to litigate* its state law takings claim because the court did not permit further discovery and relied exclusively on the extensive record created in the previous zoning litigation that ended in the revocation of Agripost's permit. . .Nothing in that litigation rendered Agripost's opportunity to make its case insufficiently "full and fair"; Agripost is simply not entitled to discovery on claims lacking any legal basis, as the state court concluded. *Florida preclusion law does not allow Agripost a second bite at the apple*, and § 1738 does not permit this court to second-guess the correctness of the Florida court's decision on the merits.

See also E.I. DuPont De Nemours & Co., Inc. v. Melvin Piedmont Nursery, 971 So.2d 897 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D2471a] ("[t]he Respondents are simply *attempting an end run around the federal court's adverse determination* by re-litigating the same issues here. They are precluded from doing so under the doctrine of collateral estoppel").

Similarly, in *Baker v. Bennett,* 633 So.2d 91 (Fla. 4th DCA 1994), the Fourth District Court of Appeal rejected an argument that the party did not have a "full and fair" opportunity to litigate an issue since they were not afforded an opportunity to challenge the reasoning of the court's decision:

> The fact that the decision of that court may have been based on a legal theory neither briefed nor argued *does not render the decision any less binding under principles of issue preclusion than would be the case had the decision been erroneous on the facts or law, or been rendered without any written opinion whatever*.

Accordingly, as this Court found above, the record reflects that the parties had a full and fair opportunity to litigate the issue of reasonableness of Plaintiff's charges in seven (7) prior cases and that this issue was actually litigated. The doctrine of Collateral Estoppel mandates that the Defendant is precluded from now having a "second bite at the apple" to re-litigate the very same issue yet again.

CONCLUSION

Based on this Court's analysis set forth above, it is

ORDERED AND ADJUDGED that Plaintiff's Amended Motion for Partial Summary Judgment as to Reasonableness of Plaintiff's Charges and Motion to Preclude Defendant From Re-Litigating the Reasonableness of Plaintiff's Charges (Doctrine of Collateral Estoppel or Issue Preclusion) is hereby GRANTED. Plaintiff's charges for treatment and/or CPT codes 97140 ($70), 97012 ($40), 97014 ($50), 97035 ($50), 97112 ($70), 97124 ($60), 98940 ($85), 98943 ($55), 99203 ($250), 99213 ($150), 99211 ($75), 72040 ($250), 72070 ($250), 72100 ($250), and 73030 ($250) 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]*West Kendall Lawsuit # 1* adjudicated the reasonableness of Plaintiff's charges for the following treatment and/or CPT codes: 97012 ($40), 97014 ($50), 97035 ($50), 97112 ($70), 99203 ($250), $99213 ($150), 72040 ($250), 72070 ($250), 72100 ($250). An order granting summary judgment in favor of Plaintiff as to the reasonableness of its charges was entered on March 31, 2017 and a final judgment was entered in favor of Plaintiff and against Defendant on April 5, 2017.

[2]*West Kendall Lawsuit # 2* adjudicated the reasonableness of Plaintiff's charges for the following treatment and/or CPT codes: 97140 ($70), 97012 ($40), 97014 ($50), 97035 ($50), 97112 ($70), 97124 ($60), 98940 ($85), 98943 ($55), 99213 ($150), 72040 ($250), 72070 ($250). A final judgment was entered in favor of Plaintiff and against Defendant on August 28, 2017 following Defendant's confession of judgment.

[3]*West Kendall Lawsuit # 3* adjudicated the reasonableness of Plaintiff's charges for the following treatment and/or CPT codes: 97012 ($40), 97112 ($70), 97124 ($60), 99203 ($250), 99213 ($150), 72040 ($250), $72100 ($250). Defendant confessed to judgment on February 7, 2017 and tendered payment to Plaintiff.

[4]*West Kendall Lawsuit # 4* adjudicated the reasonableness of Plaintiff's charges for the following treatment and/or CPT codes: 97140 ($70), 97012 ($40), 97035 ($50), 97112 ($70), 97124 ($60), 99203 ($250), 99213 ($150), 72040 ($250), 72070 ($250). Defendant confessed to judgment on June 21, 2016 and tendered payment to Plaintiff.

[5]*West Kendall Lawsuit # 5* adjudicated the reasonableness of Plaintiff's charges for the following treatment and/or CPT codes: 97012 ($40), 97014 ($50), 97035 ($50), 97112 ($70), 97124 ($60), 98940 ($85), 99203 ($250), 99213 ($150), 72070 ($250), 72100 ($250). A final judgment was entered in favor of Plaintiff and against Defendant on September 6, 2017 following Defendant's confession of judgment.

[6]*West Kendall Lawsuit # 6* adjudicated the reasonableness of Plaintiff's charges for the following treatment and/or CPT codes: 97140 ($70), 97012 ($40), 97014 ($50), 97035 ($50), 97112 ($70), 97124 ($60), 98940 ($85), 98943 ($55), 99203 ($250), 99211 ($75), 72040 ($250), 73030 ($250). A final judgment was entered in favor of Plaintiff and against Defendant on October 23, 2017 following Defendant's confession of judgment.

[7]*West Kendall Lawsuit # 7* adjudicated the reasonableness of Plaintiff's charges for the following treatment and/or CPT codes: 97012 ($40), 97014 ($50), 97035 ($50), 97112 ($70), 97124 ($60), 98940 ($85), 98943 ($55), 99203 ($250), 99213 ($160), 72040 ($250), 72070 ($250). Defendant confessed to judgment on November 7, 2017 and tendered payment to Plaintiff.

[8]*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].

[9]*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).

[10]*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).

[11]*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].

[12]*See e.g., Field v. Field*, 91 So.2d 640 (Fla. 1956).

[13]*See e.g., U.S. Fidelity & Guar. Co. v. Odoms*, 444 So. 2d 78 (Fla. 5th DCA 1984).

[14]*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].

[15]*See e.g., Weiss v. Courshon*, 768 So.2d 2 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1237a].

[16]*See e.g., Zimmerman v. State Office of Ins. Regulation*, 944 So.2d 1163 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D3126a].

[17]*See also United Auto. Ins. Co. v. Doctor Rehab Center, Inc., a/a/o Dainier Zaldivar*, Case No. 18-067 AP 01 (Fla. 11th Cir. App., May 28, 2020) [28 Fla. L. Weekly Supp. 283b].

[18]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) [42 Fla. L. Weekly D1214b].

[19]Regardless, as conceded by the Defendant, this argument would not apply to *West Kendall Lawsuit # 1* since there was no confession of judgment made in that case. Indeed, in *West Kendall Lawsuit # 1* the issue of reasonableness of Plaintiff's charges was extensively litigated culminating in the trial court entering summary judgment in favor of Plaintiff on this issue followed by final judgment.

* * *

Insurance—Personal injury protection—Rescission of policy—Material misrepresentations on application—Transcript of insured's examination under oath is not admissible for consideration in support of insurer's motion for summary judgment on issue of lack of coverage based on material misrepresentation regarding history of PIP claims—Even if EUO transcript were admissible, summary judgment is precluded by factual issues as to whether insured disclosed prior accident to agent of insurer and whether prior accident resulted in PIP claim

MANUEL V. FEIJOO, M.D., et al., a/a/o Angel Cordovi, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-005349-SP-25, Section CG04. March 12, 2021. Scott M. Janowitz, Judge. Counsel: Kenneth B. Schurr and Maylin Castaneda, Law Offices of Kenneth B. Schurr, P.A., Coral Gables, for Plaintiff. Cristina Hudson, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the court on March 1, 2021 on Defendant's Amended Motion for Summary Judgment Regarding No Coverage Due to Material Misrepresentation and Plaintiff's Motion to Strike the

EUO Transcript. The Court, having reviewed the motions, exhibits, case file, heard the arguments of counsel, and otherwise being otherwise fully advised therein, the Court hereby finds as follows:

BACKGROUND & PROCEDURAL HISTORY

On April 11, 2016, Angel Cordovi Castro (the "insured") purchased an automobile insurance policy (containing PIP benefits) from Defendant United Automobile Insurance Company. The insured went to a local broker agent and procured insurance from the Defendant from the local broker agent. As part of the application process, the insured signed an application in which he answered "no" to "Have you or any household residents filed and/or made a Personal Injury Protection (PIP) claim within the last 36 months. On June 13, 2016, during the policy term, the insured was injured in an accident and sought medical care from Plaintiff, who accepted an assignment of PIP benefits from the insured and subsequently submitted its bills to Defendant for payment.

Defendant investigated the loss and believed there may have been a misrepresentation by the insured in the policy application. Defendant ran an ISO claim search and received information that there may have been a prior PIP claim involving the insured within the prior year. Defendant did not follow up with the other carrier nor received any documents regarding the prior accident. Instead, Defendant took the Examination under Oath of the insured. Ultimately, Defendant refused to remit payment because it alleged that the insured made a material misrepresentation on the insurance policy application by failing to list prior PIP claims.

In support of its Motion for Summary Judgment, Defendant primarily relies on the EUO transcript of the insured to prove that the insured made a misrepresentation on the policy. Defendant's other evidence is the affidavit of an adjuster who relied on the ISO claim search and the EUO transcript to support the claim determination. In opposition to Defendant's motion, Plaintiff filed the affidavit of the insured stating that he informed the insurance agent that sold the policy about a prior accident.

Plaintiff contends that (1) the insured's EUO is inadmissible summary judgment evidence, and (2) that the insured's affidavit creates a genuine issue of material fact sufficient to deny the motion for summary judgment. As a threshold matter, the court must first consider whether the insured's EUO testimony can be used as summary judgment evidence.

ANALYSIS & ADMISSIBILITY OF THE EUO TRANSCRIPT

Plaintiff argues that the EUO transcript is not admissible under Fla. Stat. §90.802, §90.804, *McElroy v. Perry*, 753 So. 2d 121 (Fla. 2nd DCA 2000) [25 Fla. L. Weekly D111a], Fla. Stat. §92.33, and *Williams v. State,* 185 So. 2d 718 (Fla. 3d DCA 1966). Defendant argues that the EUO transcript is admissible pursuant to §90.803, *Smith v. Fortune Ins. Co.,* 404 So. 2d 821 (Fla. 1st DCA 1981), and *Botte v. Pomeroy,* 497 So. 2d 1275 (Fla. 4th DCA 1986). For the reasons stated below, the Court rules that the EUO transcript is not admissible for consideration at summary judgment.

Fla. R. Civ. P. 1.510 states that the moving party "must specifically identify any affidavits, answers to interrogatories, admissions, depositions, and other materials as would be admissible in evidence ('summary judgment evidence') on which the movant relies." Accordingly, the burden is on the Defendant to identify and supply the necessary evidence to demonstrate 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." *Id.* The EUO transcript is a statement of a non-party. The Court finds Defendant's caselaw is inapposite to the *facts* of this case and that the statement itself is hearsay and is not otherwise admissible absent an exception.

An Examination under Oath is not listed in the rule and is not akin to a deposition. An EUO is taken as part of the requirements of an insurance policy. In the instant case, it was taken prior to this lawsuit being filed and it was not taken in connection with a judicial proceeding. Further, there was no opportunity for cross examination or objection. *See Goldman v. State Farm,* 660 So. 2d 300 (Fla 4th DCA 1995) [20 Fla. L. Weekly D1844a] (EUO and deposition are not the same and they serve vastly different purposes). Further, there are procedural safeguards in a deposition (including witness review) under Fla. R. Civ. P. 1.310 which do not exist in an examination under oath. Similarly, Examinations under Oath are not like affidavits. The case law of *Stinnett v. Longi, Inc.,* 460 So. 2d 528 (Fla. 2d DCA 1984) and *Avampato v. Markus,* 245 So. 2d 676 (Fla. 4th DCA 1971) are inapposite as they did not involve the use of affidavits or sworn statements at a summary judgment.

DEFENDANT'S SUMMARY JUDGMENT

Without the EUO transcript of the insured, and with the ISO claim report not being admissible evidence, Defendant is unable to demonstrate it is entitled to summary judgment.

Even if the EUO transcript was considered as substantive evidence, the Court would still find that there are genuine issues of material fact. Pursuant to the affidavit of the insured, the local broker agent was told all about the prior accidents. Based on Defendant's underwriting corporate representative deposition, the Court cannot determine whether the local broker agent is an agent of the Defendant or an agent of the insured. Further, there is no admissible evidence before the Court as to whether the prior accident substantively relied on by the Defendant resulted in a PIP claim (as Defendant contends), as opposed to a bodily injury claim, property damage claim, uninsured motorist claim, etc.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Strike the EUO as Inadmissible Summary Judgment Evidence is **GRANTED** and Defendant's Motion for Summary Judgment as to its Material Misrepresentation Defense is hereby **DENIED**.

* * *

Insurance—Personal injury protection—Coverage—Affirmative defenses—Accord and satisfaction—Defense of common law accord and satisfaction fails where there is no evidence of dispute between parties prior to issuance of check for reduced PIP benefits—Defense of statutory accord and satisfaction fails where language on check and accompanying correspondence is not conspicuous, and correspondence is ambiguous—Further, payment was not made in good faith where insurer reduced charges because they were above 200% of Medicare fee schedule without having elected use of fee schedule method of reimbursement, and it is not within commercial standards for insurer to place "full and final payment" language on check without prior discussion to resolve disputed claim

MIAMI DADE COUNTY MRI, CORP., (a/a/o Daniel Medina), Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 13-11947 SP 23 (04). June 23, 2017. Alexander S. Bokor, Judge. Counsel: Kenneth J. Dorchak, Buchalter Hoffman and Dorchak, North Miami, for Plaintiff. Ari Neimand, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO DEFENSE OF ACCORD AND SATISFACTION

THIS CAUSE came on to be heard on June 6, 2017, on the Plaintiff's Motion for Summary Judgment for Summary Judgment as to the defense of accord and satisfaction and the Defendant's cross motion for summary judgment as to such defense. Upon hearing

argument of counsel present and otherwise being fully advised of the premises thereof, it is hereby:

ORDERED and ADJUDGED that for the reasons cited below and on the record and in the motion filed by the Plaintiff, the Plaintiff's Motion is GRANTED and the Defendant's motion is DENIED.

The Court finds that there is no material issue of disputed fact in this matter regarding the accord and satisfaction defense. Based upon the summary judgment evidence before the court demonstrate that as a matter of law the elements of the defense of accord and satisfaction are not present and cannot support a defense of accord and satisfaction under either the common law or under Section 673.3111, Fla. Stat.

As to common law accord and satisfaction there is no evidence that a dispute existed between the parties prior to the issuance of the check upon the Defendant relies for its defense. Accord and satisfaction results when there is an existing dispute as to the proper amount due from one party to the other party and the parties mutually intend to effect settlement of the existing dispute by a superceding agreement and the debtor tenders and the creditor accepts performance of the new agreement in full satisfaction and discharge of the debtor's prior or disputed obligation. *Republic Funding Corporation of Florida v. Juarez,* 563 So.2d 145 (Fla. 5th DCA 1990). The elements are not present under the facts of this case.

The record evidence shows that there was no contact between the parties subsequent to the Defendant's receipt of the Plaintiff's bill and the issuance of the check to discuss any dispute over the payment of the Plaintiff's bill. The Defendant has argued that the payment itself at an amount less than the charge is the dispute. However, the Court finds that an "insurer . . . cannot create a dispute by making payment in an amount it contends will fully satisfy its obligation." *Pino v. Union Bankers Insurance Company,* 627 So.2d 535 (Fla. 3rd DCA 1993).

The correspondence sent with the check did not indicate the existing of a dispute and that the payment was offered in full and final accord and satisfaction of the dispute. Quite the contrary the correspondence stated that if there was a dispute that the Plaintiff medical provider should contact the Defendant. Furthermore, the Defendant subsequently sent correspondence which asserted that the Defendant is still investigating the claim, which requests continued cooperation by the Plaintiff medical provider, and which, most importantly, asserts that the payment was made with reservation of the right to seek reimbursement, stands in contradiction with an intent to enter into an accord and satisfaction as the purpose of an accord and satisfaction is to forever resolve, without reservation, a dispute between two parties.

As with the analysis under common law accord and satisfaction, the Court finds that under an analysis under statutory accord and satisfaction by use of a negotiable instrument that the elements of such are also not present in this matter. The language on the check or correspondence sent along with the check upon which the Defendant relies to support its accord and satisfaction defense is not conspicuous as defined by law. See Section on 671.201(10), Fla. Stat. Additionally, the language in the payee line of the check which states "f/a/o for finala if pip benefits" is ambiguous. In *St. Mary's Hospital, Inc. v. Schocoff,* 725 So.2d 454 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D405a], the Court found that the hospital's depositing of a check that was accompanied by a letter that stated "no further benefits will be payable" and an explanation of benefits that asserted that the amount paid was the maximum amount payable was insufficient to create an accord and satisfaction. In the instant case, we have significantly less indicia of accord and satisfaction.

The above rationale provides ample support for granting Plaintiff's motion and denying Defendant's. Additionally, the Court notes the element of good faith payment is not present in this matter. Good faith is defined in the notes of Section 673.3111(1), Fla. Stat. as "not only honesty in fact, but the observance of reasonable commercial standards of fair dealing." Here the Defendant simply reduced the charges because they were above 200% of Medicare Part where the policy did not elect to limit payment to 200% of Medicare Part B and instead required the Defendant to pay 80% of a reasonable charge. Additionally, the affidavit filed by the Plaintiff's billing representative asserts that it is not within commercial standards for an insurer to unilaterally place full and final payment language in a draft without there having been a prior discussion to resolve a disputed claim.

Based upon the foregoing findings of facts together with the arguments set forth in the motion and at hearing IT IS **ADJUDGED** that the Plaintiff's motion for summary judgment is GRANTED and the Defendant's Motion for Summary Judgment is DENIED.

* * *

Insurance—Personal injury protection—Rescission of policy—Material misrepresentations on application—Insured's failure to appear for deposition scheduled by insurer is not ground for striking affidavit of insured proffered by medical provider in opposition to insurer's motion for summary judgment on material misrepresentation defense where insurer failed to exercise diligence in pursuing deposition—Where policy states that insured will be notified of additional premium and be given opportunity to pay additional premium if insurer determines that application information is inaccurate or incomplete, insurer's remedy on learning that insured had allegedly failed to disclose resident daughter on application was to recompute premium and seek payment from insured, not to rescind policy—Further, affidavit of insured stating that he disclosed daughter to insurer's agent creates factual issue precluding summary judgment

GABLES MR (A), a/a/o Armando Orovio, Plaintiff, v. STAR CASUALTY INS. COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2012-024556-SP-25, Section CG01. March 4, 2021. Linda Melendez, Judge. Counsel: Kenneth B. Schurr and Maylin Castaneda, Law Offices of Kenneth B. Schurr, P.A., Coral Gables, for Plaintiff. Bridgette Crespo, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO MATERIAL MISREPRESENTATION DEFENSE AND ORDER ON DEFENDANT'S MOTION TO STRIKE AFFIDAVIT AND FOR EXTENSION OF TIME

This cause came before the Court on March 2, 2021 on Defendant's Motion for Summary Judgment as to its affirmative defense regarding an alleged material misrepresentation on the insurance policy application; as well as Defendant's Motion to Strike the Affidavit of Armando Orovio and for Extension of Time. The Court, having heard the argument of counsel, and being otherwise fully advised therein, the court hereby finds as follows:

On February 13, 2012, the insured patient was injured in an automobile accident and sought medical care from the Plaintiff, who in turn accepted an assignment of benefits and submitted its medical bill to Defendant for payment. Defendant denied Plaintiff's claim and this action followed.

On June 21, 2013, Defendant filed its motion for summary judgment claiming that the named insured, Armando Orovio, failed to list a household member on the policy application. In support of its position that the named insured failed to list a household relative, Defendant relies on the affidavit of the insured's daughter, Ms. Betty Sandoval to establish that she resided in the insured's household at the time of the policy inception.

Defendant sought to depose the named insured in 2016, but apparently the witness failed to appear, which triggered two Motions for Rule to Show Cause from the Defendant. But, during the six-plus years that followed, Defendant never scheduled a hearing on its Motions for Rule to Show Cause. Defendant then scheduled a second

deposition of the named insured in January 2020, but it is unclear whether or not Defendant effectuated proper service of a subpoena on the named insured and so again, the deposition did not go forward. Defendant took no further action and never sought to depose Mr. Orovio again. Accordingly, Defendant's Motion for an Extension of Time to Depose Mr. Orovio, is denied.

Despite Defendant's inability to secure the named insured's deposition testimony, Plaintiff was able to secure the affidavit testimony of the named insured in which Mr. Orovio testified under oath that at the time of the policy inception, he specifically advised the insurance agent that he lived with his daughter. Further, it is undisputed that the insurance agent that sold the subject policy to the named insured is an appointed agent authorized by Defendant to bind the Defendant.

Plaintiff filed the Orovio affidavit shortly before the March 2, 2021 hearing on Defendant's Motion for Summary Judgment, consistent with Rule 1.510, Fla.R.Civ.P. Upon receipt of the Orovio affidavit, Defendant filed a motion seeking to strike the Orovio affidavit arguing, *inter alia* (a) the affidavit was filed solely to create an issue of fact; and (b) that Plaintiff should not benefit from the Orovio affidavit because the non-party Orovio failed to appear for deposition some 6 years ago. This court finds that Defendant's lack of diligence in pursuing the necessary deposition testimony cannot be used as a weapon to strike the affidavit secured by Plaintiff and filed in opposition to Defendant's Motion for Summary Judgment, nor can the Plaintiff be punished for the actions of a non-party. Defendant's Motion to Strike the Orovio affidavit is hereby denied.

Moving on to the merits of Defendant's Motion for Summary Judgment regarding the material misrepresentation defense, the court notes that the subject policy states, at page 11 of 13:

> Part G, General Provisions:
>
> * * *
>
> 4. OUR RIGHT TO RECOMPUTE PREMIUM
>
> The premium for this policy has been established in reliance upon the statements made by you in the application for insurance. We shall have the right to recompute the premium payable for this policy if information material to the development of the final policy premium is subsequently obtained.

The policy goes on at page 12 of 13, and states:

> 7. MISREPRESENTATION AND FRAUD
>
> Coverage is not provided to any person who knowingly conceals or misrepresents any material fact or circumstance relating to this insurance:
>
> 1. at any time application is made; or
>
> 2. at any time during the policy period; or
>
> 3. in connection with the presentation or settlement of a claim.
>
> * * *
>
> 8. TERMINATION
>
> 4. In the event we determine that you have been charged an incorrect premium for coverage requested in your application for insurance, we shall immediately mail you notice of any additional premium due us. If within 15 days of the notice of additional premium due (or a longer time period as specified in the notice), you fail to either:
>
> a. Pay the additional premium and maintain this policy in full force under its original terms; or
>
> b. Cancel this policy and demand a refund of any unearned premium;
>
> then this policy shall be cancelled effective 15 days from the date of the notice (or a longer time period as specified in the notice).

The foregoing language in Defendant's policy appears to obligate Defendant to provide notice to the named insured that an additional premium was due as a result of the insured's daughter residing in the same household. Defendant testified through its underwriter and its corporate representative that despite learning of information which would serve to increase the premium (i.e., named insured's daughter resided with the named insured), it never sought to recalculate the premium as required under the terms of the policy, and instead attempted to void the policy.

Despite the foregoing provision, Defendant seeks to rely on the statutory right to rescind the subject policy of insurance based on Florida Statute §627.409 (a)(l)(a)(b), which states in relevant part,

> 1. Any statement or description made by or on behalf of an insured or annuitant in an application for 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 amount, or would not have provided coverage with respect to the hazard resulting in the loss.

However, pursuant to Florida Statute § 627.419, "[e]very insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, or modified by any *application* therefore or any rider or endorsement thereto." (Emphasis Added). Also, the application is part of the agreement between the parties and it is read in conjunction with the policy, which, together, constitutes the contract of insurance. See, *Mathews v. Range Ins. Co*., 281 So. 2d 345 (Fla. 1973).

Moreover, where the language in an insurance contract is clear and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written. *Washington Nat'l Ins. Corp. v. Ruderman*, 117 So. 3d 943, 948 (Fla. 2013) [38 Fla. L. Weekly S511a] (citing *State Farm Mut. Auto. Ins. Co. v. Menendez*, 70 So. 3d 566, 569-70 (Fla. 2011) [36 Fla. L. Weekly S469a]). Accordingly, Florida courts may not "rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intention of the parties." *Intervest Const. of Jax, Inc. v. Gen. Fid. Ins. Co*., 133 So. 3d 494,497 (Fla. 2014) [39 Fla. L. Weekly S75a] (quoting *State Farm Mut. Auto Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986)). Thus, because Florida Statutes only provide for the minimum coverage required, carriers are not constrained by said minimum coverage and the parties are permitted to contract for broader coverage. See, *Sturgis v. Fortune Ins. Co*., 475 So. 2d 1272-73 (Fla. 1985); *Wright v. Auto-Owners Ins. Co*., 739 So. 2d 180-81 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2033a].

While the Court acknowledges that Florida law allows for statutory right to rescind based on a material misrepresentation when certain elements are met, Florida law is equally clear that with regard to an insurance contract, parties are free to contract out of state law so long as there is nothing void as to public policy or statutory law about such a contract. See, *Green v. Life & Health of America*, 704 So. 2d 1386, 1390-91 (Fla. 1998) [23 Fla. L. Weekly S42a]; *King v. Allstate Ins. Co*., 906 F. 2d 1537, 1540 (11th Cir. 1990).

A plain reading of Defendant's policy, as quoted above, states that information that if the insurer determines that any policy application information is inaccurate or incomplete, then the insured will be notified of any additional premium based on accurate and complete information, and the insured will be given an opportunity to pay the additional premium, if any. The face of the document clearly reflects

the parties' anticipation that there may be instances where the insured may provide inaccurate or incomplete information with respect to the above scenarios, and the procedure for curing same.

In the case before the Court, Defendant contends that the named insured omitted certain information regarding the presence of his daughter on the application. To the contrary, the named insured Orovio testified via affidavit that in fact he did advise Defendant through its agent that his daughter resided in his household. This alone sufficiently creates a genuine issue of material fact sufficient to preclude entry of summary judgment in favor of Defendant. But even without the Orovio affidavit, the policy language itself demonstrates that Defendant's remedy was not to seek recission upon learning about an additional household resident. Rather, the remedy was to recompute the premium and seek payment from the named insured of any additional premium, which Defendant admittedly never attempted.

Upon concluding that there was an additional premium based on accurate and complete information, Defendant's application assured its insured that a notice would be forwarded with directions as to payment of said additional premium, thus avoiding any misrepresentation. Had Defendant's policy been silent as to rectifying any inaccurate or incomplete information and all of the statutory criteria had been met, then Defendant could have applied the statutory defense of material misrepresentation and thereby prevent recovery under the insurance policy resulting in the rescission of the subject policy. Any other interpretation of the above provision results in the construction of coverage in favor of the insurer, which is in strict derogation of longstanding precedent that a policy must be construed in favor of the insured. See, *Washington National Insurance, Corp. v. Ruderman*, 117 So. 3d 943 (Fla. 2013) [38 Fla. L. Weekly S511a] ("It has long been a tenet of Florida insurance law that an insurer, as the writer of an insurance policy, is bound by the language of the policy, which is to be construed liberally in favor of the insured and strictly against the insurer. Thus, where one reasonable interpretation of the policy provisions would provide coverage, that is the construction which must be adopted.") (emphasis added).

The Court finds this matter is akin to *Green v. Life & Health of America*, supra, where the Florida Supreme Court held that "once the insurer sets its own standard by contract for judging misrepresentations and concealment, it cannot rely on a statute that imposes more stringent requirements on an insured." 704 So. 2d 1386 (Fla. 1998) [23 Fla. L. Weekly S42a]. In *Green*, the insurer chose to draft and incorporate a different "knowledge and belief" standard in its application for insurance. Thus, representations that were inaccurate or false were not sufficient for rescission. Instead, such inaccurate or false representations had to be *intentional* in order for Life & Health to avail itself of its right to rescission. Instead of relying on F.S. § 627.409, the application required that the responses be based on the applicant's "knowledge and belief." Although the insurer in *Green* argued that they were entitled to rescind the policy based on F.S. §627.409 notwithstanding their policy language, the Florida Supreme Court rejected that argument based on the contract's unambiguous language.

Similarly, in the instant case, Defendant authored a provision in its policy for insurance which permitted its insured the opportunity to pay additional premiums, if any, once corrections were made to inaccurate or incomplete information contained in the application for insurance.

Defendant cannot ignore its own policy provision and travel under the far more stringent statutory material misrepresentation provision, attempting to rescind the policy of insurance. As the Florida Supreme Court analyzed in *Green*, the carrier cannot now seek to repudiate its own contract and, as a fallback position, claim refuge in the stricter statutory standard.

More importantly, Defendant's attempt to ignore the above provision would render an entire provision of the contract as mere surplusage or, worse, allow Defendant an option—it can request payment of the additional premium under the language cited above, or it can rescind the policy when it so chooses.

The Court's analysis is consistent with other opinions which have also evaluated similar policy provisions which are less stringent than F.S. 627.409. See, *Path Medical Dade a/a/o Ari-Anna Soas v. Windhaven Insurance Company*, Case No.: 16-17659 SP 23 (J. Lehr, November 8, 2017); *Path Medical Dade a/a/o Charlotte Leatherwood v. Windhaven Insurance Company*, Case No.: 16- 17857 SP 23 (J. Lehr, October 23, 2017).; *Doctor Rehab Center, Inc. a/a/o Luis Orama v. Windhaven Insurance Company*, Case No.: 16-7550 CC 23 (J. Lehr, October 23, 2017); *Dade Injury Rehabilitation Inc. a/a/o Rosemari Quintana v. Windhaven Insurance Company*, Case No.: 14-005055 CC 23 (J. Bokor, January 17, 2018) and *Hammocks Trauma Center, Inc. a/a/o Lazaro Gonzalez v. Windhaven Insurance Company*, Case No.: 2015-10420 SP 25 (J. Beovides, November 8, 2017).

Accordingly, Defendant's Motion for Summary Judgment regarding its material misrepresentation defense is DENIED.

* * *

Criminal law—Driving under influence—Evidence—Urine test—Consent—Voluntariness—State is only required to prove voluntariness of defendant's consent to urine test by preponderance of evidence where officer did not unlawfully repeatedly ask defendant to consent to test but, rather, reiterated unanswered question of whether defendant would submit to test after responding to defendant's numerous requests for clarification of possible consequences—Where defendant was placed in handcuffs, but no improper threats were made and atmosphere of interaction was cordial, consent was voluntary—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. KIPTEN LEE PADEN, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2019 CT 13149 SC. March 8, 2021. David Denkin, Judge. Counsel: Tom Widen, Assistant State Attorney, for Plaintiff. Robert Harrison, for Defendant.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

The Defendant was arrested for DUI.[1] At the scene of the arrest, the Defendant submitted to a breath test. The results were 0.000. The arresting officer subsequently asked the Defendant if he would submit to a urine test.[2] The Defendant, a 19 year-old responded no. The Defendant was thereupon read the Implied Consent Warning pursuant to section 316.1932(1)(a)1.b., Florida Statute.[3] It was at this point where the Defendant began asking questions about providing a urine sample. He asked what would happen if he said yes. He was told that if a substance was detected his license would be suspended for 6 months and he could get a hardship license. The same Implied Consent Warning was read to the Defendant a second time. The Defendant responded by asking if he could speak to his parents. He was told that was not an option for him. The Defendant asked the officers on two more occasions if he could speak to his parents. He was told no. The Defendant continued to ask questions about taking the urine test, without ever answering the question of whether he would provide a urine sample. He asked if he would be "put on parole," one of the two deputies at the scene said he couldn't answer that while the other deputy at the scene said the charge was a simple misdemeanor. The Defendant asked what happens when he provides a urine sample and was told that the sample would be tested to look for chemicals. The Defendant asked for and was given the opportunity to read the Implied Consent Warning. The Defendant asked if the consequences were less for agreeing to provide a urine sample and the deputy stated he could not answer if it was a lesser consequence. The Defendant thereupon answered with a "yes."[4] This entire occurrence

between the defendant and law enforcement was recorded via the deputy's dash camera video and was viewed by the court during the hearing on the Defendant's Motion to Suppress.

The Defendant filed a Motion to Suppress arguing that the Defendant's consent to provide a urine sample was not voluntary and the results from the testing of the sample must be suppressed

The issues before the court are:

(1) What is the State's burden of proof, preponderance of evidence or clear and convincing in determining whether the defendant's consent to provide a urine sample was freely and voluntary given?

(2) Whether the defendant voluntarily consented to providing a urine sample?

Where the validity of a search depends upon a finding of consent, the State has the burden of showing that the consent was voluntary. Where the police have not engaged in illegal conduct, the State bears the burden of showing the voluntariness of a consent to search by a preponderance of the evidence. *Luna-Martinez v. State*, 984 So. 2d 592 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D1506a]. However, when consent is obtained after illegal police activity, the consent is presumptively involuntary and the consent will only be found voluntary if there is clear and convincing proof of an unequivocal break in the chain of illegality. *Aguilar v. State*, 259 So.3d 262 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2545c]. The Defendant asserts that the State's burden in this case is elevated to that of clear and convincing because the officers repeatedly requested that the Defendant consent. *Dormezil v. State,* 754 So. 2d 168, 169 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D839b].

The burden of proof to show voluntariness in this case is preponderance of the evidence. The Defendant was not repeatedly asked to consent. Instead, the Defendant asked numerous times for clarification and further explanation after implied consent was read, yet he did not provide an answer to the question posed to him by law enforcement. Law enforcement merely reiterated the unanswered question after answering the defendant's questions.

Next, in determining whether the Defendant voluntarily consented to provide a urine sample, the court should consider the totality of circumstances. This would include but is not limited to the following factors:

"(1) the time and place of the encounter; (2) the number of officers present; (3) the officers' words and actions; (4) the age and maturity of the defendant; (5) the defendant's prior contacts with the police; (6) whether the defendant executed a written consent form; (7) whether the defendant was informed that he or she could refuse to give consent; and (8) the length of time the defendant was interrogated before consent was given." *Montes-Valeton v. State*, 216 So. 3d 475, 480 (Fla. 2017) [42 Fla. L. Weekly S210a]; *See State v. Hernandez*, 146 So. 3d 163, 165 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1934a]; *See generally Luna-Martinez*, at 597-602 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D1506a] *(discussing each factor).*

In *Montes-Valeton,* the officer "improperly threatened *Montes-Valeton* with the suspension of his driver license for refusing to give consent to the blood draw." *Montes-Valeton v. State*, 216 So. 3d 475, 481 (Fla. 2017) [42 Fla. L. Weekly S210a]. This rendered the consent involuntary. The atmosphere of the interaction between the defendant and law enforcement appears cordial. *Luna-Martinez v. State,* 984 So. 2d 592, 599 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D1506a], No improper threats were made. While the defendant being in handcuffs during the conversation regarding a urine sample, is a factor to consider, it is not the only factor. *Gonzalez v. State*, 59 So.2d 182 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D500a]. The fact that a Defendant has been taken into custody is not sufficient to render consent involuntary. *Id. at 186.* It is not the presence or absence of any one factor alone that determines the validity of a consent. *Reynolds v. State*, 592 So. 2d 1082, 1085 (Fla. 1992).

The evidence that was presented, which includes the dash camera videos, the State has demonstrated that consent to provide a urine sample was freely and voluntarily given. After performing Field Sobriety Exercises, the defendant was placed under arrest for DUI and handcuffed. The defendant then agreed to provide a breath sample. Between the Defendant's arrest and when he provided a breath sample, the defendant mentioned the use of marijuana on more than one occasion. After providing two breath samples of 0.000, the arresting deputy requested a urine sample.[5] The Defendant refused whereupon he was read the Implied Consent Warning. The defendant proceeded to ask questions and law enforcement provided what information they could, responding that they could not answer some things. After being requested by the Defendant, the arresting deputy showed the defendant the implied consent form and read it aloud. As the conversation between the deputies and the Defendant continued, the arresting deputy did return to the question of whether he would provide a urine sample as the defendant had not yet provided a 'yes' or 'no' answer. The officer also said at one point during this conversation, "No is an okay answer."

While the dialogue regarding implied consent went on for several minutes and law enforcement did not allow the defendant to call his parents, officers engaged the defendant with in a non-coercive atmosphere.

IT IS HEREBY ORDERED that the Defendant's Motion is **DENIED**.

---

[1]The Defendant was placed in handcuffs and remained during the requests from law enforcement that he provide a breath sample and a urine sample.

[2]After the arrest and prior to providing a breath sample, the Defendant mentioned using smoking marijuana earlier.

[3]*"I am now requesting that you submit to a lawful test of your urine for the purpose of detecting the presence of chemical or controlled substances. If you fail to submit to the test I have requested of you, your privilege to operate a motor vehicle will be suspended for a period of one (1) year for a first refusal, or eighteen (18) months if your privilege has been previously suspended as a result of a first refusal to submit to a lawful test of your breath, urine, or blood. Additionally, if you refuse to submit to the test I have requested of you and if your driving privilege has been previously suspended for a prior refusal to submit to a lawful test of your breath or urine, you will be committing a misdemeanor.*

Do you understand what I have read to you?

Will you take the test?

Do you still refuse to submit this test knowing that your privilege will be suspended for a period of at least one year?"

[4]This was the first time he answered the question concerning whether he would provide a urine sample after he was read the Implied Consent Warning.

[5]The lawfulness of making this request has not been challenged.

* * *

Landlord-tenant—Eviction—Stay—Pandemic-related order by Centers for Disease Control—Default is entered against tenant who claimed to be covered person under CDC declaration ordering temporary halt to residential evictions but failed to present evidence or testimony to demonstrate that she was a covered person

41 PROPERTY MANAGEMENT, INC., d/b/a REALNET PROPERTY MANAGEMENT, INC., Plaintiff, v. CHANDRA L. SPIRES, individually, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-87970, Division I. February 18, 2021. Joelle Ann Ober, Judge. Counsel: Joshua A. Harrow, Harrow Law, P.A., Tampa, for Plaintiff.

ORDER ON PLAINTIFF'S MOTION TO DETERMINE VALIDITY OF TENANT'S DECLARATION FOR THE CENTERS FOR DISEASE CONTROL AND PREVENTION'S TEMPORARY HALT IN EVICTIONS TO PREVENT FURTHER SPREAD OF COVID-19 AND ORDER GRANTING JUDGMENT OF POSSESSION

This cause came on for hearing on February 17, 2021, before the Honorable Joelle Ann Ober, upon the Plaintiff's Motion to Determine

Validity of Tenant's Declaration for the Centers for Disease Control and Prevention's Temporary Halt in Evictions to Prevent Further Spread of Covid-19 ("Motion"). Plaintiff, 41 PROPERTY MANAGEMENT, INC. d/b/a REALNET PROPERTY MANAGEMENT, INC. ("REALNET") was represented by Joshua A. Harrow, Esq., and Defendant, CHANDRA L. SPIRES ("SPIRES") failed to appear after being duly noticed. After reviewing the motion and papers filed with the Court, hearing arguments, and being otherwise advised in the premises, the Court finds as follows:

1. On December 15, 2020, SPIRES filed an Answer to the Complaint, and attached a Declaration alleging to be a "Covered Person" under the "Temporary Halt in Residential Evictions to Prevent the Further Spread of Covid-19" ("Order").

2. Pursuant to the HHS/CDC Temporary Halt in Residential Evictions to Prevent the Further Spread of Covid-19 - Frequently Asked Questions ("FAQ"), "the Order does not preclude a landlord from challenging the truthfulness of a tenant's declaration in any state or municipal court."

3. SPIRES was required to present testimony and/or evidence to demonstrate that she was a covered person under the Order.

4. SPIRES failed to present testimony and/or evidence that she was a covered person under the Order.

It is thereupon,

ORDERED and ADJUDGED as follows:

a. REALNET's Motion is GRANTED.

b. A default is entered against SPIRES.

c. Plaintiff shall be entitled to possession of the premises described as:

[Editor's note: address redacted], Tampa, Florida 33612

d. The clerk of the court is directed to issue said writ of possession forthwith and to deliver the executed writ to counsel for the Plaintiff.

e. Jurisdiction of this case is retained to enter further orders that are proper, including determination of attorneys' fees and costs, as well as damages under Count II of the Complaint, and any supplemental relief

* * *

Landlord-tenant—Eviction—Pandemic-related declaration by Centers for Disease Control—Tenant occupying premises under oral month-to-month lease agreement is not covered person under CDC declaration ordering temporary halt to residential evictions

BRUCE A. COOPER, individually, and LAURA K. COOPER, individually, Plaintiffs, v. KRISTOFER SMITH, individually, MELISSA SMITH, individually, and ANY UNKNOWN OCCUPANT(S), Defendants. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-003491, Division S. February 19, 2021. Lisa Allen, Judge. Counsel: Joshua A. Harrow, Harrow Law, P.A., Tampa, for Plaintiffs. Kristofer Smith and Melissa Smith, Pro se, Defendants.

ORDER ON PLAINTIFF'S MOTION TO DETERMINE VALIDITY OF TENANT'S DECLARATION FOR THE CENTERS FOR DISEASE CONTROL AND PREVENTION'S TEMPORARY HALT IN EVICTIONS TO PREVENT FURTHER SPREAD OF COVID-19 AND ORDER GRANTING JUDGMENT OF POSSESSION

This cause came on for hearing on February 18, 2021, before the Honorable Lisa A. Allen, upon the Plaintiff's Motion to Determine Validity of Tenant's Declaration for the Centers for Disease Control and Prevention's Temporary Halt in Evictions to Prevent Further Spread of Covid-19 ("Motion"). Plaintiff(s), BRUCE A. COOPER and LAURA K. COOPER, were represented by Joshua A. Harrow, Esq., and Defendant(s) KRISTOFER SMITH and MELISSA SMITH, appeared pro se. After reviewing the motion and papers filed with the Court, hearing arguments, and being otherwise advised in the premises, the Court finds as follows:

1. Defendant(s) were operating as a month-to-month tenant since the written lease expired on May 31, 2017.

2. On December 8, 2020, Plaintiff(s) timely terminated the oral month-to-month lease agreement with Defendant(s), and requested that they vacate by January 1, 2021.

3. Defendant(s) failed to vacate, and became holdover tenants. Plaintiff(s) filed a complaint for eviction on January 14, 2021.

4. On February 1, 2021, Defendant(s) filed an Answer to the Complaint, and attached a Declaration alleging to be a "Covered Person" under the "Temporary Halt in Residential Evictions to Prevent the Further Spread of Covid-19" ("Order").

5. Pursuant to the HHS/CDC Temporary Halt in Residential Evictions to Prevent the Further Spread of Covid-19 - Frequently Asked Questions ("FAQ"), "the Order does not preclude a landlord from challenging the truthfulness of a tenant's declaration in any state or municipal court."

6. Under Florida law, a verbal month-to-month lease can be terminated at any time. Therefore, Defendant(s) are not a "Covered Person" because the Order is not applicable to termination of month-to-month lease agreements. The Order is applicable to tenants with a current written lease agreement that are not paying rent.

It is thereupon,

ORDERED and ADJUDGED as follows:

a. Defendant(s) are not a "Covered Person" under the Centers for Disease Control and Prevention's Temporary Halt in Evictions to Prevent Further Spread of Covid-19.

b. The month-to-month lease agreement with Defendant(s) is terminated, and Plaintiff(s) may file a judgment of possession.

c. Plaintiff(s) are not waiving any rights to seek past due rent from Defendant(s).

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Conditions precedent—Examination under oath—Where both PIP statute and policy provide that EUO is condition precedent to receipt of benefits, neither insured who failed to appear at four scheduled EUOs nor medical provider/assignee is entitled to benefits—Insurer that scheduled EUOs to occur more than thirty days after receipt of provider's bills did not thereby waive right to contest claim based on insured's failure to attend EUOs

GOLDEN CHIROPRACTIC, P.A., a/a/o Quanteana Austin, Plaintiff, v. ENTERPRISE LEASING COMPANY OF FLORIDA, LLC, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 502019SC021508XXXXMB. March 5, 2021. Sandra Bosso-Pardo, Judge. Counsel: Gregory E. Gudin, Landau & Associates, P.A., Sunrise, for Plaintiff. Alejandra M. Jay, McFarlane Law, Coral Springs, for Defendant.

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

This matter is before the Court on the parties' Cross Motions for Final Summary Judgment Regarding Quanteana Austin's Failure to Attend an Examination Under Oath (EUO). The Court having reviewed the parties' Motions and having considered argument of counsel at the February 8, 2021 hearing, the Court finds as follows:

I. Background

1. Plaintiff, GOLDEN CHIROPRACTIC, P.A., filed the instant suit pursuant to a rental agreement issued by the Defendant, ENTERPRISE LEASING COMPANY OF FLORIDA, LLC., seeking payment of PIP benefits for treatment rendered to Quanteana Austin, following a May 14, 2019 motor vehicle accident Austin was involved in while occupying Defendant's rental vehicle.

2. The rental agreement sued upon makes appearance at an EUO a condition precedent to receiving PIP benefits.

3. Defendant received the first set of bills from Plaintiff for treatment rendered to Austin, on June 6, 2019.

4. On August 19, 2019, the Defendant made its first request to take Austin's EUO. Austin failed to appear for her EUO without any explanation. The Defendant attempted on three more occasions to take Austin's EUO. However, Austin failed to appear to her scheduled EUOs without any explanation and Certificates of Non-Appearance were obtained by the Defendant.

5. The Defendant denied Austin's claim for PIP benefits as a result of her failure to appear for an EUO, and the instant PIP lawsuit was filed.

II. Plaintiff's Argument

6. Plaintiff argues that Defendant is barred from denying the PIP claim as a result of Austin's failure to appear for an EUO. In particular, Plaintiff argues that the EUO request was untimely and invalid under Florida law, as Defendant's first request to take the EUO was done 30 days after Defendant first received notice of Plaintiff's bills. Plaintiff relies on *Amador v. United Auto Ins. Co*., 748 So.2d 307 (Fla. 3rd DCA 1999) [24 Fla. L. Weekly D2437a] for the proposition that an insurer cannot use its investigative right to toll the 30-day time limit provided in Fla. Stat. 627.736(4)(b), and that Defendant's failure to complete its investigation within 30 days is a breach of the contract. Plaintiff further argues that when reading the PIP Statute as a whole, including subsections 4(b), 627.736(4)(i) and 627.736(6)(g), nothing in the PIP Statute allows a carrier to extend the time frame in 4(b) or 4(i) to take an EUO.

III. Defendant's Argument

7. Defendant argues that since the holding in *Amador v. United Auto Ins. Co*., 748 So.2d 307 (Fla. 3rd DCA 1999) [24 Fla. L. Weekly D2437a], the PIP Statute was revised to add 6(g), making appearance at an EUO a condition precedent to receiving benefits, thereby rendering the ruling in *Amador* inapplicable. Defendant further argues that at the time of the revisions to the PIP Statue, legislature was aware of the holding in *Amador*, and yet, there was no timeframe included in 6(g) for the requesting or taking of an EUO, and while the Court is required to read a statute in its entirety, it is not free to add provisions to the statute. The Defendant further argues that pursuant to the Florida Supreme Court's holding in *United Automobile Ins. Co. v. Rodriguez*, the Defendant's failure to pay PIP benefits within 30 days does not forever bar the Defendant from contesting the claim but instead exposes the Defendant to the sanctions outlined in the PIP Statute—that is, interest and attorney's fees when payment becomes overdue.

IV. Conclusions of Law

8. At the outset, the Court notes that there was no record evidence filed, by way of testimony or an Affidavit, indicating that Austin did not receive Defendant's EUO notices or that Austin had a reasonable explanation for not attending the scheduled EUOs. Therefore, the Court finds that there are no genuine issues of facts regarding Austin's failure to appear for an EUO.

9. Concerning the crux of the parties' competing Motions for Summary Judgment, the Court agrees with the Defendant, that while *Amador* is still good law, it is no longer applicable to the claim at hand as Fla. Stat. 627.736(6)(g) was added post *Amador*, making appearance at an EUO, a condition precedent to receiving PIP benefits.

10. No timeframe to take an EUO was added when the PIP Statute was amended post *Amador*. Nonetheless, the Plaintiff is asking this Court to read a 30-day limitation into the statute in which Defendant can request an EUO or forever be barred from denying the claim for the failure to appear for an EUO. However, this Court is without power to diverge from the intent the legislature expressed in the plain language of the statute. *Allstate v. Holy Cross Hospital*, 961 So.2d 328 (Fla. 2007) [32 Fla. L. Weekly S453a]; *Oceans Breeze Chiropractic of Plantation (aao Jonathan Pierre) v. State Farm Mutual Ins. Co*., 28 Fla. L. Weekly Supp. 85a (Broward Cty. Ct., February 20, 2020). While the Court is required to read statutes in their entirety, the Court is not free to add provisions to parts of a statute under the guise of such a reading. *Id.*

11. Furthermore, the Florida Supreme Court, in interpreting Fla. Stat. 627.736(4)(b) in *United Automobile Ins. Co. v. Rodriguez*, 808 So.2d 82 (Fla. 2001) [26 Fla. L. Weekly S747a] held that the insurer's failure to pay PIP benefits within thirty days after receiving written notice of a covered loss does not forever bar it from contesting a claim. Additionally, the Court found that statutory sanctions, including interest and attorney's fees, are the *only* penalties approved by the legislature once payment becomes overdue. *Id.* at 87 (emphasis added).

12. Moreover, in *January v. State Farm Mut. Ins. Co.,* 838 So. 2d 604 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D484a], the Court found that a PIP insurer is given "thirty days to investigate and to either pay the claim or discover the facts that warrant a refusal to pay. If it does not do so, then the claim is overdue and the statutory penalties for failing to pay the claim timely (interest and fees) are due. If the insurer fails to pay the claim, electing either to refuse the claim or to continue investigating, it is not barred from contesting the claims, but must pay the penalties once its duty to pay the claim is established." *Id*. at 607.

13. Finally, several cases have addressed this exact issue and found that an insurer that schedules an EUO to occur more than 30 days after receipt of the provider's bills is not barred from contesting the claim based on the claimant's failure to appear for an EUO but is instead liable for interest and/or attorney's fees once the claim is overdue. *Caribbean Rehabilitation Center, Inc. aao Reynier Cordoves v. State Farm Mutual Auto Ins. Co.*, 24 Fla. L. Weekly Supp. 844a (Fla. 11th Jud. Cir. 2016)(aff'd per curiam); *Fidel S Goldson DC PA a/a/o Cecilia Williams-Brown v. State Farm Mut. Auto. Ins. Co.*, 27 Fla. L. Weekly Supp. 418a (Broward Cty., June 1, 2019); *Gonzalez Med Ctr aao Madelayne Interian v. Infinity Auto Ins. Co.*, 25 Fla. L. Weekly Supp. 1039a (Miami Dade Cty, Feb 5, 2018); *Atlantic Coast Orthopedics, LLC, a/a/o Jermain Neil v. State Farm Mut. Auto. Ins. Co.*, 23 Fla. L. Weekly Supp. 881a (Broward Cty., January 29, 2016).

14. Reading the post *Amador* revisions of the PIP Statute in conjunction with case law, the Court cannot read in a 30-day time limit, as requested by Plaintiff, into Fla. Stat. 627.736(6)(g).

15. The Court finds that Defendant is not barred from denying or contesting the PIP claim for Austin's failure to appear for an EUO, regardless of whether the EUO was requested over 30 days from receipt of the Plaintiff's bills. The only penalties Defendant is subject to for failing to pay a claim within 30 days once the duty to pay the claim is established, are those penalties outlined in the PIP Statute including interest and attorney fees.

16. The record evidence is undisputed that Austin failed to appear for an EUO, thereby failing to comply with a statutory and contractual condition precedent to receiving PIP benefits. Therefore, neither Austin nor the Plaintiff as the assignee, are entitled to PIP benefits from Defendant.

17. Accordingly, the Defendant's Motion for Final Summary Judgment is hereby **GRANTED** and Plaintiff's Motion for Final Summary Judgment is hereby **DENIED**.

18. It is further **ORDERED** that Plaintiff takes nothing by this action. The Court reserves jurisdiction to determine entitlement to attorney fees and cost.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Where charge submitted was less than 200% of Medicare fee schedule amount, insurer was required to reimburse medical provider for 80% of 200% of fee schedule amount, not 80% of billed amount

PATH MEDICAL, LLC., Plaintiff, v. OHIO SECURITY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO20007269, Division 62. March 11, 2021. Terri-Ann Miller, Judge. Counsel: Vincent Rutigliano, Rosenberg & Rosenberg, P.A., Hollywood, for Plaintiff. Jorge Galavis, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON COUNT II OF PLAINTIFF'S STATEMENT OF CLAIM

This cause having come before the Court on Plaintiff's Motion for Summary Judgement on Count II of Plaintiff's Statement of Claim, the Court having heard argument of the parties, and being otherwise advised in the premises it is hereby ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Judgment is granted for the reasons set forth below.

The claimant was involved in an automobile accident on August 22, 2016. The claimant was entitled to personal injury protection insurance from the Defendant. The Defendant contends that their policy specifically elected the schedule of maximum charges as provided in Florida Statute 627.736(5)(a)1. The Plaintiff does not contest the Defendant's position that the at-issue policy elected the schedule of maximum charges as provided in Florida Statute 627.736(5)(a)1 for paying related and necessary bills.

The Plaintiff provided medical services to the claimant and billed the Defendant for those services. The Defendant admitted the services were related and necessary. The Defendant further admitted that under the instant policy "reasonableness" was not a factor as all bills deemed related and necessary are paid based upon the fee schedule as provided by Florida Statute 627.736.

The issue presented in Plaintiff's motion related to the reimbursement of CPT L0642. The Plaintiff billed L0642 in the amount of $750.00 which was less than 200% of Medicare Part B Durable Medical Equipment Prosthetics / Orthotics and Supplies Fee Schedule ($788.02). The Defendant reimbursed said code based upon 80% of the billed amount. The Plaintiff contends that the Defendant, having adopted the fee schedule provided by Florida Statute 627.736 was required to reimburse L0642 at 80% of 200% of Medicare Part B Durable Medical Equipment Prosthetics / Orthotics and Supplies Fee Schedule. The Defendant contended that they were able to reimburse L0642 based upon 80% of the billed amount.

This Court is bound by *Geico Ind. Co. v. Accident & Injury Clinic a/a/o Frank Irizarry,* 290 So.3d 980 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D3045b]. The *Irizarry* court in answering the certified question "Does the plain language of the PIP statute preclude an insurer from limiting its reimbursement to 80% of the total billed amount when the amount billed is less than the statutory fee schedule?" held that "as for payment of the charges, the statute authorizes insurers to limit reimbursement to 80% of an amount fixed through a fee schedule, see 627.736(5)(a)1.a-f" and that "80% of the fee schedule" is "the required amount an insurer must pay" if the insurer elected the fee schedule method. *Id.* The Fifth District held that the only exception is when a provider's charge is less than 80% of 200% of the Medicare fee schedule amount. *Id*.

For the reasons set forth herein, Plaintiff's Motion for Summary Judgment is Granted. The Court finds that the Defendant, having adopted the fee schedule, was required to reimburse L0642 based upon 80% of 200% of Medicare Part B Durable Medical Equipment Prosthetics / Orthotics and Supplies Fee Schedule. Paying 80% of the billed amount was an impermissible underpayment. The Plaintiff is directed to submit a proposed Final Judgment consistent with this ruling.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Declaratory action—Motion to dismiss count of complaint seeking declaration as to whether PIP policy unambiguously elects use of statutory fee schedule method of reimbursement and application of Multiple Procedure Payment Reduction and, if so, how those elections may be applied is denied

TOTAL HEALTH CHIROPRACTIC, LLC a/a/o Joan Bankasingh, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO 20-006084 (61). February 22, 2021. Corey Cawthon, Judge. Counsel: Vincent J. Rutigliano, Rosenberg & Rosenberg, P.A., Hollywood, for Plaintiff. Eric M. Polsky, Andrews Biernacki Davis, Miami, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND/OR STRIKE COUNT II OF PLAINTIFF'S COMPLAINT FOR DECLARATORY JUDGMENT

THIS CAUSE having come before the Court on February 10, 2021 for hearing on Defendant's Motion to Dismiss and/or Strike Count II of Plaintiff's Complaint for Declaratory Judgment, and the Court having reviewed the Motions and the relevant portions of the Court file; heard argument of counsel; reviewed relevant legal authorities; and being otherwise sufficiently advised in the premises, finds as follows:

BACKGROUND

1. This case arises out of a claim for Personal Injury Protection ("PIP") benefits where Plaintiff has filed a multi-count Complaint. Count I is a claim for breach of contract, and Count II is a claim for declaratory action.

2. Count II of Plaintiff's Complaint seeks declaratory judgment, alleging that Plaintiff is uncertain as to **(1)** whether the policy of insurance at issue clearly and unambiguously adopted the permissive fee schedule under Fla. Stat. 627.736(5)(a)(1) for the reimbursement of medical charges, and if the policy did clearly and unambiguously adopt the fee schedule, whether the Defendant is permitted to reimburse charges that were made at less than 200% of the Medicare Part B Physician fee schedule at anything less than the amount of the charge in light of the language of the subject policy of insurance and Fla. Stat. 627.736(5)(a)(5); **and (2)** whether the policy of insurance at issue clearly and unambiguously adopted the Multiple Procedure Payment Reduction for the reimbursement of medical charges, and if the policy did clearly and unambiguously adopt the Multiple Procedure Payment Reduction, whether this may be used to limit the reimbursement of chiropractors.

3. Defendant seeks to have this Court dismiss Plaintiff's Count II asserting that Count II of Plaintiff's Complaint contains conclusory allegations, which are inadequate to state a cause of action. Defendant states that Plaintiff has failed to allege sufficient facts to show there was a doubt concerning some ambiguous contractual provision requiring the Court's interpretation.

ANALYSIS & OPINION

4. When reviewing a motion to dismiss, the Court must view the complaint in the light most favorable to Plaintiff; further, the Court is limited to the facts alleged within the four corners of the Complaint. *Minor v. Brunetti,* 43 So.3d 178, 179 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2013a]; *Swerdlin v. Fla. Mun. Ins. Trust,* 162 So.3d 96, 97 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D2164c].

5. In determining the sufficiency of a complaint for declaratory judgment, the question is whether the plaintiff is entitled to a declaration of rights, not whether the plaintiff will prevail in obtaining the

decree he or she seeks. *Smith v. City of Ft. Myers,* 898 So.2d 1177, 1178 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D902a].

6. Further, it is clear after a review of *Higgins v. State Farm Fire and Casualty Company,* 894 So.2d 5 (Fla. 2005) [29 Fla. L. Weekly S533a], and the cases that follow, that the Florida Supreme Court has receded from the strict application of declaratory actions described in the case of *Columbia Casualty Co. v. Zimmerman,* 62 So.2d 338 (Fla. 1952) and that actions for declaratory relief are to be liberally allowed. In *Higgins,* the Florida Supreme Court held:

> We conclude that it is illogical and unfair to not allow insureds and insurers to have a determination as to whether coverage exists on the basis of the facts underlying a claim against an insurance policy. Why should an insured be placed in a position of having to have a substantial judgment against the insured without knowing whether there is coverage from a policy? Why should an insurer be placed in a position of either paying what it believes to be an uncovered claim or being in jeopardy of a bad faith judgment for failure to pay a claim? These are precisely the issues recognized by this Court in other contexts that are intended to come within the purpose of the declaratory judgment statute's "relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations." *Coalition for Adequacy & Fairness in School Funding Inc. v. Chiles,* 680 So.2d 400, 404 (Fla. 1996) [21 Fla. L. Weekly S271a]. We agree with what Chief Justice Pariente stated as a judge of the Fourth District Court of Appeal, in *Britamco Underwriters, Inc. v. Central Jersey Investments, Inc.,* 632 So.2d 138, 141 (Fla. 4th DCA 1994):
>
> Generally, an insurance carrier should be entitled to an expeditious resolution of coverage where there are no significant, countervailing considerations. A prompt determination of coverage potentially benefits the insured, the insurer and the injured party. If coverage is promptly determined, an insurance carrier is able to make an intelligent judgment on whether to settle the claim. If the insurer is precluded from having a good faith issue of coverage expeditiously determined, this interferes with early settlement of claims. The plaintiff certainly benefits from a resolution of coverage in favor of the insured. On the other hand, if coverage does not exist, the plaintiff may choose to cut losses by not continuing to litigate against a defendant who lacks insurance coverage.
>
> We therefore answer the certified question in the affirmative, hold that the declaratory judgment statutes authorize declaratory judgments in respect to insurance policy indemnity coverage and defense obligations in cases in which it is necessary to resolve issues of fact in order to decide the declaratory judgment action, and recede from *Columbia Casualty* to the extent that it is inconsistent with this holding.

7. The Defendant references several cases in its Motion to Dismiss and Notice of Filing in Support of its Motion to Dismiss, including *Cruz v. Union General Insurance Company,* 586 So.2d 1991 (Fla. 3d DCA 1991). However, based on the case law cited and provided by both Plaintiff and Defendant, this Court believes that Plaintiff's question of fact and its application to the policy as set forth in Count II of Plaintiff's Complaint falls within the meaning of *Higgins.*

8. Next, this Court must determine whether all the elements of a declaratory action exist before Plaintiff may proceed under Chapter 86, which governs declaratory judgments under Florida law. To be entitled to declaratory relief, a party must show that the claim satisfies the following elements:

> a. There is a bona fide, actual, present practical need for the declaration;
>
> b. The declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts;
>
> c. That some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts;
>
> d. That there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law;
>
> e. That the antagonistic and adverse interest are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

Northwest Center for Integrative Medicine & Rehabilitation, Inc. and Randy Rosenberg, D.C., P.A. v. State Farm Mutual Automobile Insurance Co., 214 So.3d 679 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D446b], citing to *Bartsch v. Costello,* 170 So.3d 83, 88 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1414a] (quoting *Olive v. Maas,* 811 So.2d 644, 657-58 (Fla. 2002) [27 Fla. L. Weekly S139a]).

9. Based on the four corners of the Complaint, Plaintiff has met all criteria required for the filing of a declaratory judgment action and stated a viable cause of action for declaratory relief under Count II of Plaintiff's Complaint. *Barbado v. Green & Murphy, P.A.,* 758 So.2d 1173 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1084a] (holding "[a] motion to dismiss tests the legal sufficiency of the complaint" and "[a] court may not go beyond the four corners of the complaint in considering the legal sufficiency of the allegations").

10. Based on the foregoing, this Court will allow the declaratory action to proceed.

Accordingly, it is hereby **ORDERED AND ADJUDGED:**

1. Defendant's Motion to Dismiss and/or Strike Count II of Plaintiff's Complaint for Declaratory Judgment is hereby **DENIED.**

2. Defendant shall have thirty (30) days from the date of this Order to file an answer to Count II of Plaintiff's Complaint.

* * *

Criminal law—Discovery—Medical records—Investigative subpoena—Where hospital and fire rescue service records are directly related to ongoing criminal investigation, state has met burden to establish that records are likely to contain relevant information regarding charge—Failure of officer to obtain legal blood draw after being notified by hospital personnel that defendant had blood alcohol level in excess of legal limit does not preclude state from later seeking subpoena for hospital records—State's request for subpoena is granted

STATE OF FLORIDA, Plaintiff, v. DONALD JAMES SPURLOCK, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 052020CT049710AXXXXX. March 18, 2021. Thomas J. Brown, Judge. Counsel: Ben Fox, Assistant State Attorney, State Attorney's Office, Viera, for State. Steven G. Casanova, Melbourne, for Defendant.

ORDER AUTHORIZING STATE TO ISSUE SUBPOENA DUCES TECUM FOR DEFENDANT'S MEDICAL RECORDS

THIS CAUSE having come on to be heard on March 9, 2021 on the State's Motion for Issuance of a Subpoena Duces Tecum, and the Court being fully apprised in the premises, hereby finds as follows:

1. By letter dated November 2, 2020, the State sent notice to Defendant of its intent to subpoena Defendant's medical records from Holmes Regional Medical Center and Brevard County Fire Rescue for treatment provided on July 23, 2020. The notice also attached a copy of the proposed subpoenas. Defendant, through counsel, lodged a timely objection. Thereafter, on November 10, 2020, the State filed the instant motion, seeking to obtain Defendant's medical records via subpoena after notice, pursuant to section 395.3025(4)(d), Florida Statutes.

2. A hearing on the State's motion was initially scheduled for January 5, 2021; however, at that time, the parties agreed to postpone the scheduled hearing in order for the parties to resolve a factual issue. The hearing was subsequently rescheduled for March 9, 2021.

3. At the hearing on said motion, without objection, the State presented the probable cause affidavit of Trooper Lopez. The

affidavit reflected the following pertinent facts:

a. Per witness statements provided to Trooper Lopez, multiple other drivers observed Defendant's Jeep Commander driving northbound erratically on Interstate 95. The Jeep was seen initially driving at a low rate of speed and driving across all lanes and then it accelerated to a high rate of speed. At that point, the Jeep struck the rear end of a Volkswagen Jetta that was also traveling northbound. The collision pushed the Jetta into another lane where it was struck by another vehicle. Defendant's Jeep then continued in a northwesterly direction and sideswiped a median guardrail, then went off the road towards the tree line and overturned twice, until coming to final rest by the tree line.

b. Trooper Lopez observed heavy damage to the rear-end of the Jetta and heavy front-end damage to Defendant's Jeep. Trooper Lopez also observed two open alcoholic containers in the Jeep.

c. Defendant was identified on scene by a deputy via Defendant's D.A.V.I.D photo and was subsequently transported to Holmes Regional Medical Center for his injuries.

d. Although Trooper Lopez did not make contact with the Defendant on scene, he was subsequently able to identify Defendant with information provided by paramedics who were on scene and also based on his own visual observations that were matched to a D.A.V.I.D. search.

e. At Holmes Regional Medical Center, hospital staff spontaneously advised Trooper Lopez that Defendant's blood ethanol level was 280 mg/dL.[1]

f. Thereafter, Defendant refused to provide a sample of his blood (i.e., "legal blood") to Trooper Lopez, even after being read implied consent warnings.

4. In *Hunter v. State,* 639 So.2d 72 (Fla. 5th DCA 1994), the Fifth District Court of Appeal established that the state attorney may use an investigative subpoena to compel disclosure of a patient's medical records, but the patient must first be given notice and an opportunity to object before the subpoena is issued. The Court explained that medical records contain "personal and potentially embarrassing information" and that "Florida's constitution has a very strict prohibition against government intrusion into the private lives of its citizens and, by implication, their medical records." 639 So.2d at 74, citing Art. I, § 23, Fla. Const. Accordingly, "[t]his invasion of a patient's privacy can only occur after the court finds a compelling state interest and that the information is relevant." *Id.* As subsequently explained in *State v. Rivers,* 787 So. 2d 952, 953 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D1512a], "a compelling state interest . . . exists where there is a reasonable founded suspicion that the materials contain information relevant to an ongoing criminal investigation."

5. Based on the probable cause affidavit introduced into evidence at the hearing, this Court finds that the State has met its burden in establishing a compelling state interest because it has shown that there is a reasonable founded suspicion that the records it is seeking are relevant to an ongoing criminal investigation.

6. At the hearing, Defendant did not dispute that the State has met the required burden. Instead, Defendant argued that the State was not lawfully entitled to subpoena the Defendant's medical records based on his interpretation of section 316.1932(1)(f)2.b. This provision states:

> Notwithstanding any provision of law pertaining to the confidentiality of hospital records or other medical records, if a health care provider, who is providing medical care in a health care facility to a person injured in a motor vehicle crash, becomes aware, as a result of any blood test performed in the course of that medical treatment, that the person's blood-alcohol level meets or exceeds the blood-alcohol level specified in s. 316.193(1)(b), the health care provider may notify any law enforcement officer or law enforcement agency. Any such notice must be given within a reasonable time after the health care provider receives the test result. *Any such notice shall be used only for the purpose of providing the law enforcement officer with reasonable cause to request the withdrawal of a blood sample pursuant to this section.*

(Emphasis added).

7. The Defendant argued that the sentence highlighted above limits the options available to the State to simply requesting withdrawal of a blood sample under implied consent (i.e., "legal blood"); and that in this case, "they didn't do that—they did not get legal blood." The Defendant argued further that by attempting to obtain records of Defendant's medical blood, the State is trying to "double dip."[2]

8. The State disagreed with the Defendant's interpretation of the above-quoted statute. The State argued that: (a) the highlighted sentence in the statute was likely intended to prevent law enforcement, once having received notice of a DUI suspect's high medical blood alcohol result, from subsequently obtaining the medical blood records on their own; and (b) this provision would not preclude the State Attorney's Office from utilizing section 395.3025(4)(d) to obtain a defendant's medical records after proper notice.

9. The State specifically relied on section 316.1932(1)(f)2.a. which provides, in pertinent part, that "the failure of a law enforcement officer to request the withdrawal of blood does not affect the admissibility of a test of blood withdrawn for medical purposes."

10. The State also relied on *Rivers, supra,* where the State was allowed to seek a DUI defendant's medical records despite already having obtained the defendant's legal blood. *See, Rivers, supra, at* 787 So. 2d 954 ("The fact that the State had other incriminating evidence against Rivers was not a proper basis to prevent execution and issuance of the investigative subpoena.").

11. This Court agrees with the State. The Court finds that the above-quoted statute was designed to simply clarify that a health care provider is authorized to notify law enforcement agencies of the unlawful blood alcohol content of a person injured in a motor vehicle crash that the provider is treating, despite the otherwise confidential nature of medical records. The Court finds also that while the statute provides a justification to allow the officer to obtain legal blood at that time, it does not act as a prohibition on the State at a later time to subpoena medical records after notice pursuant to section 395.3025(4)(d). *See, State v. Kutik,* 914 So.2d 484, 489 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2534b] (a police officer inexplicably failed to obtain a legal blood draw from Kutik when the officer had the opportunity to do so; instead, the officer later unlawfully obtained the defendant's medical blood result from the hospital by using an improper police form designed to authorize a legal blood draw; the Court explained that "having failed to obtain a blood draw, [Officer] Demeulenaere should have contacted the state attorney to obtain a subpoena for Kutik's medical records after notice to Kutik's attorney.").

12. The Court also finds that the statute does not act as a prohibition on the State's ability to seek medical blood whether the law enforcement officer obtained legal blood or did not obtain legal blood.

13. The Court acknowledges that the instant situation—in which Trooper Lopez *attempted* to obtain legal blood from Defendant but was unable to do so (because Defendant refused to provide a blood sample even after he was advised of implied consent warnings)—does not fit squarely within the scenario in *Rivers* (where the police actually *obtained* legal blood) nor within the scenario contemplated in section 316.1932(1)(f)2.a. (which only addresses an officer's failure to *request* legal blood). Nevertheless, the scenarios are analogous to what occurred herein.

14. Further, contrary to the Defendant's argument, the instant situation does not amount to "double dipping." Nothing in the implied consent statutes prohibits the State from obtaining a patient's medical

blood results merely because the patient refused a legal blood draw. *See, e.g., Commonwealth v. Hipp,* 551 A.2d 1086, 1093 (Pa. Super. 1988) (trial court properly admitted evidence of defendant's refusal to submit to blood alcohol test requested by law enforcement officer *and* results of medical blood alcohol test; Court stated: "[W]e find that the refusal to submit to the blood alcohol test as requested by the officer has no bearing upon the admissibility of the results of the medical purposes blood alcohol test"); *State v. Johnston,* 779 P.2d 556, 557-558 (N.M. App. 1989) (finding that admission of medical blood results was proper despite the fact that legal blood results had already been suppressed, stating: "Nothing in the Implied Consent Act suggests any legislative antipathy to taking and testing blood samples of drivers for purely medical reasons, nor does anything in the Act indicate that the legislature would consider it somehow unfair to use the results of such tests in a prosecution of the driver.").

15. The Court has also reviewed the State's proposed subpoenas and finds them to be in proper form and narrowly tailored in scope to limit the expected records to relevant documents only. In particular, the proposed subpoena to Holmes Regional Medical Center requests only lab reports pertaining to blood alcohol or controlled substances, any written observations by medical personnel of Defendant's impairment by alcohol or controlled substances, and any statements by Defendant regarding driving or consumption of alcohol or controlled substances.

Accordingly, as the State has met its burden of establishing a reasonable founded suspicion that the records sought are relevant to an ongoing criminal investigation, and as there is no lawful basis to prevent the issuance of the State's proposed subpoenas, it is hereby

ORDERED and ADJUDGED that the State is authorized to serve the proposed subpoenas on Holmes Regional Medical Center and on Brevard County Fire Rescue for treatment that occurred on July 23, 2020.

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[1]The affidavit itself was arguably ambiguous as to whether the hospital staff's disclosure of the Defendant's blood ethanol level was done spontaneously, as opposed to at Trooper Lopez's request. Accordingly, the parties decided to postpone the original hearing in order to resolve this factual issue. The prosecutor and defense counsel thereafter spoke to Trooper Lopez and each counsel concluded that the disclosure was made spontaneously.

[2]The Defendant also briefly suggested that HIPAA should preclude the State from obtaining these normally confidential records. However, HIPAA does not apply to the instant scenario. *See, State v. Carter,* 23 So.3d 798, 800-01 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D2466a] ("Covered entities" under HIPPA "do not include law enforcement officers or prosecutors, and the conduct of these officials is not governed by HIPAA;" moreover, HIPAA permits disclosures "as otherwise required by law" ***or*** "[i]n compliance with . . . an authorized investigative demand."). (Emphasis by the Court).

* * *

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MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Bar associations and organizations—Judge may not be a member of a voluntary bar association that endorses a particular candidate for appointment to public office

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2021-1. Date of Issue: March 8, 2021.

ISSUE

Whether it is permissible for a judge to be a member of a voluntary bar association that endorses a particular candidate for appointment to public office.

ANSWER: No.

FACTS

The inquiring judge serves as a member of a voluntary bar association. The judge was approached by a federal prosecutor seeking to have the judge approach the leadership of the voluntary bar association to obtain the bar association's endorsement of a particular attorney for appointment as U. S. Attorney. The inquiring judge is fully aware of this Committee's Opinion No. 01-15, which provides that a judge may not maintain membership in a voluntary bar association that endorses judicial candidates during an election but seeks guidance on whether the opinion applies equally to candidates for appointed office.

DISCUSSION

Canon 7A(1)(b) provides: "[A] judge or a candidate for election or appointment to judicial office shall not publicly endorse or publicly oppose another candidate for public office." This Committee in Fla. JEAC Op. 01-15 [8 Fla. L. Weekly Supp. 803a] interpreted this provision as not allowing judges to publicly endorse candidates for election, and that a judge's membership in a voluntary bar association that endorses judicial candidates is proscribed by the Code of Judicial Conduct.

Although judges are allowed to encourage lawyers to apply for judicial vacancies and communicate with selection and appointing authorities about judicial candidates, publicly doing so is proscribed.

Canon 2B provides, in pertinent part: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others." The commentary to Canon 2B provides that although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. The commentary further provides that judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship. *See also* Canon 7 (regarding use of judge's name in political activities). However, neither the Code, nor its commentary, allows for *public* endorsements of candidates for public office, judicial or otherwise. (Emphasis added.)

> [J]udges may communicate with a Judicial Nominating Committee in writing with succinct, factual statements or observations concerning the qualifications of the applicants in accordance with the standard provisions of letters of recommendation addressed in the Commentary to Canon 2B and the September 29, 1994 Opinion of the Supreme Court in *In Re: Code of Judicial Conduct,* 643 So. 2d 1037 (Fla. 1994).

Fla. JEAC Op. 95-24 [3 Fla. L. Weekly Supp. 458a]; *See also* Fla. JEAC Op. 94-08 [2 Fla. L. Weekly Supp. 274b] (stating judges prohibited from endorsing a judicial candidate).

A judge may provide unsolicited information to a Judicial Nominating Commission about a person whose application is pending before that commission. However, any judge wishing to do so must be mindful of Canon 2B which provides, "a judge shall not lend the prestige of judicial office to advance the private interests of the judge or others. . . ." Accordingly, the Committee believes any judge who decides to encourage or solicit a lawyer to apply for a judicial vacancy should take reasonable steps toward assuring that such conversation remain private. Fla. JEAC Op. 96-23.

In Fla. JEAC Op. 88-01, this Committee determined that a judge may communicate a factual, even handed, succinct, *discreet* statement in support of, or in opposition to a person whose appointment is pending before the governor. (Emphasis added.)

Pursuant to Canon 7A(1)(b) a judge is not allowed to *publicly* endorse or *publicly* oppose another candidate for public office. (Emphasis added.) The Canon does not distinguish between elected office or appointed office. As such, the Committee determines that a judge may not maintain a membership in a voluntary bar association that endorses a candidate for political office, whether elected or appointed.

REFERENCES

In Re: Code of Judicial Conduct, 643 So. 2d 1037 (Fla. 1994)
Fla. Code Jud. Conduct, Canon 2B, 7, 7A(1)(b)
Fla. JEAC Op. 01-15, 96-23, 95-24, 94-08, 88-01

* * *

Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Bar associations and organizations—Magistrate, judge, and hearing officer can continue to serve on the board of an organization on which there is a lawyer who is a partner in a firm that regularly appears before the magistrate on child support cases

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2021-2. Date of Issue: March 8, 2021.

ISSUE

May a magistrate, judge and hearing officer continue to serve on the board of an organization given that there is a lawyer on the board who is a partner in a firm that regularly appears before the magistrate on child support cases?

ANSWER: Yes.

FACTS

The inquiring child support judicial hearing officer presides over child support cases where a governmental office has contracted-out its legal work to a private law firm. Attorneys from this law firm represent the governmental office on almost all child support cases that come before the judicial hearing officer.

The judicial hearing officer was invited to serve on the board of an organization that utilizes education, research, and advocacy to improve the lives of children and families. The organization will not appear before the judicial hearing officer or be engaged in any adversarial proceedings in the circuit where the judicial hearing officer presides. However, one of the board members is a managing partner at the law firm who has the contract to provide legal representation for the governmental agency.

The managing partner does not appear before the judicial hearing officer but other lawyers in the firm regularly appear before the judicial hearing officer. One of those lawyers is the spouse of the board member/managing partner who is also a partner in the same law firm. The managing partner reviews cases and offers supervisory

guidance to the spouse/attorneys that come before the judicial hearing officer. The judicial hearing officer on occasion may communicate with the managing partner regarding processes and procedures on scheduling hearings.

The judicial hearing officer inquires as to whether they may continue to serve on the board of the organization under these circumstances where there is an attorney on the board who is a partner in a firm that regularly appears before them.

DISCUSSION

The definitions portion of the Code of Judicial Conduct defines "judge" as follows: *When used herein this term means Article V, Florida Constitution judges and, where applicable, those persons performing judicial functions under the direction or supervision of an Article V judge.* General magistrates clearly fall within this definition. As such, the term "judge" utilized throughout this opinion shall include general magistrates.

The Code of Judicial Conduct does not speak directly to this inquiry. However, the following canons are implicated:

Canon 2 of the Florida Code of Judicial Conduct is titled *"A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities*."

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."*

The commentary to Canon 2 describes the test for appearance of impropriety as "*whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired*."

Canon 3E(1) requires a judge to disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply. We have issued a number of opinions on this issue and these opinions turn on the particular facts of each inquiry.

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;* or *(5) lead to frequent disqualification of the judge.*

Canon 5C specifically permits a judge to serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal, sororal or civic organization. The Supreme Court amended the Code of Judicial Conduct and its Commentary to encourage judges to participate in extrajudicial community activities. *Code of Judicial Conduct*, 840 So. 2d 1023 (Fla. 2003) [28 Fla. L. Weekly S150a]. Thus, the Code of Judicial Conduct permits and encourages appropriate community service by judges. The Code restricts a judge from such service if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be engaged frequently in adversary proceedings in the court of which the judge is a member. Canon 5C(3)(a). Although there is no indication that the organization at issue would come before the magistrate judge and create such a conflict, a fellow board member's law firm and spouse do come before the magistrate on child support cases.

Applying the objective test, the Committee is of the opinion that the general magistrate may continue to serve on the board and would not be required to recuse themselves from presiding over child support cases. This committee has issued a number of opinions on this issue and these opinions turn on the particular facts of each inquiry. *See* Fla. JEAC Op. 2017-21 [25 Fla. L. Weekly Supp. 767a].

The Committee agrees that mere membership on boards where interaction between members is perfunctory, would not require disclosure. However, some organizations and board member interactions may be more active and engaged. In those instances where the relationships and interactions between board members are closer and more involved, several committee members would recommend not only disclosure, but even recusal.

By its terms, Canon 3E(1) requires a judge in these circumstances to make a personal and case specific decision. Therefore, the Committee would advise the inquiring magistrate to make a reasoned determination of whether presiding over the fellow board members cases on a regular basis would cause their impartiality to be questioned. *See* Fla. JEAC Op. 97-12 (*the decision to recuse from cases was a "personal and specific" decision*). In making this decision, *In Re: Frank* gives guidance on the importance of doing all that is reasonably necessary to minimize the appearance of impropriety. Even where it is personally believed one's judgment would not be colored, public perception may differ. *See*, *In Re: Frank*, 753 So. 2d 1228, 1240\ (Fla. 2000) [25 Fla. L. Weekly S147a].

If the inquiring magistrate elects to disclose, the fact that they do so does not automatically require the magistrate to be disqualified upon request by either party, but rather, resolved on a case-by-case basis. *See* Commentary to Florida Code of Judicial Conduct Canon 3E(1). Disclosure will permit the parties to decide whether to file a motion to disqualify the magistrate pursuant to Canon 3E(1); Section 38.10, Florida Statutes; and Florida Rules of General Practice and Judicial Administration 2.330. Or, the disclosure will permit the parties to consider waiving any such disqualification in accordance with Canon 3F.

REFERENCES

Fla. Code Jud. Conduct, Canons 2, 2A; 2B; 3E(1); 3F; 5A; 5C(3)(a)
Fla. JEAC Ops. 92-39, 97-12, 12-09, 12-37, 13-02, 16-04, 17-21.
In Re: Frank, 753 So. 2d 1228, (Fla. 2000)
Code of Judicial Conduct, 840 So. 2d 1023 (Fla. 2003)
Section 38.05, Florida Statues
Section 38.10, Florida Statutes
Fla. R. Gen. Prac. & Jud. Admin. 2.330

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Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Lobbying, activist and advocacy groups—Judge may write published article in support of enacting pending legislation regarding the care and treatment of children in public schools—Judge may not directly contact or lobby legislators in support of non-law related legislation—Judge may not be identified as a judge in the article

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2021-3. Date of Issue: March 24, 2021.

ISSUES

1. May a judge write an advocacy article for publication in support of proposed state legislation prohibiting the use of seclusion and restraints as behavior modification tools for public school students who have autism or are on the autism spectrum?

ANSWER: Yes.

2. May the author be identified as a judge if writing the article is ethically permissible?

ANSWER: No.

FACTS

The judge is the parent of a child on the autism spectrum. The judge and the judge's spouse belong to a parent support group for parents with children on the spectrum. The group is proposing legislation to prohibit the use of seclusion and restraints for behavior modification of these children in public schools, and such legislation is now being considered. The group has asked the judge to write an advocacy article for a Florida publication and the judge would like to do so, if ethically permissible. The judge further inquires whether it would be permissible to sign the article or otherwise be identified in the publication as a judge. The judge would do all things necessary to writing the article only when off duty and doing so will not otherwise interfere with the performance of judicial duties.

DISCUSSION

1. As the inquiring judge noted when contacting the Judicial Ethics Advisory Committee ("JEAC"), the Florida Code of Judicial Conduct does not directly address this topic. Generally speaking, Canon 5B encourages judges to speak and write concerning non-legal topics, subject to the requirements of the Code. The first such requirements are found in Canon 5A which provides, in part, that the judge's extra-judicial activities must 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; [or] . . . (5) lead to frequent disqualification of the judge. . . ." Based upon the information provided by the inquiring judge, the JEAC does not see how writing the above-described article would run afoul of any of the foregoing restrictions.

The JEAC has in the past found it acceptable for judges to be "mere members" and even legislation committee members of groups that engage in lobbying for legislation related to non-legal topics. *See* Fla. JEAC Ops. 01-13 [8 Fla. L. Weekly Supp. 663a]; 97-19. However, in each instance, the inquiring judge was not personally involved in such lobbying efforts. Canon 5C(1) restricts a judge's freedom to engage in lobbying, by stating that:

> A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

Thus, if the judge were to be engaged in lobbying or otherwise directly contacting legislators, on behalf of the parent group, to encourage the passage of the proposed non-law related legislation, such conduct would clearly be prohibited. However, there is no suggestion that the judge intends to do anything more than write an advocacy article and our advice is limited to that specific intention.

In Fla. JEAC Op. 04-32 [11 Fla. L. Weekly Supp. 943a], the JEAC found that it was acceptable for a judge, serving in a leadership position of a non-profit community organization, to publish an open letter inviting community leaders, both individuals and organizations, to attend an "action" meeting to discuss issues concerning race relations within the community with the goal of reaching consensus on various topics and deciding on a plan of action "to improve the community's quality of life by improving race relations." Our inquiring judge's advocacy article will likely be more focused than the judge's letter in Op. 04-32 that called more generally for community leaders to attend a meeting so that issues could be raised and solutions offered. However, the similarities between the article and the open letter seem to outweigh their differences. In both, the judge/author intended to make conditions better for certain members of the community, which in turn would hopefully improve the entire community's quality of life. We remind the inquiring judge to abide by the cautionary admonitions set forth in the opinions and Canons we have cited above to ensure that good intentions do not lead to cast doubt on the judge's impartiality.

2. The judge inquired if the judge could be identified as "Judge NAME" or "The Honorable NAME." The answer to that is clear: No. "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others . . . ." Fla. Code Jud. Conduct, Canon 2B. In Fla. JEAC Op. 07-07 [14 Fla. L. Weekly Supp. 693a], our conclusion that it would be improper for a judge, identified as a judge, wearing a judicial robe to appear on billboards, TV spots, mailers, and websites as part of a public relations campaign conducted by a county library system, was based in part on the application of Canon 2B. Signing the advocacy article or being identified in the publication as a judge does nothing more than lend the prestige of the judicial office to advance the interests of the parents group and their children. While that may not be the judge's intention, we find that under these circumstances, it would be prohibited.

REFERENCES

Fla. Code Jud. Conduct, Canons 2B, 5A, 5B, 5C(1)
Fla. JEAC Ops. 07-07, 04-32, 01-13, 97-19

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