Volume 29, Number 11, March 31, 2022

FLW SUPPLEMENT

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Pages 747-780

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

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

SUMMARIES

Summaries of selected opinions or orders published in this issue.

- **INSURANCE—AUTOMOBILE—WINDSHIELD REPAIR—BAD FAITH ACTION—DISCOVERY—CLAIMS FILE—SCOPE OF DISCOVERY. A county court judge ruled that the plaintiff in a first-party bad faith action against an insurer was entitled to discovery of relevant documents contained in the insurer's claim file for a period of time prior to the filing of the bad faith complaint, including materials that were in the claims file during the litigation of the underlying claim for breach of contract.** *BROWARD INSURANCE RECOVERY CENTER, LLC v. PROGRESSIVE SELECT INSURANCE COMPANY. County Court, Seventeenth Judicial Circuit in and for Broward County. Filed January 3, 2022. Full Text at County Courts Section, page 775b.*

- **INSURANCE—PROPERTY—POST-LOSS BENEFITS—ASSIGNMENT. Section 627.7152 governing post-loss assignment of benefits for residential or commercial property losses does not apply retroactively to a policy that predates the effective date of the statute. Moreover, the assignment at issue, which stated the service provided was not meant to protect, repair, restore, or replace damaged property or mitigate against further damage, does not fit the statutory definition of "assignment agreement" contained in section 627.7152.** *AIR QUALITY ASSESSORS OF FLORIDA v. FIRST PROTECTIVE INSURANCE COMPANY. County Court, Seventeenth Judicial Circuit in and for Broward County. Filed December 13, 2021. Full Text at County Courts Section, page 777a.*

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FLW SUPPLEMENT

CASES REPORTED.

FLW Supplement includes reports of decisions of Florida circuit and county courts, and miscellaneous reports of the proceedings of other public agencies. Sections are divided as follows:

CIRCUIT COURT - APPELLATE	Opinions in those cases in which circuit courts were reviewing decisions of county courts or administrative agencies.
CIRCUIT COURT - ORIGINAL	Opinions in those cases in which circuit courts were acting as trial courts.
COUNTY COURTS	County court opinions.
MISCELLANEOUS	Other proceedings.

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M	Miscellaneous Reports

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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Driving under influence—Breath test—Substantial compliance with administrative rules—Twenty-minute observation period—No merit to argument that twenty-minute observation period was not valid where breath test operator did not specifically pass responsibility for observation of licensee to arresting officer—Hearing officer's finding that arresting officer properly observed licensee during observation period is supported by body cam footage showing that officer observed licensee for entire period—Petition for writ of certiorari is denied

NATHAN SIPLE, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for Volusia County. Case No. 2021-30870 CICI. September 20, 2021. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(LEAH R. CASE, J.) **THIS MATTER** is before the Court upon Petitioner's petition for writ of certiorari, filed by and through counsel, on June 29, 2021. The Court having considered the petition, and the court file, and being otherwise fully advised in the premises finds as follows:

ANALYSIS AND CONCLUSION

In reviewing an administrative agency decision, the Court must consider: "[(i)] whether procedural due process was accorded to the parties; [(ii)] whether the essential requirements of law were observed; and [(iii)] whether the administrative findings and judgment are supported by competent substantial evidence." *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982).

"The required 'departure from the essential requirements of law' means something far beyond legal error." *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 527-528 (Fla. 1995) [20 Fla. L. Weekly S318a] (citing *Jones v. State,* 477 So. 2d 566, 569 (Fla.1985) (Boyd, C.J., concurring specially)). "Competent substantial evidence" has been defined as "evidence in the record that supports a reasonable foundation for the conclusion reached." *Dep't of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a].

In the instant petition, Petitioner asserts that the twenty (20) minute observation period (the observation period) prior to Petitioner's breath test was not properly observed, tainting any evidence obtained as a result of the breath test, and that the hearing officer failed to observe essential requirements of law when rendering their decision. Additionally, Petitioner asserts that the hearing officer failed to support their determination with competent substantial evidence that the officers involved substantially complied with the observation period before administering the breath test. Petitioner's assertions are refuted by the record and as a matter of law.

Petitioner concedes that procedural due process was accorded to the parties. As a result, the Court will provide its ruling for prongs (ii) and (iii) of *Vaillant.*

Petitioner asserts that the hearing officer failed to observe essential requirements of law, when rendering their decision. Further, Petitioner asserts that the breath test should be excluded from evidence and his license suspension lifted as the evidence in the record does not establish that Petitioner was properly observed for the twenty (20) minute period prior to the administration of the breath test. Specifically, Petitioner cites to *State v. Chaya,* arguing that the breath test operator must "clearly communicate[ ] and note[ ]" that the arresting officer would be handling the observation period as Petitioner states that *Chaya* requires a strict recording of a communication establishing the delegation between the breath test operator and another listed individual. *See* 29 Fla. L. Weekly Supp. 134a (7th Judicial Circuit 2021).

To the extent that Petitioner argues that *Chaya* is controlling, the Court disagrees. 'While we understand the trial court's desire to maintain uniformity within the county court, we note that decisions of one county court are not binding precedent on another county court because '*[t]rial court's do not create precedent*.' " *State v. Riley,* 698 So. 2d 374, 376 n. 1 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D1999b] (quoting *State v. Bamber,* 592 So. 2d 1129, 1132 (Fla. 2d DCA 1991)). " 'The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.' " *Advisory Opinion To The Governor Re: Implementation Of Amendment 4, The Voting Restoration Amendment,* 288 So. 3d 1070, 1078 (Fla. 2020) [45 Fla. L. Weekly S10a] (demonstrating that courts should adhere to the supremacy-of-text principle); *see also* § 775.021(1), Fla. Stat. (2021); Art. V § 21, Fla. Const. The plain language of Florida Administrative Code 11D-8.007(3) provides that "***The breath test operator, agency inspector, arresting officer, OR person designated by the permit holder*** shall reasonably ensure that the subject has not taken anything by mouth or has not regurgitated for at least twenty (20) minutes before administering the test." (emphasis added). There is no requirement that the permit holder must pass their responsibility of observation to any specifically listed individual. *Id.* In fact, the arresting officer is one listed individual that may observe the subject of the breath test, without being designated by the permit holder. *Id.* Thus, the Court finds that the hearing officer observed essential requirements of law when rendering their decision.

Additionally, the Florida Administrative Code provides the following language for the proper observation of a subject prior to the administration of a breath test:

> ***The breath test operator, agency inspector, arresting officer, OR person designated by the permit holder*** shall reasonably ensure that the subject has not taken anything by mouth or has not regurgitated for at least twenty (20) minutes before administering the test. This provision shall not be construed to otherwise require an additional twenty (20) minute observation period before the administering of a subsequent sample.

11D-8.007(3) (emphasis added). Petitioner concedes that the body cam footage shows that both Officer Morris, and the breath test operator observed Petitioner for a combined twenty (20) minutes. In fact, the hearing officer stated in their decision that they reviewed the body cam footage of both Officer Morris and the breath test operator, and found that Officer Morris properly observed Petitioner for the entire observation period, prior to the administration of the breath test. *See* Petitioner's Petition for Writ of Certiorari Exhibit A. As a result, the Court finds that there is competent substantial evidence to support the hearing officer's finding that Officer Morris properly observed Petitioner during the observation period, prior to the administration of the breath test. *See Vaillant,* 419 So. 2d at 626. Moreover, the Court finds that competent substantial evidence supports the hearing officer's decision to deny the motion to suppress the breath test. *See id.* Therefore, Petitioner's petition for writ of certiorari is **DENIED**.

RULING

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

1. Petitioner's petition for writ of certiorari is **DENIED**; and
2. The hearing officer's decision is **AFFIRMED**.

* * *

Licensing—Driver's license—Permanent revocation—Fourth DUI conviction—Licensee's deferred prosecution for DUI charge constitutes conviction for purposes revocation of driving privilege for fourth DUI conviction—License revocation based on four out-of-state convictions was proper

THOMAS D. PIERCE, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for St. Johns County. Case No. CA20-606, Division 59. January 3, 2022. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(KENNETH JAMES JANESK, II, J.) Petitioner Thomas Pierce seeks review of the Order of Revocation issued by the Florida Department of Highway Safety and Motor Vehicles ("the Department") permanently revoking his driving privilege. This Court, having considered the briefs of the parties, finds as follows:[1]

Statement of Case

Petitioner's license was permanently revoked pursuant to section Fla. Stat. §322.28(2)(d), which provides in pertinent part that "[t]he court shall permanently revoke the driver license or driving privilege of a person who has been convicted four times for violation of s. 316.193." Petitioner's Florida driver record (R.A. 1) demonstrates that he received dispositions of "guilty" of driving under the influence (DUI) on five occasions: four times from 1977 to 1981 and once in 2020. All five DUIs occurred in the state of Indiana, though Petitioner possessed a Florida license as of 2017. (R.A. 1); (R.A. 2). Regarding Petitioner's most recent DUI—offense date 18 March 2018, disposition date March 3, 2020—his driver record describes the offense as follows:

> DRIVING UNDER THE INFLUENCE DISPOSITION WAS GUILTY
>
> Due to Petitioner's DUI "conviction" dated March 3, 2020, the Department issued an Order of Revocation, which permanently revoked his driving privilege. The basis for the permanent revocation is stated in the driving record as follows:
>
> 4 OR MORE DUIS
> REVOCATION IS A RESULT OF VIOLATION NUMBERS 2, 3, 4, 5, 25
> DHSMV ACTION

The violation numbers all correspond to entries on the driver record providing "Disposition was Guilty" with regards to a charge of DUI. The record indicates that the Department input Petitioner's March 3, 2020 offense (Violation Number 25) on his driver record due to its receipt of an Abstract of Court Record from the Indiana Bureau of Motor Vehicles. The Abstract of Court Record provides that Petitioner was charged with the offense of Operating While Intoxicated pursuant to Ind. Code Section 9-30-5-2(a)(b), and that the court finding in this matter was "Deferred (Under Ind. Code Section 12-23-5-2)."

In the instant Petition, Petitioner argues that the aforementioned deferred prosecution does not qualify as a conviction sufficient to trigger permanent revocation of his driving privilege.

Jurisdiction

Pursuant to Fla. Stat. §322.31, Petitioner seeks review of the Department's 30 April 2020 Order of Revocation. This Court has jurisdiction to consider the Petition for Writ of Certiorari, pursuant to Rule 9.030(c)(3), Florida Rules of Appellate Procedure.

Standard of Review

Certiorari review permits the circuit court to review the Department's order only to determine (1) whether procedural due process has been accorded, (2) whether the essential requirements of the law have been observed, and (3) whether the administrative findings and judgment are supported by competent, substantial evidence. *Vichich v. Dep't of Highway Safety & Motor Vehicles,* 799 So. 2d 1069, 1073 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D2290a]. The record before the circuit court includes only the materials furnished to and reviewed by the lower tribunal in advance of the administrative action to be reviewed by the court. *Id.* Review of whether an agency's decision is supported by competent substantial evidence is limited to a determination of whether there is evidentiary support for the agency's decision, and whether the record also contains competent substantial evidence that would support some other result is irrelevant. *Dusseau v. Metropolitan Dade County Bd. Of County Com'rs,* 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a].

Analysis

Petitioner's license was permanently revoked pursuant to section 322.28(2)(d), Florida Statutes, which provides in pertinent part that "[t]he court shall permanently revoke the driver license or driving privilege of a person who has been convicted four times for violation of s. 316.193." The statute further provides that if a court does not do so, then "the department shall permanently revoke the driver license or driving privilege pursuant to this paragraph." *Id.* Additionally, the statute specifies that "a conviction of driving under the influence, driving while intoxicated, driving with an unlawful blood-alcohol level, or any other similar alcohol-related or drug-related traffic offense outside this state is considered a conviction for the purposes of this paragraph." *Id.* Pursuant to section 322.24, Florida Statutes, the Department is authorized to revoke the license of any resident of this state upon receiving notice of the conviction of such person in another state which, if committed in this state, would be grounds for revocation. Such action may be taken without a preliminary hearing, based solely upon a showing of the Department's records that the person "[h]as committed an offense in another state which, if committed in this state, would be grounds for suspension or revocation." § 322.27(1)(e), Fla. Stat.

Petitioner asserts that his Indiana deferred prosecution does not qualify as a conviction sufficient to trigger permanent revocation of his driving privilege. Respondent does not dispute that the criminal case in Indiana resulted in a deferral pursuant to Indiana law. However, Respondent disagrees with Petitioner's assertion that this deferral means that he has not been "convicted" within the meaning of the statute. As discussed *infra,* Respondent argues that "conviction" is a chameleon-like term which draws meaning from its statutory context. *Raulerson v. State,* 763 So. 2d 285, 290 (Fla. 2000) [25 Fla. L. Weekly S542a] (holding that in certain contexts, adjudications withheld will count as convictions for the purposes of designating a driver a habitual traffic offender). After reviewing the petition, response, applicable statutory provisions, and relevant case law, the Court finds that competent, substantial evidence exists that the Petitioner has received the four DUI convictions necessary to support the revocation of his driving privilege.

As indicated *supra,* the dispositive issue before the Court is whether the aforementioned deferred prosecution constitutes a "conviction" within the meaning of section 322.28(2)(d), Florida Statutes. For purposes of Ch. 322, a "conviction" is defined as follows:

> "Conviction" means a conviction of an offense relating to the operation of motor vehicles on highways which is a violation of this chapter or any other such law of this state or any other state, including an admission or determination of a noncriminal traffic infraction pursuant to s. 318.14, or a judicial disposition of an offense committed under any federal law substantially conforming to the aforesaid state statutory provisions.

§ 322.01(11)(a), Fla. Stat.

In *Raulerson,* the Florida Supreme Court held that in the absence of more specific statutory language to the contrary, the definition of "conviction" found in section 322.01(11)(a) was broad enough to encompass a disposition of "adjudication withheld." 763 So. 2d at 291-92. For instance, section 318.14(11), Florida Statutes, by contrast, explicitly provides that with regards to non-criminal traffic infractions, "[i]f adjudication is withheld for any person charged or cited under this section, such action is not a conviction." The court observed that such language would have been superfluous if the plain meaning of the word "conviction" already excluded withheld adjudications, and further observed that the definition of "conviction" under Ch. 322 focuses on "whether an offense was committed and not on the judicial decision of whether to impose or withhold adjudication." *Id.* at 293-94.[2] The court additionally reasoned that this broad interpretation of the word "conviction" is consistent with the legislative intent expressly declared in section 322.263, Florida Statutes as follows:

> It is declared to be the legislative intent to:
>
> (1) Provide maximum safety for all persons who travel or otherwise use the public highways of the state.
>
> (2) Deny the privilege of operating motor vehicles on public highways to persons who, by their conduct and record, have demonstrated their indifference for the safety and welfare of others and their disrespect for the laws of the state and the orders of the state courts and administrative agencies.
>
> (3) Discourage repetition of criminal action by individuals against the peace and dignity of the state, its political subdivisions, and its municipalities and impose increased and added deprivation of the privilege of operating motor vehicles upon habitual offenders who have been convicted repeatedly of violations of traffic laws.

§ 322.263, Fla. Stat.

The Court finds the foregoing analysis delineated by the Florida Supreme Court in *Raulerson* to be highly persuasive. Additionally, the Court is guided by section 322.42, Florida Statutes, which provides that Ch. 322 must "be liberally construed to the end that the greatest force and effect be given to its provisions for the promotion of public safety."[3] After considering the definitional provisions of Ch. 322, the opinion of the Florida Supreme Court in *Raulerson,* and the clearly expressed legislative intent set forth in section 322.42, the Court finds that Petitioner's Indiana deferred prosecution constitutes a conviction under section 322.28.

Further informing the Court's decision is the fact that Florida law does not authorize courts to withhold adjudication of guilt for DUI offenses. *See* § 316.656, Fla. Stat.[4] However, Florida law treats dismissed charges as a result of enrollment in rehabilitation programs as convictions. *See e.g., Freeman v. Dep't of Highway Safety & Motor Vehicles,* 23 Fla. L. Weekly Supp. 222a (Fla. 20th Cir. Ct. July 28, 2015). By contrast, Indiana law permits withholding adjudication of guilt for DUI offenses. According to the report of conviction from Indiana, Petitioner was charged with the offense of Operating While Intoxicated pursuant to Ind. Code § 9-30-5-2(a)(b). The court finding in this matter was "Deferred (Under Ind. Code § 12-23-5-2)," and § 12-23-5-2 expressly provides that a court may conditionally defer proceedings and order rehabilitation of a defendant in an alcohol and drug services treatment program, as well as impose other appropriate conditions. However, even if a court enters an order conditionally deferring charges, the court is still required to suspend the defendant's driving privileges. Ind. Code § 12-23-5-5.[5]

Finally, the Court observes that Petitioner's revocation was properly predicated on the out of state conviction from Indiana. Under section 322.44, Florida Statutes, also known as the Florida Driver License Compact Act, provisions have been made for an interstate exchange of information as to a variety of matters, including the reporting of motor vehicle related convictions by members of the compact to other compact members. The Driver License Compact mandates that when a conviction is reported by a licensing authority of another state, the licensing authority of the home state is required to give effect to the conduct reported as if the conduct occurred in the home state. Here, the Abstract of Court Record from Indiana for Petitioner's March 18, 2018 offense describes the offense as "Operating While Intoxicated Endangering a Person/MA" with the notation "A20." (R.A. 2). A20 is the code used by the U.S. Department of Transportation in its violations exchange code and represents the offense of "[d]riving under the influence of alcohol or drugs." *See* 23 C.F.R. § Pt. 1327, App. A. Pursuant to Article IV of the Driver License Compact, the state of Florida was required to rely upon the report of conviction from Indiana and give the same effect to the conduct reported as if such conduct had occurred in Florida, Petitioner's home state. Upon receiving the report from the Indiana Bureau of Motor Vehicles, the Department was required to take appropriate action in suspending or revoking the Petitioner's license as though the offense occurred in this state. Due to Petitioner's four prior DUI convictions, permanent revocation of his license was mandated pursuant to section 322.28(2)(d), Florida Statutes based upon his most recent DUI offense.

Based upon the foregoing analysis, the Court finds no legal basis for quashing the Department's Order of Revocation.

Accordingly, it is:

ORDERED AND ADJUDGED that:

1. The Petition for Writ of Certiorari is hereby **DENIED.**

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[1]The Department's "Appendix to Response to Petition for Writ of Certiorari" consists of a certified copy of Petitioner's driver record as well as an Abstract of Court Record from the Indiana Bureau of Motor Vehicles. Petitioner's "Appendix" consists of a copy of the Order of Revocation which also contains 2 of 4 pages of his Florida driver record, as well as a blog article containing a general description of Conditional Deferment for Drunk Driving Offenses used in "some counties" in Indiana.

[2]Here, Petitioner does not dispute that the fourth offense was committed.

[3]Because driver license revocations are considered public safety measures rather than punishment, the rule of lenity, which requires that ambiguity in a criminal statute be construed most favorably to the accused, does not apply in this administrative context. *Dep't of Highway Safety and Motor Vehicles v. Grapski,* 696 So. 2d 950, 951 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1739a].

[4]However, even if a Florida court could lawfully enter an adjudication of withheld, this would still count as a conviction for the purposes of driver license suspensions or revocations. *See Martin v. Dep't of Highway Safety & Motor Vehicles,* 28 Fla. L. Weekly Supp. 25a (Fla. 13th Cir. Ct. Mar. 6, 2020) (holding that notwithstanding the fact that the criminal court entered an illegal sentence of adjudication withheld on a DUI charge, this still qualifies as a conviction that can result in a permanent revocation of the driving privilege).

[5]Additionally, Indiana's definition of "conviction" in the context of DUIs includes not only conviction or judgments, but also includes determination of guilt by a court, even if no sentence is imposed or a sentence is suspended. Ind. Code § 9-13-2-38.

* * *

Municipal corporations—Employees—Termination—Employee waived any objection to city personnel board placing burden of proof on him in appeal of his termination where employee did not contemporaneously object during discussion of burden of proof at board hearing—Board correctly placed burden of proof on employee—No merit to argument that record lacks competent substantial evidence of employee's alleged incompetency, inefficiency, or insubordination—Record reflects that employee received negative performance review, two written reprimands, and paid leave of absence and that employee's work resulted in mistakes

TERRY HENLEY, Petitioner, v. CITY OF NORTH MIAMI, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-248 AP 01. January 22, 2022. On Petition for Writ of Certiorari from the October 2, 2019 decision of the City Manager approving recommendation of the City of North Miami Personnel Board to terminate Petitioner's employment. Counsel: William R. Amlong, Karen Coolman Amlong, and Rani Nair Bolen, Amlong & Amlong, P.A., for Petitioner. Laura K. Wendell, Brett J. Schneider, and Richard Rosengarten, Weiss Serota Helfman Cole & Bierman, P.L. for Respondent.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

OPINION

(SANTOVENIA, J.) The Petition filed by Terry Henley ("Petitioner" or "Henley") contests a September 18, 2018 termination by the City of North Miami ("Respondent" or "City") of Henley's employment as the City's Assistant Budget Director. The notice of termination sets forth the reasons for termination[1] and cites two provisions of the City's Civil Service Rules as the bases for the termination:

> (1)Rule XIII, B.1—That the employee is incompetent or inefficient in the performance of assigned tasks or duties.
>
> (2)Rule XIIII, B.8—That the employee has violated any lawful or official regulation or order, or failed to obey any lawful and reasonable direction given by a supervisor when such violation or failure to obey amounts to insubordination or serious breach of discipline.

Henley appealed the termination to the City's Personnel Board ("Board"). The Board held a hearing on January 23 and 24, 2019, which continued on September 25 and 26, 2019 after an intervening mediation. The Board concluded the hearings by voting unanimously that Henley had not met the burden to overcome his firing for cause and recommended affirming the termination. Henley then appealed the Board's decision to City Manager Larry Spring, who affirmed the decision.

STANDARD OF REVIEW

The Court's review is limited to a determination of: "[1] whether procedural due process is accorded,[2] [2] whether the essential requirements of the law have been observed, and [3] whether the administrative findings and judgment are supported by competent substantial evidence." *Broward Cty. v. G.B.V. Int'l, Ltd.,* 787 So. 2d 838, 843 (Fla. 2001) [26 Fla. L. Weekly S463a] (citing *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982)).

Essential Requirements of Law

In *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 527 (Fla. 1995) [20 Fla. L. Weekly S318a], the Supreme Court stated that "applied the correct law" is synonymous with "observing the essential requirements of law." Further, to warrant relief, there must be "an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice." *Id.* (citation omitted).

The Board vote addressed whether or not Mr. Henley met his burden to overcome a firing for cause. Petitioner contends that the Board departed from the essential requirements of law by improperly shifting the burden of proof to him to show that he was fired for cause.

The City correctly maintains that Henley waived any objection to the burden of proof being placed on him because he did not contemporaneously object at the conclusion of the Board's public hearings on September 26, 2019. Henley had several opportunities to object at the end of the hearing. The discussion of "burden" was mentioned at least twelve times[3] by Board members and the City attorney in the closing discussion.

"In order for an error to be raised on appeal, it must be preserved by contemporaneous objection, or be fundamental in nature." *Mora v. State,* 964 So. 2d 881, 883 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D2320a]. *See also Robins v. Colombo,* 253 So. 3d 94, 97 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1821a]; *Ludeca, Inc. v. Alignment and Condition Monitoring, Inc., et al.,* 276 So. 3d 475, 480 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1853a]. "To provide a trial court with the opportunity to correct errors, a timely objection is necessary." *Dorsey v. Reddy,* 931 So. 2d 259, 265 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D1721a] (citation omitted). The Board, at the conclusion of the hearing, deliberated on the burden of proof and decided that it rested with the Petitioner. Henley failed to contemporaneously object to the Board's decision that the burden rested with Henley, nor does Petitioner argue that the error was fundamental in nature. Accordingly, Petitioner cannot raise that argument on appeal.[4] *See Doral Health Center, P.A. v. State Farm Mutual Automobile Ins. Co.,* 324 So. 3d 996, 998 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1609a] (citation omitted) ("[i]n order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.").

Even had the issue of the appropriate burden of proof been preserved for review, the Board correctly placed the burden of proof on Henley.

City of North Miami, Florida, Civil Service Rule ("Rule(s)") XIII(A) states:

> Any regular employee in the classified service may be demoted, removed, fined or suspended from an employment by the City Manager or by the head of the department in which employed if so authorized by the City Manager for ***any cause*** which will promote the efficiency of the service. The affected employee must be furnished with a written statement of the reasons therefore within five (5) calendar days from the date of such disciplinary action and be allowed to answer such reasons in writing, which shall be made a part of the personnel records. Such disciplinary action shall be effective the date when a written notice of disciplinary action is furnished the employee.
>
> Any employee in the classified service who deems that he or she has been demoted, removed, fined or suspended without ***just cause*** may, within fourteen (14) calendar days of such action, request in writing a hearing before the Personnel Board to determine the reasonableness of the action. . .

(emphasis added).

Rule XIII, C(8) (Appeal Proceedings) provides:

> The Board shall be free to make its determination of appellant's innocence or guilt in keeping with the public interest, based solely on the Board's reasonable interpretation of all the pertinent information available. The Board shall not be bound by a presumption of the appellant's innocence or guilt; such presumption does not prevail in administrative law. The findings of the Board shall be based on competent substantial evidence before it.

"The general rule is that, apart from statute, the burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal." *Espinoza v. Dep't of Bus. & Pro. Regul.,* 739 So. 2d 1250, 1251 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D1909a]; *Withers v. Metro. Dade Cty.,* 290 So. 2d 573, 574 (Fla. 3d DCA 1974). Here, the party asserting the affirmative of the issue was Henley. Moreover, the Rules are silent on the burden of proof. Accordingly, the Board correctly imposed the burden of proof on Henley.

Competent substantial evidence

Petitioner also argues that the Board's decision is not supported by competent substantial evidence of his alleged incompetency, inefficiency or insubordination. However, the record of the hearing before the Board reflects that Henley was terminated following a negative performance review, two written reprimands, and a paid leave of absence. Furthermore, record evidence supports that Henley's mistakes caused the City to issue corrected tax notices to residents. Moreover, his work on the 2018 and 2019 budget was inadequate. Arthur Sorey, Deputy City Manager discovered significant mistakes in the 2019 budget, which Henley neglected to correct. In addition, Henley ignored requests that he produce an analysis concerning the City's temporary employment contracts. Accordingly, the Board's decision is supported by competent substantial evidence.

In reviewing a decision of an administrative body, a circuit court in its appellate capacity cannot reweigh the evidence where there may

be conflicts in the evidence nor substitute its judgment about what should have been done for that of the administrative body. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 529 (Fla. 1995) [20 Fla. L. Weekly S318a]; *School Bd. of Hillsborough Cty. v. Tenney,* 210 So. 3d 130, 134 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D2149a]; *Dep't of Highway Safety & Motor Vehicles v. Stenmark,* 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a]. *See Dusseau v. Metro. Dade Cty. Bd. of Cty. Comm'rs.,* 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a] (The test is whether there exists any competent substantial evidence to support the decision maker's conclusion, and any evidence which would support a contrary decision is irrelevant.). Accordingly, we decline Petitioners' invitation to reweigh the evidence.

Requested Reversal of Personnel Board Decision

Petitioner requests that the Court grant his Petition with directions that Henley be reinstated because there is allegedly no neutral panel of the Personnel Board to which this cause could be remanded. However, on certiorari review, the Court lacks authority to direct the City to reinstate Henley. *See Broward County v. G.B.V. Intern., Ltd., supra.,* 787 So. 2d at 844 ("The appellate court has no power in exercising its jurisdiction in certiorari to enter a judgment on the merits of the controversy under consideration nor to direct the respondent to enter any particular order or judgment"); *Gulf Oil Realty Co. v. Windhover Ass'n, Inc.,* 403 So. 2d 476, 478 (Fla. 5th DCA 1981) ("[W]hen an appellate court reviews a lower court order, there is a procedural distinction between review by certiorari and review by appeal. On appeal, an appellate court has authority to reverse an order or judgment and remand with directions or instructions for the trial court to follow. However, after review by certiorari, an appellate court can only quash the lower court order; it has no authority to direct the lower court to enter contrary orders.").

For the foregoing reasons, the Petition for Writ of Certiorari is **DENIED**. (TRAWICK and WALSH, JJ., concur.)

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[1]The reasons for termination are stated as:

> You have been given written reprimands on two (2) separate occasions, September 12, 2018 and July 30, 2018, when you were also sent home on Administrative Leave with pay. Over the last year both the manager and I have verbally counseled you on numerous occasions about shortcomings in your performance.
>
> Your lack of preparation and knowledge was evident at both budget hearings this year, as you were unable to advise council members on the location of budgeted items and was (sic) unable to explain items or account numbers when questioned by the council members. We have lost confidence in your ability to perform your job functions as the Assistant Budget Director.

[2]Petitioner does not allege a deprivation of procedural due process.

[3]"Whether or not he has carried the burden of a preponderance of the evidence to overturn being terminated by showing us how he is no—whatever he was terminated for, I think it was incompetent, insubordination, and inefficient?" (Petitioner's Appendix (hereinafter "A.") 0663: 14-19) "Did he carry the burden?" (A. 0665: 9-10) "Did he carry the burden?" (A. 0675:4). "And then you can deal—it might help you with the burden." (A. 0681: 15-16). "At the end of the day, it is his burden to show us that he was not incompetent, that he was not insubordinate." (A. 0683:24-25 and 0684:1). "And I vote that Mr. Henley was fired for cause; or, has not met his burden that he was fired without cause." (A. 0687:18-20). "I believe Mr. Hindmarsh said whether or not he met his burden to overturn." (A. 0689:5-7). "Met his burden." (A. 0689:10). "—met his burden to overturn." (A. 0689:11-12). "I think you need to choose, Mr. Henley failed to meet the burden, or Mr. Henley met the burden, as the question you are calling." (A. 0690:6-9). "So, the question is, Mr. Henley failed to meet his burden of the preponderance of the evidence, to show that he was fired without cause?" (A. 0690:20-23). "—met his burden." (A. 0691:2-3). "The first question we're going to decide, here, tonight is whether or not Mr. Henley met his burden—" (A. 0691:11-13). "I think it's—Madam Attorney, have we answered the question? He failed to carry his burden." (A. 0693:7-9). "So, with that, we've come to a unanimous decision that Mr. Henley has not met his burden." (A. 0693:20-22).

[4]Petitioner also raises a new argument in his reply that the error in shifting the burden of proof cannot be harmless. However, a new argument cannot be made for the first time in a reply brief. *See Rosier v. State,* 276 So. 3d 403, 406 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D1686a]. The *Rosier* court stated that:

> For an appellant to raise an issue properly on appeal, he must raise it in the initial brief. Otherwise, issues not raised in the initial brief are considered waived or abandoned. *See Hall v. State,* 823 So. 2d 757, 763 (Fla. 2002) [27 Fla. L. Weekly S692b] (finding procedurally barred argument made in appellant's reply brief that was not raised in the initial brief), *abrogated on other grounds by Norvil v. State,* 191 So. 3d 406 (Fla. 2016) [41 Fla. L. Weekly S190a]; *City of Miami v. Steckloff,* 111 So. 2d 446, 447 (Fla. 1959) ("An assigned error will be deemed to have been abandoned when it is completely omitted from the briefs."); *J.A.B. Enter. v. Gibbons,* 596 So. 2d 1247, 1250 (Fla. 4th DCA 1992) ("[A]n issue not raised in an initial brief is deemed abandoned and may not be raised for the first time in a reply brief."); Philip J. Padovano, Waiver, 2 Fla. Prac., App. Practice § 8:10 (2017 ed.) ("Failure to pursue the argument on appeal or review is a waiver of the point.").

Id.

* * *

Municipal corporations—Code enforcement—Appeals—Timeliness—Appellate court is not authorized to extend time for filing notice of appeal—Further, tenant lacks standing to contest code violations asserted against owner of leased property

FLORIDA AUTO RESERVE, Appellant, v. TOWN OF MEDLEY, FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2021-43-AP-01. L.T. Case No. ECC2021-0004. January 11, 2022. An Appeal from an Administrative Order of Special Magistrate Rafael E. Suarez-Rivas, Code Compliance Special Magistrate for the Town of Medley. Counsel: Phillip J. Sheehe and Johanna E. Sheehe, Sheehe & Associates, P.A., for Appellant. Laura K. Wendell and Jose L. Arango, Weiss Serota Helfman Cole & Bierman, P.L., for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

ORDER OF DISMISSAL

(TRAWICK, J.) This is an appeal from an administrative order of a special magistrate for code enforcement. The order was rendered on July 13, 2021. A notice of appeal was filed on September 1, 2021. Because the notice of appeal was untimely filed, this Court lacks jurisdiction to entertain the appeal. As a result, this appeal must be dismissed.

Appellant is an automobile dealership which occupies and operates its business at 12450 N.W. South River Drive, Medley, Florida ("the subject property"). Appellant leases this property from its landlord, Alpha Invest of South Florida, LLC ("Alpha Invest"). Due to the alleged failure to pay business taxes for the subject property, a warning notice was issued to Alpha Invest on January 13, 2021, giving them thirty days to obtain a business tax receipt. No warning notice was provided to Appellant. On March 30, 2021, a "Uniform Civil Violation Notice" was issued for the failure to obtain a business tax receipt for the subject property. The notice indicated that a fine of $250 per day would be imposed until the violation was corrected. The record indicates that this notice was sent to Appellant.[1] On July 13, 2021, the alleged violation was brought before a Special Magistrate. The record does not reflect that anyone appeared to contest the violation. In his order, the Special Magistrate noted that the violator, Alpha Invest, had waived their right to a hearing and found that the violation had not been corrected. A fine was imposed on Alpha Invest in the amount of $21,075, and a code compliance lien was entered. A certificate of service attached to the order indicates that the order was provided to Alpha Invest. No mention was made of Appellant either in the order or on the code compliance lien filed with the Town Clerk.

Appellant contends that they were denied due process because they did not receive the notice of violation or a notice of the hearing before the Special Magistrate. They assert that the failure to provide either of these notices was the reason for the late filing of the notice of appeal. They ask that they therefore be allowed to proceed with the appeal, or in the alternative, that the Court allow Appellant to petition the Special Magistrate to vacate and re-enter his order so that the time for filing will begin anew.

Florida Rule of Appellate Procedure 9.190 governs appellate review of administrative actions. Rule 9.190(b)(3) provides that:

> "[review of quasi-judicial decisions of any administrative body, agency, board or commission not subject to the APA shall be commenced by filing a petition for writ of certiorari in accordance with rules 9.100(b) and ((c), unless judicial review by appeal is provided by general law.
>
> §162.11, Florida Statutes, states:
>
> An aggrieved party, including the local governing body, may appeal a final administrative order of an enforcement board to the circuit court. Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the code enforcement board. **An appeal shall be filed within 30 days of the execution of the order to be appealed.**

(Emphasis added).

While Appellant asks this Court to exercise jurisdiction because of an asserted denial of due process, such a request is beyond the power of this Court to grant. Neither trial nor appellate courts in this state are authorized to extend the time for filing notices of appeal, "no matter what reason or method is employed in an attempt to do so." *Congregation Temple De Hirsch of Seattle, Wash. v. Aronson,* 128 So. 2d 585, 586 (Fla. 1961). Similarly, in *Jones v. Jones,* 845 So. 2d 1012, 1013 (5th DCA 2003) [28 Fla. L. Weekly D1254b], the court dismissed an appeal filed more than 30 days after rendition of a judgment, stating: "[j]urisdictional time limits may not be altered by the actions or inactions of the parties or the trial court. . .The trial court was without authority to extend the time to file a motion for rehearing or to file the notice of appeal". Following the same rationale, the court dismissed an appeal as untimely in *Capone v. Florida Board of Regents,* 774 So. 2d 825, 827 (Fla. 4th DCA 2000) [26 Fla. L. Weekly D43a] (concluding that a court's local rules and practices for filing of non-jurisdictional papers cannot usurp the constitutional power of the supreme court's authority to establish the time limit within which appellate review must be sought).

Even if this Court had jurisdiction to consider this appeal, Appellant lacks standing to bring this matter before the Court. Alpha Invest is the owner of the subject property, and the alleged violations were asserted against them. Indeed, Medley Town Code §2-82(a) and (b) specifically state in applicable part:

> The **owner of any real property** in the town shall be responsible for any person or business occupying the premises of **the owner's property**, which shall be done in compliance with the Town Code. . . .
>
> A **property owner** violates this section of the Code if a person or business commits a violation of any section of the Town Code at or on **the owner's property.**

(Emphasis added). Since Appellant was a tenant of the subject property rather than the owner, they were not responsible for the asserted violation. Neither the notice of violation nor the notice of hearing were required to be provided to a non-party. The failure to provide such a notice is thus not properly before this Court. "The right to appeal is available only to those who were parties to the action in the lower tribunal." *Ahlers v. Wilson,* 867 So.2d 524 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D494a]. *See also Bondi v. Tucker,* 93 So. 3d 1106 (Fla. 1st DCA 2012) [37 Fla. L. Weekly D1742a] (a party who suffers an adverse judgment has the right to appeal, but non-parties whose rights have not been adjudicated have no right to appeal); *Stas v. Posada,* 760 So.2d 954 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2023c] (granting motion to dismiss appeal as to non-parties with no ownership interest in the subject property).

Based on the foregoing authorities, we find that this appeal is untimely and must therefore be **DISMISSED.** Furthermore, we conclude that Appellant lacks standing to contest the asserted code violation. (TRAWICK, WALSH and SANTOVENIA, JJ., concur.)

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[1]While Appellant disputes receiving this notice, a U.S. Postal Service Certified Mail Receipt accompanying the notice at Exhibit 4 of the Appendix in the record before this Court lists Appellant as the addressee receiving the notice at the subject property.

* * *

Municipal corporations—Development ordinances—Challenge—Standing—Special injury—Petitioners had standing to challenge city commission's approval of ordinances allowing for redevelopment in waterfront district where redevelopment would result in increased traffic on two-lane avenue that is sole means of access to their property—Any inconsistency between challenged ordinances and prior ordinances disappeared by operation of provisions repealing any conflicting prior ordinances—Argument regarding lack of compatibility of redevelopment with surrounding neighborhood relied on legal authorities regarding rezoned properties whose density or intensity was changed which were inapposite to instant case—Moreover, compatibility issue was not raised before city commission below—Court lacks certiorari jurisdiction to hear challenge to inconsistency of development agreement and amended conceptual plan with comprehensive plan—City commission decision was supported by competent substantial evidence

EASTERN SHORES PROPERTY OWNERS ASSOCIATION, INC., et al., Petitioners, v. CITY OF NORTH MIAMI BEACH and DEZER INTRACOASTAL MALL, LLC, Respondents. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2021-2 AP 01. January 10, 2022. A Petition for Writ of Certiorari from City of North Miami Beach Ordinances 2020-07 and 2020-08 approving the redevelopment of the Intracoastal Mall. Counsel: Eric D. Isicoff, Teresa Ragatz, and Christopher M. Yannuzzi, Isicoff Ragatz, for Petitioners. Hans Ottinot, Ottinot Law, P.A., for Respondent, City of North Miami Beach; Jeffrey S. Bass, Alannah L. Shubrick, Katherine R. Maxwell, and Deana D. Falce, Shubin & Bass, P.A., for Respondent, Dezer Intracoastal Mall, LLC.

(Before TRAWICK, DE LA O, and SANTOVENIA, JJ.)

OPINION

(SANTOVENIA, J.) Petitioner Eastern Shores Property Owners Association, Inc. is a Florida not-for-profit corporation comprised of property owners within the Eastern Shores neighborhood of the City of North Miami Beach ("City"). Individual Petitioners Bruce Kusens, Bruce Lamberto, and Stacy Roskin live within Eastern Shores. (Eastern Shores Property Owners Association, Inc., Kusens, Lamberto and Roskin are collectively the "Petitioners"). Petitioners seek to quash the December 18, 2020 decision of the City Commission which approved Ordinances 2020-07 and 2020-08 (collectively "the Ordinances") for the redevelopment of the Intracoastal Mall located in the Eastern Shores neighborhood.

Factual Background

By enacting Ordinance 2020-07[1], the City Commission through its legislative approval process amended the North Miami Beach Zoning and Land Development Code ("Code") to allow for the redevelopment of the Intracoastal Mall ("Mall"), a mixed-use project. The redevelopment is to occur in accordance with the amended conceptual master plan ("CMP") submitted by Respondent Dezer Intracoastal Mall, LLC ("Developer"). By Ordinance 2020-08[2], the City approved a thirty-year Development Agreement with the Developer which incorporated the amended CMP for the redevelopment of the Mall. The amended CMP is a mixed-use phase redevelopment project consisting of 2,000 multifamily residential units, up to 575,000 square feet of commercial/retail/office space, and a 250-room hotel.

In March of 2015, the Mall, zoned BU-2, General Business District, a commercial zone allowing 16.5 million square feet of non-residential development, 669 residential units and 15 stories, was rezoned by the City to the "Mixed-Use Eastern Waterfront District" (MU/EWF) with amendments to the Comprehensive Plan and the

MU/EWF District zoning regulations adopted by the City. The MU/EWF District increased the allowable building heights up to 40 stories and number of dwelling units to 2,000 residential units, and decreased the commercial use size to 2.5 million square feet of commercial development.

Section 24-58 of the Code governs the development and redevelopment of the MU/EWF District. At issue is the interpretation of Section 24-58.7(O)(2)(e), entitled "Development Approval Conditions of the Code", which states: "[t]he developer shall be required to provide for multiple access points with direct east and west access to and from SR 826 and traffic mitigation such that the development does not burden NE 35th Avenue." Petitioners argue that the Ordinances are noncompliant with section 24-58.7(O)(2)(e) of the Code since NE 35th Avenue will become burdened by traffic resulting from the proposed redevelopment because the Developer failed to "provide for multiple access points with direct east and west access to and from SR 826" as a condition of redevelopment and traffic mitigation.

Standard of Review

When a circuit court in its appellate capacity reviews local governmental administrative action, it must determine: 1) whether procedural due process was accorded[3]; 2) whether the administrative body departed from the essential requirements of the law by applying incorrect law; and 3) whether the administrative body's findings are supported by competent, substantial evidence. *Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles,* 209 So. 3d 1165, 1170 (Fla. 2017) [42 Fla. L. Weekly S85a]; *City of Miami Beach v. Beach Blitz, Co.,* 279 So. 3d 776, 778 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2281a].

Standing

Other than by water, the only way to enter and exit the Eastern Shores neighborhood is by using NE 35th Avenue (a two-lane road) to and from NE 163rd Street/State Road (SR) 826. Petitioners, with the exception of Roskin, have standing[4] as they challenge not only the potential resulting traffic increase, but also argue that the sharing of NE 35th Avenue as the sole means to enter or leave their properties confers a special injury. Consequently, Petitioners have a legally cognizable interest that is adversely affected by the Ordinances. *See Renard v. Dade Cty.,* 261 So. 2d 832, 835-837 (Fla. 1972) ("An aggrieved or adversely affected person having standing to sue is a person who has a legally recognizable interest which is or will be affected by the action of the zoning authority in question. The interest may be one shared in common with a number of other members of the community as where an entire neighborhood is affected. . . An individual having standing must have a definite interest exceeding the general interest in community good share [sic] in common with all citizens").

Essential Requirements of Law

A failure to observe the essential requirements of the law has been held to be synonymous with a failure to apply the correct law. *Fassy v. Crowley,* 884 So. 2d 359, 364 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D2050a]. It is well-established that the City possesses the inherent "power to amend, modify or repeal by ordinance." *Miami-Dade Water & Sewer Auth. v. Metro. Dade Cty.,* 503 So. 2d 1314, 1316 (Fla. 3d DCA 1987). Notably, both Ordinances contain provisions repealing any conflicting prior ordinances. Section 5 of Ordinance 2020-07 specifically states: "[a]ll prior ordinances or resolutions, or parts thereof, in conflict herewith are hereby repealed to the extent of said conflict." Similarly, section 6 of Ordinance 2020-08 specifically states: "[a]ll ordinances or parts of ordinances in conflict therewith be and the same are hereby repealed."

We find no conflict between the Ordinances and section 24-58.7(O)(2)(e) of the Code when harmonized and construed *in pari materia* with the City's controlling regulations. Even assuming *arguendo* that there had been an inconsistency between the prior 2015 ordinance [section 24-58.7(O)(2)(e) of the Code] and the Ordinances, once the Ordinances were approved, any alleged conflict between the Ordinances and section 24-58.7(O)(2)(e) of the Code disappeared by operation of the plain and ordinary meaning of the provisions repealing all inconsistent ordinances. *See Rinker Materials Corp. v. City of North Miami,* 286 So. 2d 552, 553-54 (Fla. 1973); *Matheson v. Miami-Dade Cty.,* 258 So. 3d 516, 521-22 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2428a].

Moreover, the City implicitly declared the meaning of section 24-58.7(O)(2)(e) of the Code in 2015 when it approved the diagrammatic 2015 MU/EWF District Street Regulating Plan which shows the required single traffic access point to NE 163rd Street/SR 826. The declared purpose of a Street Regulating Plan pursuant to section 24-58(G)(2) of the Code is to show: "[t]he location of existing and the required new streets to create the prescribed networking streets within the mixed-use district. This plan also establishes the hierarchy of the streets." Pursuant to section 24-58.7(E)(2) of the Code, the 2015 MU/EWF District Street Regulating Plan shows "the approximate location of existing and required new streets needed to create the prescribed network of streets within the [MU/EWF]." While Petitioners interpret section 24-58.7(O)(2)(e) of the Code as requiring multiple access points directly to and from NE 163rd Street/SR 826, it must be noted that the 2015 MU/EWF District Street Regulating Plan shows only one traffic access point from the subject property to NE 163rd Street/SR 826, which is the same access point in the proposed Street Regulating Plan of the Developer. We find that the MU/EWF District Street Regulating Plan adopted in 2015 that showed only one point of ingress/egress to NE 163rd Street/SR 826 is controlling as to the meaning of section 24-58.7(O)(E)(2) of the Code.

Petitioners also argue a lack of compatibility with the surrounding Eastern Shores neighborhood, relying on legal authorities regarding rezoned properties whose density or intensity was changed. Those legal authorities are inapposite.[5] The City and Developer correctly argue that no resolution was advanced below and that no rezoning occurred regarding the redevelopment of the Mall since the intensity and density were set in the 2015 rezoning of the Mall to the MU-EWF District. Further, during the first and second readings of the Ordinances on September 24, 2020 and October 20, 2020, the issue of lack of compatibility was not considered by the City below.

Furthermore, we lack certiorari jurisdiction to hear Petitioners' comprehensive plan inconsistency challenge to the Development Agreement and amended CMP. *See Parker v. Leon Cty.,* 627 So. 2d 476, 480 (Fla. 1993). Accordingly, we find that the City did not depart from the essential requirements of the law in enacting the Ordinances.

Substantial Competent Evidence

In reviewing a decision of an administrative body, a circuit court in its appellate capacity cannot reweigh the evidence where there may be conflicts in the evidence nor substitute its judgment about what should have been done for that of the administrative body. *School Bd. of Hillsborough Cty. v. Tenney,* 210 So. 3d 130, 134 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D2149a]; *Dep't of Highway Safety & Motor Vehicles v. Stenmark,* 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a].

The record consists in part of the September 24, 2020 City's Staff Report and a traffic study by Kimley-Horn and Associates which shows that NE 35th Avenue will not be overburdened. *See Village of Palmetto Bay v. Palmer Trinity Private Sch., Inc.,* 128 So. 3d 19, 27 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1599c] (a staff report is competent substantial evidence where the staff made a complete review of all applicable review criteria); *City of Hialeah Gardens v.*

Miami-Dade Charter Found., Inc, 857 So. 2d 202, 204-05 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1686a] (staff recommendations can constitute substantial competent evidence). Competent substantial evidence may also be comprised of aerial photographs and maps. *See generally Metro. Dade Cty. v. Blumenthal,* 675 So. 2d 598, 600 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1445c]. Here, the fact-based, competent substantial evidence supporting the City's decision to approve the Ordinances consists of testimony from the City's independent traffic consultant, the Developer's traffic engineer and its architect, as well as maps, aerials, studies, and a hurricane preparedness analysis.

In addition, the issue of whether the Ordinances complied with the traffic multiple access points under the 2015 section 24-58.7(O)(2)(e) Code provision was fully debated before the City below. The City concluded that the "level of service provided to the adjacent roadways with improvements comply [sic] with the level of service outlined in the comprehensive plan transportation element." The City's concurrency and traffic engineering consultants, the Corradino Group, reviewed the Traffic Impact Analysis and the amended CMP and concurred with the analysis provided by Kimley-Horn and Associates. The City's Planning and Zoning Manager recommended approval of the MU/EWF District and MU District zoning text amendments and testified that the Developer is providing multiple access points in the redevelopment of the Mall and that one of them provides the direct east/west access to and from NE 163rd Street/SR 826.

To resolve the traffic, safety, and evacuation concerns of Petitioners and Eastern Shores residents, the City's traffic consultant testified that by adding an additional left turn lane and an additional new signalized intersection at NE 36th Avenue, the requirement of section 24-58.7(O)(2)(e) will be satisfied. The access options were constrained by 1) the proximity of the Mall to the state park; 2) the "bridge raised roadway"; 3) the protections to the state park in the Comprehensive Plan; 4) whether a second access point on NE 163rd Street/SR 826 would fit or whether it would be aligned with the existing roadway; and 5) the geometry relating to access configuration to maintain appropriate speed.

As to the Texas U-Turn advocated by the Petitioners to resolve the traffic, safety, and evacuation concerns, in 2016, the Texas U-Turn's feasibility and environmental impact was studied, and it was rejected because of environmental concerns regarding the state park and protected areas. Based on the Staff Report analyzing the Comprehensive Plan, the Texas U-Turn or a Fly-a-Way was not a feasible solution due to environmental conditions and a right-of-way issue. Nonetheless, the Conservation Element of the Comprehensive Plan would prohibit both.

The Staff Report found that the redevelopment of the Mall satisfied the objective measures for transportation concurrency with the conditions of approval. The proposed development plan provided for less commercial intensity than permitted in 2015. All future phases of the redevelopment project will provide a site plan that will also be evaluated against the requirements of the Comprehensive Plan and Code. Petitioners argue that the City's Staff Report misrepresented the NMB Comprehensive Plan-Future Land Use Element (FLUE) - Policy 1.8.7 (Policy 1.8.7) content in its report because the issue of multiple access points pursuant to Policy 1.8.7 was merely a listed topic to be discussed in a pre-application meeting. Therefore, Petitioners argue no inconsistency exists between section 24-58.7(O)(2)(e) of the Code and Policy 1.8.7 as alluded to in the Staff Report. We decline Petitioners' invitation to reweigh the Staff Report as evidence. *See Dusseau v. Metro. Dade Cty. Bd. of Cty. Comm'rs.,* 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a] ("The test is whether there exists any competent substantial evidence to support the decision maker's conclusion; and any evidence which would support a contrary decision is irrelevant.")

Finally, the Community Development Director testified extensively below and recommended approval. The Community Development Director testified that the roadway improvements provide direct east and west access to and from NE 163rd Street/SR 826 and that the redevelopment of the Mall's safety and design features will undergo further review and final approval by the Florida Department of Transportation.

Based on our review of the extensive appellate record, we find that the City's decision to approve the Ordinances concerning the redevelopment of the Mall was supported by substantial competent evidence.

Accordingly, for the foregoing reasons, the Petition for Writ of Certiorari is **DENIED**. (TRAWICK and DE LA O, JJ., concur.)

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[1]Ordinance 2020-07 amends Chapter XXIV, Zoning and Land Development Code, Article V Zoning Use Districts, section 24-58 MU District of the City's Code; updates regulations to the mixed-use district, section 24-58.7 MU/EWF District; and provides for and updates regulations and regulating plans to allow for the redevelopment of the Intracoastal Mall. The zoning code amendments address improvements to the site configuration and pedestrian and vehicular circulation.

[2]Ordinance 2020-08 approved the Development Agreement between Developer and City for the mixed-use project on 29.8 acres under section 24-214 of the City's Code in the MU/EWF District and approved an amended CMP for phase development to surround the harbor with waterfront cafes, restaurants, shops, residential uses, retail uses, a playground, a dog park, public space, park space and a community center.

[3]The Petition does not allege a deprivation of due process, but argues only that the City departed from the essential requirements of the law and that the City's findings are not supported by competent substantial evidence.

[4]Petitioner Stacy Roskin lacks standing as she failed to appear in any of the proceedings below. *See Edwards v. CIT Bank, N.A.,* 306 So. 3d 217, 219 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1405a].

[5]Neither of the Ordinances grants a change in zoning as the Mall remains zoned MU/EWF District. The City and Developer correctly argue that Petitioners' reliance on the Allapattah Trilogy, *i.e., Allapattah Community Ass'n, Inc. of Florida v. City of Miami,* 379 So. 2d 387, 388 (Fla. 3d DCA 1980); *Auerbach v. City of Miami,* 929 So. 3d 693, 695 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1432a] and *Alvey v. City of North Miami Beach,* 206 So. 3d 67, 74 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1028a] is misplaced, because unlike in the Allapattah Trilogy where the resolutions changed the zoning from residential to commercial, no rezoning of the subject property occurred here since the zoning of MU/EWF District remains the same as in 2015. The Ordinances approved the redevelopment with the same uses, density, and height previously approved in 2015 while the amount of commercial development intensity was reduced by 75% by moving the taller buildings to the waterfront and away from single family residences.

* * *

MARIA ELENA VACA, Plaintiff, v. CITY OF FORT LAUDERDALE, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE21016445, Division AP. December 29, 2021.

FINAL ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon its Court's Sua Sponte Order Show Cause, filed November 18, 2021, directing Appellant to file an Initial Brief and Appendix within thirty (30) days in accordance with Florida Rules of Appellate Procedure 9.200, 9.210 and 9.220. Alternatively, Appellant was directed to show cause why this appeal should not be dismissed. This Order stated that a failure to comply could result in dismissal of this proceeding. As of the date of this Order, Appellant has filed to file and Initial Brief or response to the Order to Show Cause.

Accordingly, after due consideration and for the above-stated reasons, it is hereby **ORDERED**, as follows:

1. This Appellate proceeding is **DISMISSED**; and
3. The Clerk of Court is **DIRECTED** to close this case.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Although hearing officer did not provide explanation for how time discrepancy in documents was resolved, competent substantial evidence supported finding that arrest preceded request to submit to breath test, and reviewing court must defer to that finding—Affidavit of refusal is not required to be submitted on Department of Highway Safety and Motor Vehicles form—All that is required is that affidavit state that test was requested, implied consent warnings were given, and licensee refused to submit

EUGENE HARLOW, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 18th Judicial Circuit (Appellate) in and for Brevard County. Case No. 05-2021-AP-011014-XXXX-XX. September 24, 2021. Counsel: Keeley R. Karatinos, for Petitioner. Mark L. Mason, Assistant General Counsel, and Roberto Castillo, DHSMV, Tallahassee, for Respondent.

(PER CURIAM.) Although there was no explanation of how the hearing officer resolved the time discrepancies in the documentation, the Court may not reweigh evidence, and is limited to determining whether the evidence supports the hearing officer's application of the law. *See Dep't of Highway Safety & Motor Vehicles v. Stenmark,* 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a], *citing State, Dep't of Highway Safety & Motor Vehicles v. Porter,* 791 So. 2d 32, 35 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D1161a]. The Court finds there is competent substantial evidence to support the hearing officer's application of the law.

Further, section 322.2615(2), Fla. Stat., does not mandate the filing of an affidavit of refusal on a form provided by the Department. It requires only that an affidavit stating the breath, blood, or urine test was requested by a law enforcement officer, implied consent warnings were given, and that the person arrested refused to submit. *See Dep't of Highway Safety & Motor Vehicles v. Perry,* 751 So. 2d 1277, 1280 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D669a].

Based upon the foregoing, the First Amended Petition for Writ of Certiorari is **DENIED**. (**TAYLOR and MCKIBBEN, JJ., concur with PAULK, J., concurring specially with opinion.**)

(**PAULK, J., concurring specially.**) I completely agree with the Court's opinion; I write only to further explain my reasoning for this agreement. It is an interesting and complex issue of when and how much a court should write in making a ruling. In this case, while sitting in an appellate capacity, with arguments alleging discrepancies in the record and the lower tribunal's failure to address same, the undersigned believes greater explanation is warranted.

This cause came to be reviewed upon Petitioner Eugene Harlow's First Amended Petition for Writ of Certiorari. Petitioner seeks review of the suspension of a commercial driver's license entered by Respondent following a hearing held on December 2, 2020. Relief is sought on three grounds. Petitioner asserts there is not competent substantial evidence on two key issues: 1) conflicts in the documents lead to material discrepancies on the timing of the implied consent warning, thus the warning was given before the arrest; and 2) the documents do not establish that a CDL appropriate consent warning was given. Petitioner also asserts that the Department failed to fully address his arguments, and this is a departure from the essential requirements of law.

This Court has jurisdiction to review the decision of the Department hearing officer under Section 322.31, Florida Statutes and Rule 9.030(c)(1)(C), Florida Rules of Appellate Procedure.

A circuit court conducting first-tier certiorari review of an administrative decision is limited to determining (1) whether due process was accorded, (2) whether the essential requirements of the law were observed, and (3) whether the administrative findings and judgment were supported by competent, substantial evidence. *Nader v. Fla. Dep't of Highway Safety & Motor Vehicles,* 87 So. 3d 712, 723 (Fla. 2012) [37 Fla. L. Weekly S130a] (quoting *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. "The competent, substantial evidence standard requires the circuit court to defer to the hearing officer's findings of fact, unless there is no competent evidence of any substance, in light of the record as a whole, that supports the findings." *Department of Highway Safety and Motor Vehicles v. Hirtzel,* 163 So. 3d 527, 529 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D552a] (internal citations omitted).

In closely reviewing the record before the hearing officer, if you pick and choose amongst the times stated in the various documents you can create a time discrepancy and then argue the warning occurred after the arrest. However, the narrative in the case report is consistent with the narrative in the sworn probable cause affidavit that the implied consent was given *after* arrest. On this material issue the documents agree and are internally consistent—they are not "hopelessly in conflict," as the documents were in both *Department of Highway Safety and Motor Vehicles v. Trimble,* 821 So. 2d 1084 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a] and *Department of Highway Safety and Motor Vehicles v. Colling,* 178 So. 3d 2 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1195b]. Although the hearing officer did not address the (alleged) discrepancies in the documentation, the Court may not reweigh evidence, and is limited to determining whether the evidence supports the hearing officer's application of the law. *See Dep't of Highway Safety & Motor Vehicles v. Stenmark,* 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a], *citing State, Dep't of Highway Safety & Motor Vehicles v. Porter,* 791 So. 2d 32, 35 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D1161a].

Similarly, the documents contain the required affidavit averring that the implied consent warning was given. Section 322.2615(2), Fla. Stat., does not mandate the filing of an affidavit of refusal on a form provided by the Department. It requires only that an affidavit stating the breath, blood, or urine test was requested by a law enforcement officer, implied consent warnings were given, and that the person arrested refused to submit. *See Dep't of Highway Safety & Motor Vehicles v. Perry,* 751 So. 2d 1277, 1280 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D669a].

The Court finds there is competent substantial evidence to support the hearing officer's application of the law.

Finally, the Department did rule on all matters put before it. In this context, failure to give a detailed finding is not a departure from the essential requirements of law. See *Emley v. Dep't of Highway Safety & Motor Vehicles,* 13 Fla. L. Weekly Supp. 1037a (Fla. 6th Cir. Ct. July 13, 2006); *State, Dep't of Highway Safety & Motor Vehicles v. Porter,* 791 So. 2d 32, 35 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D1161a].

It is for these reasons that I concur in denying the First Amended Petition for Writ of Certiorari.

* * *

Licensing—Driver's license—Business purposes only license—Denial—Petition for writ of certiorari challenging denial of BPO license dismissed without prejudice to filing amended petition where petition does not allege that procedural due process was not accorded, that Department of Highway Safety and Motor Vehicles failed to observe essential requirements of law, or that findings and judgment are not supported by competent substantial evidence

DUANE ALAN GWIZDALA, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, BUREAU OF DRIVER IMPROVEMENT, Respondent. Circuit Court, 20th Judicial Circuit (Appellate) in and for Lee County, Civil Action. Case No. 21-CA-4678. October 8, 2021. Counsel: Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DISMISSING PETITION FOR WRIT OF CERTIORARI

(JAMES SHENKO, J.) **THIS CAUSE** comes before the Court on Petitioner's "Petition for Writ of Certiorari," filed August 12, 2021, pursuant to Florida Statute §322.2615(13) and Florida Rule of Appellate Procedure 9.030(c)(3). Having reviewed the petition, the record provided and attached to the petition, and the applicable law, and upon due consideration, the Court finds as follows:

1. Petitioner is challenging a "Final Admisnistrative Order disallowing a Business Purpose Only Driver's License (BPO)." Petition, p. 1.

2. Generally, the applicable standard of review by a circuit court of an administrative agency decision is limited to: (1) whether procedural due process was accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. The Court is not entitled to reweigh the evidence, to reevaluate the credibility of the evidence, or to substitute its judgment for that of the agency. *Haines City Community Development v. Heggs,* 658 So. 2d 523 (Fla. 1995) [20 Fla. L. Weekly S318a].

3. Rule 1.630(b) sets forth what such a petition should contain: "(1) the facts on which the plaintiff relies for relief; (2) a request for the relief sought; and (3) if desired, argument in support of the complaint with citations of authority." Fla. R. App. P 1.630(b) (West 2021). The only facts offered by Petitioner are that 1) his employment requires him to travel, 2) in order to meet his work obligations he must rely on alternate modes of transportation, 3) this situation is expensive, and 4) will ultimately result in Petitioner losing his job.

4. However, Petitioner does not allege that procedural due process was not accorded to him; he does not allege that the administrative agency failed to observe the essential requirements of law; and he does not allege that the administrative findings and judgment were not supported by competent substantial evidence. Instead he says that the "department denied Petitioner's request for a BPO license based on the legislative intent of F.S. 322.263. It is also the legislative intent of the statute to allow an individual to be able to work, live and be productive, which Petitioner . . . is being denied." Petition, p. 2. Given that Petitioner has failed to present any allegation or fact that would relate to one or more of the three limited areas in which a circuit court may review an administrative agency's decision, this Court cannot address the petition. Accordingly, it is hereby,

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is DISMISSED. This dismissal is without prejudice for Petitioner to file an amended petition within 30 days, if appropriate. Failure to file an amended petition within the timeframe will result in the instant petition being deemed at that time as having been dismissed with prejudice without further order from this Court and any subsequent petition for writ of certiorari being deemed untimely.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop—Hearing officer's finding that there was probable cause for stop is supported by competent substantial evidence where video shows licensee acknowledging that he did not stop at stop sign—Petition for writ of certiorari is denied

DAKOTA JAMES CALDWELL, Plaintiff, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Defendant. Circuit Court, 20th Judicial Circuit (Appellate) in and for Charlotte County, Civil Action. Case No. 21000812CA. December 10, 2021. Counsel: Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Defendant.

Order Denying Petition for Writ of Certiorari

(GEOFFREY H. GENTILE, J.) **THIS CAUSE** came before the court on December 10, 2021 on Petitioner's request for a Writ of Certiorari and the court having heard argument of counsel on November 12, 2021, having reviewed all filings in the court file (including the written order from the hearing officer) and having watched the recordings of the stop and arrest of Dakota James Caldwell and being otherwise fully advised in the premises, finds as follows:

Scope of Review

This Court's scope of review is: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether the decision was supported by competent, substantial evidence. *City of Deerfield Beach v. Vaillant,* 419 So.2d 624,626 (Fla. 1982).

Issues in this Case

Petitioner contends that the Hearing officer erred in finding that there was probable cause for his stop and arrest. Primarily, Petitioner claims that the real-time video is directly contrary to and refutes the hearing officer's findings and that this court should issue the Writ pursuant to *Wiggins v. Florida Department of Highway Safety and Motor Vehicles,* 209 So.3d 1165 (Fla. 2017) [42 Fla. L. Weekly S85a].

This court has reviewed the videos and finds that the decision of the hearing officer was supported by competent, substantial evidence. The videos show Petitioner acknowledging that he did not stop at the stop sign. Also, the video does not objectively establish that the arresting officer did not have probable cause to arrest Petitioner. The hearing officer is responsible for evaluating the credibility of witnesses and the Hearing Officer's findings of facts, the evidence and the filings in this file and the video constitute competent and substantial record evidence to support the Hearing Officer's findings.

Ruling

The court finds that Petitioner received procedural due process, that the essential requirements of law were observed and that the Hearing Officer's decision was well reasoned and supported by competent, substantial evidence.

The Court does find it troubling that the State dropped both the ticket and the criminal DUI charges but that does not require or even permit the issuance of a Writ in this case.

Request for Writ of Certiorari Denied.

* * *

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CIRCUIT COURTS—ORIGINAL

Estates—Wills—Challenge—Testamentary capacity—Son's averment that deceased father's cognitive abilities were impaired due to frail health is not sufficient to establish that decedent lacked testamentary capacity when he made will in favor of wife—Because there is strong presumption of testamentary capacity and uncontradicted evidence that decedent was in command of his mental faculties at time of making will, wife's motion for summary judgment is granted

IN RE: ESTATE OF MANUEL BONILLA, Deceased. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Probate Division. Case No. 2020-1540-CP-02. ERNESTO BONILLA, Petitioner, v. SILVIA BONILLA, Respondent. Case No. 2020-1944-CP-02. January 18, 2022. Milton Hirsch, Judge.

ORDER ON MOTION FOR SUMMARY JUDGMENT

I. Facts

A will purporting to be that of the late Manuel Bonilla was filed in Case No. 2020-1540-cp-02 on May 1, 2020. DE 11. The will is of the fill-in-the-blanks variety, clearly not the work of a lawyer; but it is intelligible, and it leaves everything to Mr. Bonilla's wife Silvia, who is also named personal representative. Had Silvia predeceased him, the will provided that Manuel's estate would pass to his daughter Sandra Rodriguez. Ernesto Bonilla, petitioner herein and son to Manuel (but not to Silvia) is unmentioned in the will. In Case No. 2020-1944-cp-02, Ernesto petitioned "for revocation of probate of will," DE 2, alleging undue influence on the part of Silvia and lack of testamentary capacity on the part of Manuel.

Silvia now moves for summary judgment, DE 16 in 2020-1944-cp-02, which motion she supports with an affidavit executed by one Pamela Bohmer. DE 17. Ms. Bohmer identifies herself as a notary public. *Id.* ¶1. So far as appears, she first met Manuel through common friends "around the time of Christmas 2019." *Id.* ¶2. Knowing Ms. Bohmer to be a notary, Manuel asked if she could prepare a will for him. *Id.* ¶5. She quite properly explained that notaries do not draft wills, but then inexplicably "offered to take [her] husband's will and . . . white out his information and provide it to Manuel Bonilla as a sample so he could execute his own will." *Id.* She later visited Manuel and, not content that he merely use her husband's will as a template, actually "filled in the" whited-out version of her husband's will "to Manuel Bonilla's satisfaction. Manuel Bonilla then signed the will in my presence, and in the presence of her husband and another friend. Ms. Bohmer notarized the will. *Id.* ¶8. Bizarre as this narrative is, it explains the do-it-yourself appearance of Manuel's will.

Apart from providing this chronology of events, Ms. Bohmer's affidavit also reflects her impression that, on the couple of occasions when she dealt with him, Manuel appeared to be in possession of his faculties. *See, e.g.*, ¶7 ("Manuel Bonilla appeared alert and oriented to time and place").[1]

Ernesto filed no pleading in opposition to Silvia's summary judgment motion, but did file his own affidavit, DE 19. In it he makes series of naked and unsupported conclusory allegations, *e.g.*:

> Decedent's capacity was severely diminished at the time of the execution of the purported last will and testament, as a result of a severe illness, and associated physical infirmities, including but not limited to vision loss, irritability, tremendous headaches due to brain cancer and was under the influence of narcotic pain killers.

Id. ¶3. To the same effect, *see* ¶6 (Manuel "suffered from vision loss, difficulty concentrating, brain cancer and neurologic problems"); ¶7 (Manuel's "cognitive abilities were impaired due to his frail health").

When, if ever, did Ernesto observe and interact with Manuel? How often? How close to the time that the will was made?[2] Were others present on those occasions? Did they form the same impressions of Manuel's lack of cognitive function? If so, why have they not provided affidavits to that effect? Is Ernesto trained in any way in medicine or psychology? Did he speak to any of Ernesto's doctors? Did he speak, for example, to the doctor or doctors treating Manuel for "brain cancer"? To the doctor or doctors prescribing the debilitating "narcotic pain killers"? Are those doctors willing to provide affidavits? Are they willing, upon receipt of a proper court order, to provide some medical records, or summaries of medical records? And apart from doctors, are there friends, neighbors, family members who can corroborate Ernesto's allegations of Manuel's "difficulty concentrating," of his "frail health"? To the foregoing questions, the reader of Ernesto's affidavit will find no answers.[3] Although Ernesto swears that the far-reaching averments appearing in his affidavit are true "to the best of his knowledge and belief," *Affidavit in Opposition to Respondent's Motion for Summary Judgment,* DE 19 in 2020-1944-cp-02 at ¶8, he swears in that same affidavit that Silvia had "isolat[ed]" Manuel from friends and relatives, even denying him "access to his telephone." *Id.* ¶6. How, then, did Ernesto acquire his knowledge, and form his beliefs?

On the basis of his affidavit Ernesto seeks to defeat Silvia's summary judgment motion, alleging that he has raised material issues of fact as to Manuel's testamentary capacity.[4]

II. Testamentary Capacity

There is a strong presumption in favor of testamentary capacity. In keeping with that presumption, the threshold for a finding of capacity is low. No more is required than that the testator, at the time of execution of the will, have a general understanding of the nature and extent of the property to be disposed of; of his relationship to those who would be the natural objects of his bounty; and of the effect of the will as executed. *Raimi v. Furlong,* 702 So. 2d 1273, 1286 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D2184j] (citing *In Re Wilmott's Estate,* 66 So. 2d 465, 467 (Fla. 1953); *In Re Weihe's Estate,* 268 So. 2d 446, 448 (Fla. 4th DCA 1972); *In Re Dunson's Estate,* 141 So. 2d 601, 604 (Fla. 2d DCA 1962)). "A testator may still have testamentary capacity to execute a valid will even though he may frequently be intoxicated, use narcotics, have an enfeebled mind, failing memory, [or] vacillating judgment." *Raimi,* 702 So. 2d at 1286 (quoting *In Re Weihe's Estate,* 268 So. 2d at 448).

Assume, then, that all the very general allegations in Ernesto's affidavit are true. Assume that Manuel suffered from brain cancer, headaches, and vision loss; and that he took narcotic pain medication. It is simply not the law that one suffering from some of these symptoms, or all of them, is necessarily without capacity to dispose of his property by will. The question is not whether Manuel suffered from these symptoms, but whether, as a consequence of his suffering, he was so debilitated in his cognitive function that he lacked a minimally sufficient understanding of the nature and extent of his estate; lacked an understanding of who would be the natural objects of his bounty; and lacked an understanding of the effect of his will. There is no averment in Ernesto's affidavit that any of these conditions is met. A chronic user of narcotic drugs, even one who suffers, in the language of the Third District in *Raimi,* from "failing memory, [or] vacillating judgment," may well be sufficiently lucid and intellectually capacitated to execute a will that the court would be bound to admit to probate. To say nothing more than that Manuel's "cognitive abilities were impaired due to his frail health," *Affidavit in Opposition to Respondent's Motion for Summary Judgment,* DE 19 in 2020-1944-cp-02 at ¶7, is to say nothing. And Ernesto says nothing more.

III. The Standard for Summary Judgment

As of May 1, 2021, Florida follows the federal summary judgment standard. *See In Re: Amendments to Florida Rule of Civil Procedure 1.510,* 317 So. 3d 72 (Fla. 2021) [46 Fla. L. Weekly S95a]. As a consequence, Florida circuit judges are no longer obliged to keep a meritless case alive until a motion for directed verdict can be made simply because the litigant opposing summary judgment was able to scrape up some "scintilla" of factual opposition to the summary judgment motion. The new interpretation of the rule "recognize[s] the fundamental [conceptual] similarity between a motion for directed verdict and a motion for summary judgment." *In Re: Amendments to Florida Rule of Civil Procedure 1.510,* 309 So. 3d 192, 192 (Fla. 2020) [46 Fla. L. Weekly S6a] (quoting Thomas Logue and Javier Alberto Soto, *Florida Should Adopt the Celotex Standard for Summary Judgment,* 76 Fla. Bar J. Feb. 2002, at 20, 22). Nor must the beleaguered circuit judge continue to participate in the scavenger hunt for that scintilla of fact that will defeat summary judgment. "If evidence [in opposition to summary judgment] is merely colorable, or is not significantly probative, summary judgment may be granted." *In Re: Amendments to Florida Rule of Civil Procedure 1.510,* 309 So. 3d at 193 (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-50 (1986)).[5]

Here, however, there is lacking even that scintilla of factual opposition to summary judgment that was required by the former iteration of the rule. Manuel's will, DE 11 in 2020-1540-cp-02, appears to be dated February 10, 2020. The only evidence before the court offered by a percipient witness to Manuel's mental condition—the only evidence offered by a witness who swears to have seen and spoken with Manuel on or about that date—is that appearing in Pamela Bohmer's affidavit. According to her:

> 7. On February 10, 2020[,] David Rojas, my husband Mauricio Bohmer, and myself arrived at Manuel Bonilla's home. Manuel Bonilla reminisced about old times in Colombia as Manuel was evidently a friend of David Rojas's father. They both laughed and chatted with my husband and we eventually settled down to review the will. At all times, Manuel Bonilla appeared alert and oriented to time and place.
>
> 8. Manuel expressed his wishes—that he desired to give all of his personal property, accounts, and real property to his wife Silvia Bonilla so that she would be provided for after his death—and we filled in the will to Manuel Bonilla's satisfaction. . . . Silvia Bonilla was not involved in the conversation.

Affidavit of Pamela Bohmer in Support of Respondent's Motion for Summary Judgment, DE 36 in 2020-1540-cp-02, ¶¶7-8.

The foregoing describes a testator in more than ample command of his mental faculties, and more than sufficiently free from any overbearing influence, to dispose of his worldly goods. And there is nothing before the court—nothing—to contradict the captioned language. Yes, Ernesto submits a document entitled "affidavit." But he does not swear that he saw and spoke to his father on the day the will was executed; or the day before that; or anytime during the week before that; or anytime during the month before that. He does not swear that he received information about his father's mental state or wellbeing on the day the will was executed; or the day before that; or anytime during the week before that; or anytime during the month before that. He claims that his father was terribly ill, and heavily medicated. But he does not swear that he spoke with any doctor or health-care provider about his father's condition on the day the will was executed; or the day before that; or anytime during the week before that; or anytime during the month before that. Taking refuge in the lawyerism, "upon information and belief," Ernesto speculates that Manuel was too sick, or too drugged, to retain testamentary capacity. "Upon information and belief" is an elastic phrase, but not infinitely so. It is not a synonym for "I guess and I wish." Or at least it is not supposed to be.

There is, all things considered, no material dispute of fact here. As noted *supra,* there is a strong presumption of testamentary capacity, and the bar for such capacity is low. The Manuel Bonilla who appears in Pamela Bohmer's description more than meets that bar. That description is not contradicted or gainsaid. Undoubtedly Ernesto Bonilla is dissatisfied with the disposition that his father made of his property. But as a great judge reminds us:

> Courts are not free to treat lightly a testator's intent merely because he has entered into a December marriage and has chosen to leave his last companion his worldly goods. It is his money and his goods to do with as he chooses . . . and unless the evidence shows that he has been precluded from freely exercising that choice, his wishes are to be respected. Merely because his choice happens to be to bestow his estate upon a second wife, perhaps to the natural disappointment of his children by a first and much longer marriage, does not mean that his choice was not freely made.

Tarsagian v. Watt, 402 So. 2d 471, 472 (Fla. 3d DCA 1981) (Daniel Pearson, J.).

IV. Conclusion

Respondent Silvia Bonilla's Motion for Summary Judgment is respectfully GRANTED.

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[1]Although she borrows a turn of phrase commonly employed by psychologists and psychiatrists, Ms. Bohmer is neither. She is a notary, and makes no claim to expertise in the field of psychology. A lay witness can express his or her impression that someone with whom he or she interacted appeared to be lucid and in possession of his mental faculties, Fla. Stat. § 90.701, *see, e.g., Florida Bar v. Clement,* 662 So. 2d 690, 697 (Fla. 1995) [20 Fla. L. Weekly S553a]; *Cruse v. State,* 588 So. 2d 983, 990 (Fla. 1991); but such an impression is not necessarily entitled to great weight. Here, however, it is the *only* evidence of Manuel's mental state at or about the time of the execution of his will.

[2]"Whether a testator had the required testamentary capacity is determined solely by his mental state at the time he executed the instrument." *Coppock v. Carlson,* 547 So. 2d 946, 947 (Fla. 3d DCA 1989), *rev. denied,* 558 So. 2d 17 (Fla. 1990). "A testator who possesses a sound mind at the time of the execution of his will has a right to disinherit his children or others who may have a claim on his bounty." *In Re Bailey's Estate,* 122 So. 2d 243, 247 (Fla. 2d DCA 1960).

[3]Manuel's death certificate, 2020-1540-cp-02 at DE 10, indicates that he died, not in a hospital, but in his own home; and that at the time of death he was 87 years of age. Perhaps it is possible for a man "severe[ly] ill[ ]," suffering from vision loss and tremendous headaches, riddled with brain cancer and profoundly under the influence of narcotic pain killers, to live at home to age 87 and die, not hospitalized and under a doctor's care, but in his own bed. Perhaps it is possible. But it seems unlikely.

[4]Ernesto's affidavit also makes reference to "undue influence," but its allegations of undue influence on Silvia's part are even less specific and more tepid than its allegations of lack of testamentary capacity. He asserts no more than that Manuel was dependent on Silvia, and that she had isolated him from friends and relatives. *Affidavit in Opposition to Respondent's Motion for Summary Judgment,* DE 19 in 2020-1944-cp-02 at ¶6. This falls woefully short of adequately pleading undue influence. *See, e.g., In Re Estate of Carpenter,* 253 So. 2d 697 (Fla. 1971); *Carter v. Carter,* 526 So. 2d 141 (Fla. 3d DCA 1988). Similarly, Ernesto's affidavit notes that Manuel's will gets poor grades for penmanship, neatness, and form; and suggests that these shortcomings evidence that the will is not Manuel's at all. *Id.* ¶¶4-5. But these shortcomings are explained in Pamela Bohmer's affidavit. *See discussion supra*. I do not for a moment condone Ms. Bohmer's behavior in connection with Manuel's will—indeed it borders on the unauthorized practice of law. But her narrative is not one that someone would concoct. Its frank confessions of ill-advised conduct on the part of a notary—conduct that a notary should know better than to engage in—carry with them the ring of truth. Her tale is not one she would willingly invent.

[5]The poetry of Robert Browning is often profound and occasionally indecipherable. Legend has it that on one occasion an admirer approached Browning, identified a passage in his poetry over which she had puzzled, and asked him if he could explain it to her. Browning read it; read it again; then looked up and said, "Madam, when those words were written, their meaning was known to Robert Browning and God. Now, but to God."

When a motion for summary judgment is filed, the judge will read it. A written opposition, perhaps supported by affidavits, will follow. The judge will read that, too. Were he a federal judge, he would then rule. But a Florida judge dares not do so. For reasons which, like the meaning of the opaque passage in the Browning poem, can be known but to God, a Florida judge must set the matter for oral argument. It matters not how clear the case for, or against, the granting of summary judgment is. It matters not if the case for, or against, the granting of summary judgment is overwhelming,

irrefragable, clear beyond a shadow of a doubt. The Florida judge *must* set the matter for oral argument. *Chiu v. Wells Fargo Bank,* 242 So. 3d 461, 463 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D672a] (it is fundamental error—*fundamental error*—to enter summary judgment without affording the litigants oral argument); *State Farm Fire & Casualty Co. v. Lezcano,* 22 So. 3d 632, 634 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2105a]; *Greene v. Seigle,* 745 So. 2d 411 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2451d] (failure to afford oral argument on summary judgment motion *violated due process*). So the movant comes to court and reads aloud to the judge the motion that the judge has already read with care. And the opponent comes to court and reads aloud to the judge the memorandum in opposition and supporting affidavit that the judge has already read with care. To pretermit this charade is to commit *fundamental error.* It is to deprive the parties of *due process of law.*

It appears that this feature of Florida law remains, and will remain, unchanged. *See In Re Amendments to Florida Rule of Civil Procedure 1.510,* 317 So. 3d 72, 77 (Fla. 2021) [46 Fla. L. Weekly S95a] ("the deadlines for filing and responding to summary judgment motions should stay tied to a hearing date—a feature of Florida practice that contrasts with federal practice, where summary judgment hearings are much less frequent"). But even a lowly circuit judge can dream. Perhaps someday the Rules Committee, or the Florida Supreme Court, will see this footnote, and resolve to complete the process of modernization begun by *In Re: Amendments to Florida Rule of Civil Procedure 1.510,* 309 So. 3d 192 (Fla. 2020) [46 Fla. L. Weekly S6a].

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Municipal corporations—Development orders—Modification—Due process—Action for declaratory and injunctive relief challenging legality of process by which city modified planned area development and site plan to approve construction of gas station in lieu of initially approved restaurant without public notice and meetings—Timeliness—No merit to argument that plaintiffs were required to petition for writ of certiorari within 30 days of approval of site plan modification—Circuit court has jurisdiction to entertain suit in equity seeking to have city ordinance approving modification declared void—Standing—Motion to dismiss based on lack of standing is denied where it is unclear whether plaintiffs alleging ultra vires act by city must prove special injury to attain standing, and allegations of special injury are sufficient to withstand dismissal at this stage of litigation

GABLES ACCOUNTABILITY PROJECT, INC., et al., Plaintiffs, v. CITY OF CORAL GABLES, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Complex Business Litigation. Case No. 2021-1892 CA 01. January 6, 2022. Michael A. Hanzman, Judge.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs, Gables Accountability Project, Inc. ("GAP") and seven (7) residents of the City of Coral Gables ("City"), bring this action challenging the legality of a modification to a 2014 Planned Area Development ("PAD") and site plan adopted by the City Commission via Ordinance No. 2014-21.[1] This modification authorized the construction/lease of a WAWA store/gas station (in lieu of the initially approved restaurant) on property commonly known as the Grand Avenue Right of Way. The amendment to the PAD/site plan was approved administratively by the City Attorney via a January 28, 2020 "Legal Opinion regarding Bahamian Village Site Plan" ("Legal Opinion"). The City Attorney claimed authority to administratively approve this change of use pursuant to: (a) Resolution No. 2015-303 adopted by the City Commission on December 28, 2015; and (b) a November 16, 2017 Settlement Agreement entered into between the City and Defendant Bahamian Village LLC ("BV, LLC").[2]

Plaintiffs insist that the process which paved the way for this WAWA store/gas station was "fundamentally flawed and unlawful," resulting in "land originally earmarked for affordable housing . . . being transferred to a for-profit entity" that intends to develop/operate a "6-pump gas station that will include fast-paced sales of tobacco and alcohol." *See* SAC, Introduction. In Plaintiffs' view, the prospect of a WAWA store/gas station on this site is "distressing to the local community," as "gasoline fumes, underground fuel storage tanks, vagrants, traffic, and over-the-counter sales of tobacco/vapes and alcohol [will] directly [affect] the safety and well-being of students from George Washington Carver Elementary School . . . and George Washington Carver Middle School . . . both of which are directly across the street from the property in question." *Id.*[3]

While the Court appreciates Plaintiffs' concerns, municipalities have the ability to decide how land within their borders may be used, and courts lack jurisdiction to second guess the wisdom of, or interfere with, a local government's lawful exercise of its police and executive powers. *See* Article II, Section 3 of the Florida Constitution; *Detournay v. City of Coral Gables,* 127 So. 3d 869 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D2552a]. If citizens are dissatisfied with land use decisions made by their elected officials, their remedy generally "should be at the polls and not in the courts." *Paul v. Blake,* 376 So. 2d 256 (Fla. 3d DCA 1979). These Plaintiffs, however, do not challenge the wisdom of this proposed development. They challenge the legality of the process that authorized it, insisting that "the City departed from the express requirements of the City Zoning Code and Comprehensive Plan by entering into a private contract" which waived "the mandatory public notice and meetings and opportunity for public comment otherwise required for approval of [this] project and instead [allowed] the City Attorney and City Manager to administratively approve the project." *Id.* As a result, "at multiple junctures members of the community were not given their due opportunity to raise legitimate questions, present evidence and have their concerns properly considered." *Id.* Put in legal parlance, Plaintiffs say that they were deprived of the procedural due process required by law.[4]

To remedy this perceived injustice, Plaintiffs ask the Court to declare that the 2017 Settlement Agreement, the City Attorney's Legal Opinion, and the "development approvals, orders, permits, or any authorization issued by the City in connection with the 2017 City Settlement [are] void ab initio, ultra vires, and unenforceable . . . ." *See* SAC, ¶ 60. Plaintiffs also seek injunctive relief "directing the City to immediately rescind any approvals, permits, or any authorization in connection with the Property that, in whole or in part, arise from or are predicated upon the Settlement Agreement and/or Legal Opinion . . ." *See* SAC, ¶ 66 (ii).

Presently before the Court is "Defendant City of Coral Gables' Motion to Dismiss Plaintiffs' Second Amended Complaint for Declaratory and Injunctive Relief." ("MTD") (D.E. 38). That motion has been adopted by Defendants BV, LLC (D.E. 37) and WAWA Florida LLC (D. E. 40). Defendants argue that "dismissal is mandated because the Court lacks subject matter jurisdiction since the action is time-barred and Plaintiffs lack standing." *See* MTD, p. 3. For the reasons discussed herein, the Court disagrees and denies the motion.

II. THE BAHAMIAN VILLAGE PROJECT

The land at issue here, colloquially referred to as the Grand Avenue Right of Way, was originally owned by Miami-Dade County. In 2003, the County conveyed the land to LBW Homeowners Foundation of Coral Gables, Inc. ("LBW"), a charitable organization that intended to develop affordable housing on the site. *See* SAC, ¶ 19. *See also,* Miami-Dade County Resolution R-50-03. On June 28, 2007, LBW transferred the property to Defendant BV, LLC. *Id.,* ¶ 20. In September 2014, the Coral Gables City Commission approved a PAD and site plan for a development project initially referred to as "Gables Pointe Plaza." *Id.,* ¶ 22.

This proposed development, approved via Ordinance No. 2014-21, had two phases. Phase 1 included a community center and office space. Phase 2 incorporated a restaurant.[5] The development later became referred to as the "BV Community Project."

As part of its initial conveyance, Miami-Dade County was entitled to exercise a reverter if the property was not timely developed. Due to

significant delay in the redevelopment of the land, BV, LLC brought suit in 2015 seeking to prevent the County from exercising that reverter. That action, filed in Miami-Dade County Circuit Court, was styled *Bahamian Village LLC, et al., v. Miami-Dade County,* 2015-15755 CA 01. On December 8, 2015, the Coral Gables City Commission adopted Resolution No. 2015-303 which: (a) acknowledged the significance and importance of this historical black area; (b) acknowledged delays in developing the property; (c) urged the County to reach a settlement that would permit completion of the BV Community Project; and (d) authorized the City Manager and City Attorney to take all necessary action to facilitate a resolution of the lawsuit. *Id.*

Pursuant to Resolution No. 2015-303, on January 6, 2016, the City filed a motion to intervene in the litigation between BV, LLC and Miami-Dade County. Six days later, on January 12, 2016, the City Commission adopted Resolution No. 2016-11, expressing concern "with the impact [that the] litigation may pose to the community center and the surrounding neighborhood," and again urging the County to resolve the lawsuit. *See* Resolution No. 2016-11, p. 2. The City also committed itself to "expedite the permit process for the Bahamian Village Project." *Id.*

The City clearly did not want the property to revert to Miami-Dade County, and was actively involved in the effort to resolve the litigation, thereby clearing the way for BV, LLC to "complete the community center project." *Id.*; *see also,* Resolution No. 2015-303. To assist the parties in resolving the case, on November 16, 2017, the City entered into a Settlement Agreement with BV, LLC (and the Debra Sinkle Kolsky Trust). That Settlement Agreement imposed upon the City a number of obligations. Relevant to this dispute, Section 1.5 obligated the City:

> . . . to expedite the review and approval process for any and all site plan modification. The City further agrees any approval for site plan modification only requires one submission to the Board of Architects for its review and recommendations. The City also agrees no other public hearings are required, including without limitation hearings before the Planning and Zoning Board. Any and all approvals will proceed administratively to be completed by the City Attorney and the City Manager as stated in Resolution 2015-303, and all administrative review and approval for permits will also conclude on or before 90 days from submission, provided the plans submitted for permitting meet the Florida Building Code, the Coral Gables City Code, and the Coral Gables Zoning Code.

Id.[6]

While the 2017 Settlement Agreement appeared to put the BV Community Project back on track, in March 2019, the developer requested an amendment to the 2014 PAD. Instead of Phase 2 being a restaurant, BV, LLC proposed that the property would be leased to Defendant WAWA Florida, LLC, which would build/operate a convenience store/gas station. As the City Attorney herself recognized, the developer was proposing "a new project that [required] significant modification of the site plan for Phase 2 of the Project." *See* January 28, 2020 Legal Opinion.[7]

After describing the differences between the two uses (i.e., a restaurant versus a WAWA store), the City Attorney opined that "in accordance with Resolution No. 2015-303 and the Settlement Agreement," a new site plan could "be approved by the City Manager and the City Attorney through the authority delegated by the City Commission and Sections 2-701 and 2-702 of the City's Zoning Code." *Id.*[8] Then, after noting that the proposed WAWA "may reasonably fall under two categories of the Zoning Code," and that "the adjacent property owners are very much in favor of the [WAWA] Project," the City Attorney—"pursuant to the Settlement Agreement, Sec. 2-252 (e)(1) and (8) of the City Code, and Sec. 2-702 of the City's Zoning Code," modified "the PAD approved in Ordinance No. 2014-21 and the corresponding site plan," thereby enabling Phase 2 of the PAD to consist of a WAWA store/gas station in lieu of a restaurant. *See* Legal Opinion p. 7. In the City's view, this merely "approved the change in the site plan from a commercial restaurant use to another permitted commercial use." *See* MTD, p. 6.[9]

On January 30, 2020, a public meeting was held by the City's Board of Architects to review the plans for the proposed WAWA store/gas station. On December 7, 2020, the City issued a building permit allowing construction to proceed. Plaintiffs filed this action on January 22, 2021.

III. PLAINTIFFS' CLAIM

As the Court said earlier, neither Plaintiffs (nor anyone else) had any complaint about the 2014 PAD and site plan for the project as initially approved—a two phase development consisting of: (1) a community center and office space; and (2) a restaurant. *See* Ordinance No. 2014-21. The City then agreed, through the 2017 Settlement Agreement, to "expedite the review and approval for any and all [proposed] site plan modification[s]." *See* Settlement Agreement, § 1.5. To comply with this obligation, the City agreed, among other things, that: (a) "no other public hearings" were required, including hearings before the Planning and Zoning Board;[10] and (b) that "any and all approvals [would] proceed administratively to be completed by the City Attorney and City Manager as stated in Resolution 2015-303 . . ." *Id.*[11] So *assuming* this modification of the 2014 PAD would have required further "public hearings" and Commission approval (something the Court does not now decide), the City—by virtue of this private contract, agreed to bypass notice and public hearing requirements, instead delegating to the City Attorney/City Manager the exercise of its police power.

Plaintiffs say that this delegation was illegal, and that "the City departed from the express requirements of the City Zoning Code and Comprehensive Plan by entering into a private contract to waive the mandatory public notice and meetings and opportunity for public comment otherwise required . . . and instead allow the City Attorney and City Manager to administratively approve the project." *See* SAC, p. 3. They may be correct, as a municipality may not "legislate by contract." *See Hartnett v. Austin,* 93 So. 2d 86, 89 (Fla. 1956) (explaining that if a city could legislate by contract, "each citizen would be governed by an individual rule based upon the best deal that he could make with the governing body"); *Chung v. Sarasota County,* 686 So. 2d 1358, 1359 (Fla. 2d DCA 1996) [22 Fla. L. Weekly D107b] (rejecting "purported settlement agreement . . . which obligated the County to rezone Chung's property" as "invalid as contract zoning and as violative of due process and various statutes and ordinances related to zoning").

As this Court explained in *Cuesta v. City of Miami,* No. 2020-006298-CA-01, 2020 WL 5051464 (Fla. 11th Jud. Cir., August 24, 2020) [28 Fla. L. Weekly Supp. 602a], if a municipality assumes a contractual undertaking that is illegal, "it is not rescued by the mere fact that it is contained within a contract settling litigation." *Id.* at *12; *see also, Neapolitan Enterprises, LLC v. City of Naples,* 185 So. 3d 585, 593 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D299a] ("[a]municipality engages in an 'ultra vires' act when it lacks the authority to take the action under statute or its own governing laws"). So, if the delegation embedded within Section 1.5 of the Settlement Agreement is illegal, then the City Attorney could not modify the 2014 PAD through the authority ostensibly provided by that private contract. Maybe the City Attorney derived such authority elsewhere, such as from Section 2-701 and 2-702 of the City Zoning Code—provisions cited in her Letter Opinion. Or maybe not. But for present purposes, Plaintiffs have alleged that the delegation purportedly conferred upon the City Attorney through section 1.5 of the Settle-

ment Agreement is blatantly illegal and *ultra vires.*

IV. ANALYSIS

A. Defendants' Subject Matter Jurisdiction Challenge

Citing Article 3, Section 3-606 and Section 2-702 of the City Zoning Code, Defendants claim that Plaintiffs' sole remedy was to challenge these acts "in the manner and within the time prescribed by the Florida Rules of Appellate Procedure." *See* MTD, p. 10. According to the Defendants, Plaintiffs were thus obligated to file a petition for Writ of Certiorari within thirty (30) days "of rendition of any decision to be reviewed." *Id.,* citing *Hofer v. Gil De Rubio,* 409 So. 2d 527 (Fla. 5th DCA 1982); *Miccosukee Tribe of Indians of Florida v. Lewis,* 122 So. 3d 504 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D2088a]. This argument is foreclosed by binding precedent. *See Keay v. City of Coral Gables,* 236 So. 2d 133, 134 (Fla. 3d DCA 1970) (holding that Coral Gables Zoning Code does not divest circuit court of ability to entertain "a traditional suit in equity seeking to directly attack the validity" of city ordinance, and that trial court erred in dismissing suit in equity seeking to have ordinance declared void)*;see also, Neapolitan Enterprises,* 185 So. 3d at 588 (reversing order dismissing claim for declaratory and injunctive relief filed in 2012 challenging, as illegal and void, the "City's alleged [2010] ultra vires act of confirming . . . parking credits").[12]

B. Defendants' Standing Challenge

Defendants next insist that Plaintiffs lack standing because they have failed to "allege a separate and distinct injury from that shared with the rest of the community . . . ." *See* MTD, p. 16. The Court disagrees.

Generally speaking, a party lacks common law standing "unless he or she can demonstrate a direct and articulable stake in the outcome of a controversy." *Brown v. Firestone,* 382 So. 2d 654, 662 (Fla. 1980); *Weiss v. Johansen,* 898 So. 2d 1009, 1011 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D680a] ("[s]tanding depends on whether a party has a sufficient stake in a justiciable controversy, with a legally cognizable interest which would be affected by the outcome of the litigation"). In an action for declaratory/injunctive relief, the concept of standing, which is grounded upon the "constitutional limitations upon the function of the judicial department of government," dictates that:

> Before any proceeding for declaratory relief should be entertained it should be clearly made to appear that there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interests are all before the court by proper process or class representation *and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.* These elements are necessary in order to maintain the status [sic] of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts. *May v. Holley,* 59 So. 2d 636, 639 (Fla. 1952) (Emphasis added). Thus, in order to have ***common law*** standing, a plaintiff seeking declaratory relief must be "some person or persons" with a direct and articulable stake in an "actual" and "present" controversy, not merely a party seeking "legal advice" in order to "satisfy curiosity."

Bryant v. Gray, 70 So. 2d 581, 584 (Fla. 1954). And as this Court explained in *Cuesta*:

> . . . in the context of a challenge to governmental action (or inaction), the concept of ***common law*** standing is even more refined because, theoretically speaking, every citizen/taxpayer is arguably "affected" by, and holds a "stake" in, governmental activity, as every action (or inaction) on the part of a sovereign impacts the public as a whole, and every citizen/taxpayer is a member of that public. But the ***common law*** does not permit every citizen to challenge governmental conduct based solely upon her status as a citizen/taxpayer. Rather, to have ***common law*** standing to challenge governmental activity that is not "based on the violation of a provision of the constitution that governs the taxing and spending powers," a citizen/taxpayer must generally allege and demonstrate "special injury different from injuries to other citizens and taxpayers. . . ." *Herbits v. City of Miami,* 207 So. 3d 274, 281 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D2408a]; *Solares v. City of Miami,* 166 So. 3d 887 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1253a]; *Sch. Bd. of Volusia County v. Clayton,* 691 So. 2d 1066 (Fla. 1997) [22 Fla. L. Weekly S122a] ("[t]he requirement that a taxpayer seeking standing allege a "special injury" or a "constitutional challenge" is consistent with long established precedent").

Cuesta v. City of Miami, 28 Fla. L. Weekly Supp. 602a (11th Jud. Cir., August 24, 2020).

While special injury is generally required in cases challenging governmental action, Plaintiffs here have alleged that the City Attorney's approval of the modification to the 2014 PAD is illegal and *ultra vires.* In circumstances such as this, involving a claim that action taken was illegal and void (i.e., "without proper notice or legislative authority, or in excess of police power"), courts, including the Third District, have held that no special injury needs to be pled, or proven. *Parsons v. City of Jacksonville,* 295 So. 3d 892, 894 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1065a] ("[u]nder Florida law, no special injury is required for actions attacking void ordinances . ."); *David v. City of Dunedin,* 473 So. 2d 304, 306 (Fla. 2d DCA 1985) (no special injury required in circumstances where plaintiff alleged that ordinance failed to comply with controlling statutory law); *Kelner v. City of Miami Beach,* 252 So. 2d 870, 871 (Fla. 3d DCA 1971) (special injury requirement "has no application where a person affected seeks to challenge such action of the city on the ground that the action was illegal . . . ."); *Renard v. Dade County,* 249 So. 2d 500, 502 (Fla. 3d DCA 1971) (special injury not necessary "when a plaintiff seeks to have an act of a zoning authority declared void . . . ."); *Upper Keys Citizens Ass*'n, *Inc. v. Wedel,* 341 So. 2d 1062, 1064 (Fla. 3d DCA 1977) (" 'special injury' requirement has no application where a person affected seeks to challenge a zoning action on the ground that said action was illegally enacted . . . .").[13]

Though this exception to the special injury requirement appeared well settled, two recent decisions out of our appellate court cast doubt on the issue, at least in this district. In *Solares v. City of Miami,* 166 So. 3d 887 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1253a], the Third District considered the question of standing in a lawsuit challenging the City of Miami's decision to extend a lease with Bayside Marketplace, and allow a sublease of a portion of the property to SkyRise Miami, LLC. *Id.* at 887. The plaintiff (Solares)—who lost the case "on the merits"—conceded on appeal that "she brought her claims in her capacity as a citizen and taxpayer, but that she had no special injury, different from the injury to other citizens or taxpayers, and that her claim was not based on the violation of a provision of the Constitution that governs the taxing and spending powers." *Id.* at 887-88.

Based upon Solares' "own admission that she had no special injury," *id.* at 888, the Third District concluded that she lacked standing. *Id.* The court also noted that cases, such as the Supreme Court's opinion in *Renard v. Dade County,* 261 So. 2d 832 (Fla. 1972), "recognizing the standing of property owners and residents to challenge zoning decisions do not create an exception to the special injury requirement, they simply identify a type of special injury." *Solares,* 166 So. 3d at 889.

Because the plaintiff in *Solares* did not allege that the actions taken

by the City were illegal and void, the case does not conflict with the court's earlier opinions in *Kelner, Renard* and *Upper Keys.* But a year later, in *Herbits v. City of Miami,* 207 So. 3d 274 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D2408a], a panel of the Third District opined that the "holdings in *Kelner* and *Renard* have been impliedly overruled by the Supreme Court of Florida's later cases regarding standing, as articulated in this Court's recent opinion in *Solares* . . . ." *Id.* at 284. *Solares,* however, cites only two Supreme Court of Florida decisions issued after *Kelner, Renard* and *Upper Keys: N. Broward Hosp. Dist. v. Fornes,* 476 So. 2d 154 (Fla. 1985) and *Sch. Bd. of Volusia County v. Clayton,* 691 So. 2d 1066 (Fla. 1997) [22 Fla. L. Weekly S122a]. Neither of these cases involved a claim of illegal/ultra *vires* governmental action, and neither mention *Kelner, Renard* or *Upper Keys.* And the plaintiffs in *Herbits,* like the plaintiff in *Solares,* did not allege that the action challenged was illegal/void. Rather, plaintiffs' complaint was that the City of Miami did not receive "at least fair market value" for a "long term" lease. *Herbits,* 207 So. 3d at 277.

This Court is uncertain as to whether the *Herbits* panel's observation that the holdings in *Kelner* and *Renard* had been "impliedly overruled" by our Supreme Court renders this prior precedent obsolete. As appellate courts at the state and federal level recognize, "a panel cannot overrule a prior one's holding even though convinced it is wrong." *United States v. Steele,* 147 F.3d 1316, 1318 (11th Cir. 1998); *State v. Washington,* 114 So. 3d 182, 188-89 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1535a] (a "panel is not free to disregard, or recede from" an earlier decision, "only this Court, sitting en bane, may recede from an earlier opinion"). This prior panel precedent rule binds a subsequent panel to the holdings of" earlier panels unless and until they are clearly overruled by this court *en bane* or by the Supreme Court." *Randall v. Scott,* 610 F.3d 701, 707 (11th Cir. 2010) [22 Fla. L. Weekly Fed. C1050a]. "To constitute an 'overruling' for the purposes of this prior panel precedent rule, the Supreme Court decision must be clearly on point," *United States v. Kaley,* 579 F.3d 1246, 1255 (11th Cir. 2009) [22 Fla. L. Weekly Fed. C75a], and "the intervening Supreme Court case [must] actually abrogate or directly conflict with . . . the holding of the prior panel." *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GmbH,* 921 F.3d 1291, 1302 (11th Cir. 2019) [27 Fla. L. Weekly Fed. C1865a].

Notwithstanding the *Herbits* panel's observation, this Court sees nothing in any intervening decision of the Supreme Court of Florida which either expressly, or by implication, overruled the Third District's longstanding precedent. Neither of the intervening Supreme Court decisions cited in *Solares* even mention these decisions. *See, e.g., United States v. Vega-Castillo,* 540 F.3d 1235, 1238-39 (11th Cir. 2008) [21 Fla. L. Weekly Fed. C993a] ("[w]e agree with the Government that *Kimbrough* did not overrule *Castro* or its progeny, and so we are bound to apply the prior precedent rule in this appeal. Specifically, *Kimbrough* never discussed *Castro* or the cases following it, or otherwise commented on non-crack cocaine disparities, and so *Kimbrough* did not expressly overrule *Castro* or its progeny"). On top of that, the Third District's opinion in *Renard* was approved by our Supreme Court. But given *Herbits,* this Court is frankly unsure as to whether *Kelner, Renard, Upper Keys* remain binding precedent.

Fortunately, the Court need not now decide whether these Plaintiffs must plead/prove special injury, as the allegations of their complaint, taken as true, allege that they have suffered injury different in kind and degree from the public at large. Nothing more is required at this stage of the case, and the questions of whether special injury must be shown and, if so, whether it can be proven here, will await another day.

V. CONCLUSION

As this Court said in *Cuesta II,* "land use decisions can dramatically impact the health and well-being of a community." *Cuesta v. City of Miami,* 28 Fla. L. Weekly Supp. 1086a (11th Jud. Cir., January 19, 2021). That is precisely why municipalities enact, and are obligated to follow, detailed laws and procedures governing the process to be employed in making land-use decisions. Plaintiffs say that the City disregarded those laws here, depriving the public of input and delegating to the City Attorney the task of considering, and deciding, a proposed modification of the 2014 PAD which materially changed the use of Phase 2. Whether Plaintiffs are correct remains to be seen. But unless the City decides to have this "site plan modification" passed upon by the City Commission, in accordance with the procedure mandated by Section 3-506 of its Zoning Code, this case will proceed on the merits.

The Defendants' Motion to Dismiss is **DENIED**. Each Defendant shall file its answer and affirmative defenses, if any, within ten (10) days of this Order.

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[1]GAP is alleged to be a Florida non-profit organization "devoted to ensuring responsible development" in the City of Coral Gables. Second Amended Complaint ("SAC"), ¶ 7. (D.E. 34). The resident Plaintiffs are Caty Chung, Francisco Gonzalez, Joshua Goodman, Mildred Carlow, Angela Martini, Cecile Melanie, and Lucia Pedraja (collectively "Individual Plaintiffs").

[2]The Debra Sinkle Kolsky Trust dtd 1/4/2000 is also a party to the Settlement Agreement which resolved the case of *Bahamian Village LLC, et al., v. Miami-Dade County,* case number 2015-15755 CA 01. *See* SAC, Ex. C. The trust is not a party to this action.

[3]Some of the Individual Plaintiffs "have children [who attend] George Washington Carver Elementary School and live within 500 feet of [the] proposed WAWA." *See* SAC, ¶ 8.

[4]While Plaintiffs' pleading is hardly a model of clarity, counsel has made clear that what is being challenged is the modification of the 2014 PAD which permits the WAWA store/gas station—a modification approved by the City Attorney pursuant to authority allegedly delegated through Resolution No. 2015-303 and the 2017 Settlement Agreement. Plaintiffs' Counsel conceded that had the 2014 PAD been completed as originally approved, this action would not have been filed. The issue, then, is whether the City Attorney's administrative modification of the 2014 PAD is lawful.

[5]The Court is entitled to, and has, taken judicial notice of all relevant Ordinances and Resolutions issued by the City and County. *See* Florida Evidence Code, Fla. Stat. §§ 90.202(10) and 90.203 (court may take judicial notice of "[d]uly enacted ordinances and resolutions of municipalities and counties located in Florida . .").

[6]This Settlement Agreement was not approved by resolution of the City Commission.

[7]Despite this acknowledgement, the City now claims that this change of use "could meet the criteria for a 'minor amendment' under Section 3-507(a) of the Zoning Code and could have been administratively approved, even absent the 2017 Settlement." *See* Supp. Brief, p. 8, fn. 12. Aside from the fact that this change of use was hardly a "minor-amendment," even if it were, any administrative modification to the PAD would have had to be approved by the "Building and Zoning Department with recommendations from other departments, as needed," not by the City Attorney. *See* City of Coral Gables Zoning Code, § 3-507.

[8]The City Attorney apparently believed that this change of use from a restaurant to a WAWA store/gas station was a "site plan modification" for purposes of Section 1.5 of the Settlement Agreement. The Court does not necessarily agree.

[9]The City misses the point. The PAD allowed a specific use for Phase 2, not any use permitted by the Zoning Code. The fact that the modification allowed the developer to swap one permitted use (the restaurant) for another allegedly permitted use (WAWA store/gas station) is irrelevant, as the issue here is not whether the City Commission, after proper notice and public comment, could have approved this modification consistent with the Zoning Code. The issue is whether the City Attorney had the authority to make that decision administratively, without public input or the involvement of the Commission.

[10]This covenant is a bit cryptic. Specifically, the Court cannot discern whether the City was representing that "no other public hearings" were required by law in order to approve any site plan modification, or whether the City was—through this covenant—obligating itself to dispense with any "other public hearings" required by law. If the former, the representation was incorrect, as Section 3-506 of the Zoning Code requires that any "major amendment" to a PAD be put through the entire PAD process, including a "Public Hearing." *See* City of Coral Gables Zoning Code § 3-506(c) (2019). If the latter, the City, by private contract, agreed to bypass its Zoning Code.

[11]While Section 1.5 of the Settlement Agreement recites that such approval "will proceed administratively. . . as stated in Resolution 2015-303," the Resolution says no such thing. Resolution No. 2015-303 merely directs the City Attorney "to seek to appear" in the litigation between Miami-Dade County and BV, LLC "as *amicus curiae,*" and urges the County "to reach a settlement . . and allow [the parties] to

complete the community center project." *Id.* Nowhere does this Resolution provide for any site plan modification to proceed administratively, or delegate the authority to approve any proposed modification to the City Attorney. The Settlement Agreement's recitation of this supposed delegation of authority is made of whole cloth, and the Court rejects the City's claim that "the power conferred to the City Attorney and City Manager . . . to administratively modify the site plan flow from the validly enacted 2015 Resolution . . ." *See* MTD, p. 14. Nothing in Resolution No. 2015-303 bestowed such authority upon the City Attorney.

[12]The Court also rejects the City's belated claim that this case involves a development order and that, for this reason, Florida Statute § 163.3215 (3) mandated that Plaintiffs file this action "no later than 30 days following" the City Attorney's Legal Opinion. Section 163.3215 affords a specific cause of action in narrow circumstances where a development order is challenged on the basis that it "materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan . . . ." *Fla. Stat.* § 163.3215 (3). Plaintiffs' challenge here does not "fall within the ken" of the statute. *Heine v. Lee County,* 221 So. 3d 1254, 1257 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D1473a] (discussing the limited "scope of claims allowed under [this] Consistency Statute").

[13]*Renard* was approved of by our Supreme Court. *See Renard v. Dade County,* 261 So. 2d 832 (Fla. 1972) ("[a]ny affected resident, Citizen or property owner of the governmental unit . . . has standing to challenge" an ordinance as void).

* * *

Insurance—Property—On motion for reconsideration, trial court concludes that it was improper to abate action to allow insured an opportunity to submit supplemental claim required by policy as condition precedent to filing suit where insured admitted that it did not submit invoice attached to complaint to insurer prior to filing suit, and evidence offered by insured in opposition to insurer's motion for summary judgment was untimely and did not demonstrate the submission of timely supplemental claim—Abatement order is set aside, and final summary judgment is entered in favor of insurer

PROFESSIONAL GENERAL CONTRACTORS, LLC, a/a/o Richard Gallo, Plaintiff, v. UNITED PROPERTY & CASUALTY INSURANCE COMPANY, Defendant. Circuit Court, 20th Judicial Circuit in and for Lee County. Case No. 19-CA-002587. October 11, 2021. Leigh Hayes, Judge. Counsel: Ardalan Montazer, Kanner & Pintaluga, Boca Raton, for Plaintiff. Michael Kranzler and Laurie Sharpe Dulcer, Chartwell Law, Deerfield Beach, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR RECONSIDERATION

THIS CAUSE having come before this Court on the Defendant's Motion for Reconsideration, and the Court having reviewed the record, heard the arguments of the Parties, and being otherwise fully informed in the Premises, the Defendant's Motion for Reconsideration is hereby **GRANTED** for the reasons set forth in greater detail below:

I. STATEMENT OF FACTS

1. The instant lawsuit arises out of a claim for breach of contract in a first party property matter.

2. The Defendant moved for summary judgment on May 4, 2021, premised upon an argument that the Plaintiff failed to properly submit a supplemental claim pursuant to the Policy, and therefore the lawsuit was premature. A hearing was mutually coordinated on the Defendant's Motion for Summary Judgment to occur on July 26, 2021.

3. On July 20, 2021, the Plaintiff filed as evidence in opposition two affidavits, one of which included a single email, which was a simple automatic reply to an email on April 12, 2019 which did not provide any information as to what was contained within the underlying email allegedly sent by or on behalf of the Plaintiff.

4. The Parties appeared before the Court on the Defendant's Motion for Summary Judgment on July 26, 2021.

5. At the July 26, 2021 hearing, this Court noted that the Plaintiff's evidence was untimely, but abated the instant action based upon that same evidence such that the Plaintiff could submit a supplemental claim. The Defendant subsequently moved for reconsideration on August 20, 2021, and the Parties appeared before the Court on a hearing on Defendant's Motion for Reconsideration on October 4, 2021.

II. STANDARD OF REVIEW

Rather than constituting a motion for rehearing under Florida Rule of Civil Procedure 1.530, a motion directed to a nonfinal order is termed a "Motion for Reconsideration based upon the trial court's inherent authority to reconsider and alter or retract orders prior to the entry of final judgment. *See Bettez v. City of Miami,* 510 So. 2d 1242 (Fla. 3d DCA 1987). As outlined in greater detail below, the Defendant has presented a valid basis for this Court to exercise its inherent authority and reconsider its prior Order abating this action.

III. ANALYSIS

Pursuant to *Brandon Goldberg v. Universal Prop. & Cas. Ins. Co.,* 302 So. 3d 919 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D2118b], summary judgment is proper as to coverage where the insured does not comply with the Policy's requirement to submit a supplemental claim prior to filing suit. In the litigation of this matter, the Defendant propounded upon the Plaintiff its Request for Admissions, to which the Plaintiff responded on October 21, 2020. As relevant to this matter, the Defendant's Third Request for Admissions sought the following admission from the Plaintiff:

> *Admit that you did not submit the estimate/invoice attached to your Complainant [sic] as Exhibit B and further described in Paragraph 11 of your Complaint to Defendant prior to filing the subject lawsuit on May 3, 2019.*

The Plaintiff responded to the Defendant's Third Request for Admissions by simply stating "Admit." By the Plaintiff's own admission, it did not submit to the Defendant the documentation upon which it relied for its cause of action prior to filing the instant lawsuit.

Turning to the email submitted by the Plaintiff in opposition to the original summary judgment proceedings, it is undisputed that such evidence was not timely pursuant to the strict deadlines prescribed by Florida's new summary judgment rule. *See* Fla. R. Civ. P. 1.510(c)(5) ("At least 20 days before the time fixed for the hearing, the nonmovant must serve a response that includes the nonmovant's supporting factual position as provided in subdivision (1) above."). The evidence relied upon by the Plaintiff was not submitted to the Court until a mere six (6) days before the time fixed for hearing. The Plaintiff had previously timely filed a Response in Opposition, but only supplemented the record with the evidence upon which it actually sought to rely well after the expiration of the strict deadline. On that basis alone, it could not be considered. Furthermore, the Defendant promptly and timely submitted to the Court an objection to this untimely evidence, further supporting a finding that such evidence could not be considered in opposition to summary judgment. Pursuant to *Yosvani Gonzalez & Yenisleidys Perez v. Citizens Prop. Ins. Corp.,* 273 So. 3d 1031 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D686a], inadmissible evidence is legally insufficient to create a disputed issue of fact in opposition to summary judgment.

Assuming *arguendo* that this untimely email could be considered by the Court as evidence in opposition to summary judgment, it lacks any reasonable demonstration within the record that such an email actually constitutes the submission of a supplemental claim pursuant to the Plaintiff's Policy obligations. It is merely an automated response confirming receipt of *something* sent by email from the Plaintiff to the Defendant. The Court cannot ascertain what may have been in that underlying email, nor could a reasonable jury in the absence of additional information which is plainly not within the record. No such evidence was ever submitted by the Plaintiff, either timely or untimely. Therefore, this email does not persuade the Court of the existence of a timely supplemental claim prior to the Plaintiff filing this lawsuit.

In *GEICO Gen. Ins. Co. v. Martinez,* the Third District Court of Appeal granted a petition for certiorari where abatement was done in contravention of the express requirements of the nonjoinder statute, constituting a departure from the essential requirements of law. 240 So. 3d 43 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D86a]. In fact, the *Martinez* court found the abatement of the action to result in irreparable harm which could not be remedied on appeal. The facts of the instant case are very much in line with those in *Martinez.* The Defendant has reasonably articulated the irreparable harm which would be the result of the abatement of this action, which has been in litigation for several years arising out of a claim that, based upon the record evidence before the Court, was premature in a breach of contract matter where the record evidence demonstrates that no such breach had occurred prior to the initiation of litigation. Abatement at this stage would extinguish the Defendant's primary defense that has been applicable at all times since the Plaintiff originally filed this lawsuit. Under the above circumstances, it was improper for the Court to have abated the Plaintiff's cause of action. Accordingly, it is hereby

ORDERED and **ADJUDGED** as follows:

1. Defendant's Motion for Reconsideration is **GRANTED**.

2. The Court sets aside its July 26, 2021 Order (as documented in the Hearing Minutes) abating the instant Action.

3. Final Summary Judgment is hereby entered in favor of the Defendant, UNITED PROPERTY & CASUALTY INSURANCE COMPANY and against the Plaintiff, PROFESSIONAL GENERAL CONTRACTORS, LLC (A/A/O RICHARD GALLO). The Plaintiff shall take nothing from this Action and the Defendant shall go hence without day. The Court does not address the issue of prejudice.

4. The Court reserves jurisdiction to consider a timely motion for entitlement to attorney's fees or taxable costs as is just and proper.

* * *

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COUNTY COURTS

Consumer law—Debt collection—Bona fide error—Because defendant failed to plead bona fide error defense with particularity or establish that it had procedures in place to prevent error that resulted in debt collection activity at issue, summary disposition is entered in favor of plaintiff

MICHAEL BLAIR, Plaintiff, v. BAY RADIOLOGY ASSOCIATES, P.L., Defendant. County Court, 5th Judicial Circuit in and for Lake County. Case No. 35-2021-SC-000832. December 29, 2021. Carla R. Pepperman, Judge. Counsel: Ryan G. Moore, First Coast Consumer Law, Jacksonville Beach, for Plaintiff. Daniel Harrell, Pensacola, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

THIS CAUSE having come before the Court upon the Plaintiff's Motion for Summary Disposition at hearing on December 13, 2021, at 2:30 P.M. This Court, having reviewed the relevant case law, pleadings and motions filed herein, affidavits of the parties, having heard arguments of counsel, and being otherwise fully advised in the premises, finds that:

1. Defendant failed to plead the *bona fide* error defense with requisite particularity; further, Defendant failed to establish that it had procedures in place to avoid the errors which Defendant admitted had occurred.

2. Those errors resulted in the debt collection activity at issue in this matter.

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

A. Plaintiff's Motion for Summary Disposition is granted, because there is no triable issue to be adjudicated by the Court.

B. This Court reserves ruling on the amount of damages, costs, and attorney's fees to which Plaintiff is entitled.

It is further **ORDERED** and **ADJUDGED** that within 5 days from the date of e-service of this Order, the attorney submitting this Order shall furnish a copy of this Order to each self-represented party by U.S. Mail, first-class, postage paid or via the E-portal and, file a certificate signed that attorney that delivery of this Order has been made as set forth herein.

* * *

Insurance—Automobile—Windshield repair—Appraisal—Dispute as to cost of windshield repair must be determined by appraisal where policy contains valid appraisal provision—Motion to dismiss is granted

WINDSHIELD WARRIORS, LLC, a/a/o Kevin Trier, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 6th Judicial Circuit in and for Pinellas County, Small Claims Division. Case No. 21-007105-SC - North. January 11, 2022. Susan Bedinghaus, Judge. Counsel: Michael D. Cerasa, The Cerasa Law Firm, LLC, Winter Park, for Plaintiff. Lisa M. Lewis, Cole, Scott & Kissane, P.A., Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS, OR ALTERNATIVELY, MOTION TO STAY AND COMPEL APPRAISAL

THIS CAUSE having come before the Court on Defendant's Motion to Dismiss, or Alternatively, Motion to Stay and Compel Appraisal and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon:

ORDERED AND ADJUDGED that said Motion be, and the same is hereby GRANTED.

Plaintiff, WINDSHIELD WARRIORS, LLC, AS AN ASSIGNEE OF KEVIN TRIER, brought this Complaint for breach of contract against Defendant, State Farm Mutual Automobile Insurance Company. Defendant argues in pertinent part that the Complaint should be dismissed because Plaintiff failed to satisfy a condition precedent to brining this lawsuit by failing to participate in the appraisal process, as expressly required pursuant to the State Farm policy executed by and between State Farm and Kevin Trier. State Farm's 6910A Amendatory Endorsement states, "If there is a disagreement as to the cost of repair. . .an appraisal will be use as the first step toward resolution." Further, the policy provides that, "[l]egal action may not be brought against ***us*** until there has been full compliance with all the provisions of this policy. Policy Form 9810A at 46.

Plaintiff argues that 1) appraisal was not properly invoked; 2) no appraisable issue exists; 3) waiver; 4) Defendant's appraisal provision violates the Prohibitive Cost Doctrine; and 5) that Defendant's appraisal provision violates the Plaintiff's fundamental right of access to Courts. This Court is not persuaded by these arguments.

The Court hereby finds that State Farm's appraisal provision is a valid, mandatory provision of the policy and that compliance with the same is a mandatory condition precedent to filing suit. The issue in dispute is one of the cost of repair and not one of coverage. Pursuant to the terms of the policy, if there is a disagreement as to the cost of repair, appraisal will be used as the first step towards resolution. Because there is a disagreement as to the cost of repair and the parties agreed to appraisal, the terms and conditions of the policy must be complied with before Plaintiff can file suit. Thus, the cost of repair shall be determined by appraisal. Accordingly, this matter is not ripe for adjudication until both parties have complied with the appraisal process outlined in the Policy.

For the reasons stated above, Defendant's Motion to Dismiss is hereby GRANTED. This case is dismissed without prejudice.

* * *

Insurance—Residential property—Standing—Assignment—An assignment of post-loss benefits executed by an insured acting under urgent or emergency circumstances to protect, repair, restore, or replace property or mitigate against further damage was invalid and unenforceable as a matter of law under section 627.7152(2)(c) where the amount of post-loss assignment exceeded the greater of $3,000 or 1 percent of the policy's coverage limit

DRYZONE SOLUTIONS, LLC, a/a/o Vanessa Roman, Plaintiff, v. STATE FARM FLORIDA INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Osceola County. Case No. 2021-SC-002451-SP. December 6, 2021. Christine E. Arendas, Judge. Counsel: Jeremy F. Serres, Mooneeram + Serres + Vivanco, P.A., Aventura, for Plaintiff. Lynn S. Alfano and Christopher J. Goodrum, Alfano Kingsford, P.A., Maitland, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S STATEMENT OF CLAIM

THIS CAUSE, having come before the Honorable Christine E. Arendas on November 29, 2021, on Defendant's *Motion to Dismiss Plaintiff's Statement of Claim,* the Court having reviewed the record, having heard argument of counsel, and being otherwise duly advised in the premises, the Court hereby makes the following findings:

A. Florida Statutes §627.7152(2)(c) provides as follows: "If an assignor acts under an urgent or emergency circumstance to protect property from damage and executes an assignment agreement to protect, repair, restore, or replace property or to mitigate against further damage to the property, an assignee may not receive an assignment of post-loss benefits under a residential property insurance policy in excess of the greater of $3,000 or 1 percent of the Coverage A limit under such policy. For purposes of this paragraph, the term "urgent or emergency circumstance" means a situation in which a loss to property, if not addressed immediately, will result in additional damage until measures are completed to prevent such damage."

B. The parties agree that the work performed by the Plaintiff was performed under an urgent or emergency circumstance within the meaning of Florida Statutes §627.7152(2)(c). Therefore, the statutory provision applies.

C. Plaintiff obtained an assignment of post-loss benefits for its work in excess of the greater of $3,000 or 1 percent of the Coverage A limit of the subject policy. Accordingly, the Plaintiff's assignment agreement is invalid and unenforceable as a matter of law pursuant to Florida Statutes §627.7152(2)(d).

it is hereby ORDERED and ADJUDGED that:

1. Defendant's Motion to Dismiss Plaintiff's Statement of Claim is **GRANTED.**

2. This case is hereby dismissed with prejudice.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Lawfully rendered services—Because it was physically impossible for physician who maintained home and active medical practices more than 200 miles away from medical provider to fulfill duties of medical director of provider as required by Health Care Clinic Act, provider's charges are unlawful—Arguments that insurer is impermissibly seeking private enforcement of HCCA or that court lacks jurisdiction to adjudicate affirmative defenses regarding lawfulness of services rendered are without merit—Ruling on provider's argument that absence of finding by Agency for Health Care Administration regarding provider's violation of HCCA is indicative of substantial compliance with HCCA is deferred until discovery is completed

TOUCH OF HEALTH MEDICAL CENTER, LLC, a/a/o Yvener Maxime, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2019-SC-036892-O. December 28, 2021. Michael Deen, Judge. Counsel: Shannon Mahoney, Shannon M. Mahoney, PLLC, West Palm Beach, for Plaintiff. Tiffany V. Colbert, Andrews Biernacki Davis, Orlando, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This cause came on for consideration by this Court on Plaintiff's Amended Motion for Partial Summary Judgment, a hearing was held November 4, 2021, and the Court having heard argument and considered the motion, the appropriate record evidence, and Defendant's response, it hereby finds as follows:

BACKGROUND

Plaintiff, Touch of Health Medical Center, LLC, ("TOH"), filed the present lawsuit against Defendant, Progressive Select Insurance Company, ("Progressive"), for breach of contract arising out of an automobile accident occurring on April 1, 2017, for unpaid medical care and treatment rendered to Yvener Maxime. In their answer, Progressive raised affirmative defenses alleging TOH's claims were unlawful. TOH filed an Amended Motion for Summary Judgment on August 25, 2021 as to the affirmative defenses, and a hearing was held on November 4, 2021.

At the hearing, TOH argued that Progressive's affirmative defenses failed as a matter of law because (1) Progressive lacks standing to challenge the lawfulness of the claims (2) the Court lacks jurisdiction to determine the lawfulness of the claims under the separation of powers doctrine. Progressive responded that they have a duty to pay only lawful claims pursuant to the applicable PIP Statutes, Fla. Stat. § 627.736(5)(b)(1), Fla. Stat. § 627.732(11), and Fla. Stat. § 400.9935, that the Court has jurisdiction, and their affirmative defenses do not constitute a private cause of action.

ANALYSIS AND HOLDING

A party is entitled to summary judgment if the pleadings, depositions, interrogatory answers, affidavits and admissions of record show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.150(c); *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). Here, TOH argues that the affirmative defenses as pled are legally impermissible and, as such, no genuine issue of material fact exists in regards to them.

Progressive pled the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

"Under Fla. Stat. §627.736 (5)(a), any physician, hospital, clinic or other person or institution ***lawfully rendering*** treatment to an injured person for a bodily injury covered by personal injury protection insurance may charge the insurer and injured party only a reasonable amount pursuant to this section for the services and supplies rendered, and the insurer providing such coverage may pay for such charges directly to such person or institution ***lawfully rendering*** such treatment. Here, however, Plaintiff failed to comply with the requirements of the Health Care Clinic Act.

Pursuant to Fla. Admin Code 59A-33.008:

> Medical or Clinic Director. (1) A licensed health care clinic ***may not operate or be maintained without the day-to-day supervision*** of a single medical or clinic director as defined in section 400.9905(5), F.S. The health care clinic responsibilities under sections 400.9935(1)(a)-(i), F.S., cannot be met without an active, appointed medical or clinic director. Failure of an appointed medical or clinic director to substantially comply with health care clinic responsibilities under rule 59A-33.012, F.A.C. and sections 400.9935(1)(a)-(i), F.S., shall be grounds for the revocation or suspension of the license and assessment of a fine pursuant to section 400.995(1), F.S.

Based on the information gleaned from public records received from the Association for Health Care Administration and the Florida Department of Health for Dr. Michael Loss, it appears that it was physically impossible for him to fulfill the duties of a medical director for the Plaintiff, as required by the Health Care Clinic Act. Among other facts and/or violations, despite Plaintiff's allegation that Dr. Loss was in Plaintiff's Orlando office in the medical director capacity five days a week, Dr. Loss maintained a South Florida home address, more than 200 miles away from the clinic, and active medical practices in South Florida as well. Thus, pursuant to the Fla. Admin Code, Fla. Stat. §400.9935(1), Fla. Stat. §400.9935(2), Fla. Stat. §400.9935(3), Fla. Stat. § 456.053, and Fla. Stat. §627.736, Plaintiff's failure to comply with the Health Care Clinic Act and applicable statutes renders their charges unlawful, noncompensable, and unenforceable pursuant to Fla. Stat. § 400.9935(3), §627.736 (5)(a), Fla. Stat. § 627.736(a)(2)(e), or Fla. Stat. § 627.736(5)(d)."

SECOND AFFIRMATIVE DEFENSE

"Defendant states that the services rendered to the claimant were ***unlawful*** in that the Plaintiff did not have the proper licensure to perform the medical services rendered. Upon information and belief, Dr. Loss was improperly licensed in violation of Fla. Stat. § 400.9935, Fla. Admin Code 59A-33.002(g) and Fla. Admin Code 59A-33.013. Dr. Loss maintained a South Florida home address and active medical practices in South Florida, over 200 miles away, as well. Upon information and belief, Dr. Loss failed to satisfy his obligations as medical director pursuant to F.S. 400.9935(1) in failing to perform the duties outlined in Fla. Stat. § 400.9935(1)(a) through (i) and his medical contract with the Clinic, as required by Fla. Admin Code 59A-33.008, Fla. Stat. § 400.9935(1), and Fla. Stat. § 456.053. Thus, the bills at issue are not payable pursuant to Fla. Stat. § 400.9935(3) or Fla. Stat. §627.736 (5)(a)."

An affirmative defense is a pleading that, in whole or part, bars or voids the cause of action asserted by an opponent and must be distinguished from a counterclaim which asserts a cause of action against a plaintiff. *Storchwerke, GMBH v. Mr. Thiessen's Wallpapering Supplies, Inc.,* 538 So. 2d 1382, 1383 (Fla. 5th DCA 1989), *Fed. Deposit Ins. Corp. v. Brodie,* 602 So. 2d 1358, 1362 (Fla. 3d DCA 1992). TOH concedes they are unaware of any law that states an affirmative defense may constitute a private cause of action or enforcement. Nonetheless, TOH argues that Progressive is impermissibly enforcing Chapter 400, Florida's Health Care Clinic Act ("HCCA"), because compliance with HCCA is determined exclusively by Florida's Agency for Health Care Administration ("ACHA"). This Court disagrees.

The PIP statute provides that an insurer is not required to pay a claim or charges for any service or treatment that was not lawful at the time rendered. *Fla. Stat.* § 627.736(5)(a), (5)(b)(1)(b) and (d), (5)(d), Fla. Stat. Per the statutes, "lawful" or "lawfully" mean Plaintiff must be "in substantial compliance with all relevant applicable criminal, civil, and *administrative requirements* of state and federal law related to the provision of medical services or treatment." § 627.732(11), Fla. Stat (emphasis added). It's the burden of the Plaintiff to show that they were in substantial compliance with all civil and administrative requirements of state law when they rendered treatment to the injured person. In other words, it is TOH that is attempting to enforce the PIP statute by alleging they have complied with all appropriate statutes and that they are entitled to relief, and in turn, Progressive is entitled to refute that allegation.

As there are outstanding fact questions as to whether those claims submitted are lawful, compensable, and enforceable under the PIP statute, Progressive is entitled to the appropriate discovery. The Court takes no action on Plaintiff's argument that an absence of a finding by AHCA is indicative of substantial compliance and lack of a violation as Progressive has not been able to conduct discovery in order to support arguments in response to that issue.

Furthermore, the Court has jurisdiction in this case. Progressive is not asking this Court to step outside its jurisdictional role in order to compel AHCA to address any potential violations under the HCCA. Although the HCCA does not refer to a judicial remedy, it provides that "[all] charges or reimbursement claims made by or on behalf of a clinic that is required to be licensed under this part, but that is not so licensed, or that is otherwise operating in violation of this part, are unlawful charges, and therefore are noncompensable and unenforceable." Fla. Stat. § 400.9935(3). The plain language of the applicable PIP statutes provides that "[a]n insurer . . . is not required to pay a claim or charges . . . [f]or any service or treatment that was not lawful at the time rendered . . .," *id*. § 627.736(5)(b)(1)(b), and it defines "lawful" as "in substantial compliance with all relevant applicable criminal, civil, and *administrative* requirements of state and federal law related to the provision of medical services and treatment," *id*. § 627.732(11) (emphasis added).

The legislatures' statutory definition of "lawful" or "lawfully" plainly and clearly includes adherence to Florida administrative requirements, including the licensing requirements of the HCCA. The plain language of the statute shows that a charge or reimbursement claim by a non-compliant clinic, as in the case of *Silver Star,* is "unlawful . . . noncompensable and unenforceable." *State Farm Fire & Cas. Co. v. Silver Star Health & Rehab,* 739 F.3d 579, 583 (11th Cir. 2013) [24 Fla. L. Weekly Fed. C834a]. The court in *State Farm v. Silver Star* states,

> *"Because courts are traditional forums for determining the lawfulness, compensability, and enforceability of claims, it would make no sense to read into a statute a provision that courts lack the authority to decide the crucial question on which the lawfulness, compensability, and enforceability of a claim depends."*

Consequently, this Court finds it has jurisdiction to entertain and adjudicate Progressive's affirmative defenses.

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff's Amended Motion for Partial Summary Judgment as to Defendant's First and Second Affirmative Defenses is hereby DENIED. The Court takes no action on Plaintiff's argument regarding compliance due to a lack of finding by AHCA as no discovery as to that issue has been completed and may be a fact question, thus would be improper to determine at this juncture.

IT IS FURTHER ORDERED that Plaintiff, Counsel for Dr. Loss, and Defendant coordinate Dr. Loss's deposition within ninety (90) days from the date of this order.

* * *

Insurance—Personal injury protection—Attorney's fees—Claim or defense not supported by material facts or applicable law—Motion for attorney's fees under section 57.105 is denied where motion does not cite to any competent substantial evidence in record supporting sanctions—Unauthenticated, unverified PIP log showing exhaustion of benefits is not competent substantial evidence that medical provider was on notice of exhaustion of benefits—Further, continuation of litigation despite exhaustion of benefits does not warrant sanctions where complaint sought declaratory judgment, not benefits, and at time of action, suits for declaratory judgment were allowed even though insurers alleged that benefits had been exhausted

DR. E. MICHAEL WILLIAMS AND ASSOCIATES, P.A., a/a/o Jamie Booker, Plaintiff, STATE FARM FIRE AND CASUALTY COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 16-CC-029285, Division J. February 11, 2022. J. Logan Murphy, Judge. Counsel: Anthony Prieto and Amy Sullivan, Morgan & Morgan, Tampa; and David H. Caldevilla, de la Parte & Gilbert, P.A., Tampa, for Plaintiff. David B. Kampf, Joseph G. Monte, II, Allen Gaffney, and Sarah Baniszewski, Ramey & Kampf, P.A., Tampa, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR ATTORNEYS' FEES AND COSTS

BEFORE THE COURT is Defendant's Motion for Entitlement to Attorney's Fees and Costs, filed May 21, 2018. Plaintiff responded on June 28, 2019, and a predecessor judge of this division held a hearing on July 3, 2019, though an order was never entered. To facilitate a swift disposition, the parties convened a case management conference where they stipulated to allowing me to decide the motion based on

the written filings and a transcript of the 2019 hearing. Neither party has requested an evidentiary hearing, content to rely on the record already established.[1] Upon consideration of the motion, the response, the transcript, and the record as a whole, the motion is denied.

I. INTRODUCTION.

With Jamie Booker's rights under her State Farm policy, Plaintiff Dr. E. Michael Williams and Associates, P.A. ("Williams") sued State Farm for "declaratory and/or supplemental relief." Compl. ¶ 31. Though detailed, it is not the most artfully pled complaint. Despite an *ad damnum* clause that hews to its demand for declaratory relief, the very first line of the complaint alleges Williams is "asserting claims for declaratory relief, supplemental relief, and for *damages* that do not exceed" $5,000. Compl. ¶ 1 (emphasis added). Nevertheless, the complaint may only be reasonably read as a whole to seek declaratory and supplemental relief, as State Farm acknowledges. *See id.* ¶¶ 31-47; § 57.105 Motion ¶ 5.

Williams sought a declaration that State Farm used an "impermissible Hybrid Method to calculate PIP benefits" and that State Farm was instead required to pay claims by using a "Reasonable Amount Method." This issue was recently resolved in State Farm's favor. *MRI Assocs. of Tampa, Inc. v. State Farm Auto. Ins. Co.*, No. SC18-1390, 46 Fla. L. Weekly S379, 2021 WL 5832298 (Fla. Dec. 9, 2021). But when the complaint was filed in 2016, it remained an open question.

State Farm moved to dismiss the complaint, arguing the complaint sought an "advisory opinion." The motion to dismiss did not argue that State Farm had exhausted the benefits due under Booker's policy. About one month later, State Farm filed an earlier-served Motion for Sanctions Pursuant to Florida Statutes § 57.105 Based on Plaintiff's Cause of Action Seeking Declaratory Relief as to PIP Benefits. The motion for sanctions likewise argued (at ¶¶ 4, 5) that Williams improperly sought an "advisory opinion." The motion for sanctions also argued (at ¶ 9) "[t]here are no PIP benefits remaining under the policy," attaching an unauthenticated payment log, which shows State Farm had paid $10,000 in PIP coverage to Booker and her providers.

A predecessor judge of this division held a hearing on the motion to dismiss on April 5, 2018. State Farm argued that "benefits have exhausted," so "[t]here's nothing additional to pay plaintiff in this case." Hrg. Tr. at 3:12-13 (Apr. 5, 2018).[2] Williams responded that it was not seeking benefits and, in any event, the PIP log State Farm attached to the motion was insufficient and outside the four corners of the complaint. *Id.* at 7:5-8:6. The transcript reveals that the predecessor judge dismissed the complaint "[b]ased on the statements of defense counsel" that "all benefits have been exhausted in this case." Hrg. Tr. at 11:4-6, 13:25-14:2. The order likewise granted the motion to dismiss with prejudice "due to this Court finding the policy of insurance at issue in this matter having exhausted all benefits."

Williams initially appealed the order, but later dismissed the appeal. Meanwhile, State Farm filed a motion to tax costs and its Motion for Entitlement to Attorney's Fees and Costs—the motion addressed in this order. The motion seeks sanctions under § 57.105, Florida Statutes, arguing that the complaint was not supported by necessary material facts or the application of then-existing law. In essence, State Farm argues that because benefits had been exhausted, Williams' complaint was subject to § 57.105 sanctions.

Williams argues that sanctions are inappropriate because the complaint was improperly dismissed based on unauthenticated evidence outside the four corners of the complaint. Williams also contends that the material facts and then-existing law support the claim because "several courts (including judges in Hillsborough County) had already held that [State Farm's] insurance policy adopted an unauthorized 'hybrid' method" of payment.[3] And it cited three orders from the Hillsborough County Court suggesting that its declaratory judgment action could be brought even if State Farm had conclusively demonstrated an exhaustion of benefits.[4] Williams further argues that State Farm has not sustained its burden for § 57.105 sanctions because it has not produced any admissible evidence that Williams or its attorneys knew or should have known that the complaint was not supported by necessary material facts or by the application of then-existing law.

A different predecessor judge held a non-evidentiary hearing on July 3, 2019, but never entered an order on the motion for sanctions. I later assumed the division, and the parties agreed to allow me to decide the motion based on the papers and the transcript of the 2019 hearing.

II. STANDARD.

Because the motion for sanctions is based on a statute, we start with the statute's text. *Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 946-47 (Fla. 2020) [46 Fla. L. Weekly S9a].

> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a) was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) would not be supported by the application of then-existing law to those material facts.
>
> . . . .
>
> (3) Notwithstanding subsections (1) and (2), monetary sanctions may not be awarded:
>
> (a) Under paragraph 1(b) if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.
>
> (b) Under paragraph (1)(a) or paragraph (1)(b) against the losing party's attorney if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts.

§ 57.105, Fla. Stat. (2019).

"The statute is 'intended to address frivolous pleadings,' " but it should not "cast a chilling effect on use of the courts." *Soto*, 326 So. 3d at 1184 (quoting *Peyton v. Horner*, 920 So. 2d 180, 183 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D462a]); *Stevenson v. Rutherford*, 440 So. 2d 28, 29 (Fla. 4th DCA 1983). To that effect, "section 57.105 should not be construed to discourage a party from pursuing a colorable claim . . . ." *Swan Landing Dev., LLC v. First Tennessee Bank Nat'l Ass'n*, 97 So. 3d 326, 328-29 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2225a]. And it must be applied with restraint "to ensure that it serves the purpose for which it was intended." *Bridgestone/Firestone, Inc. v. Herron*, 828 So. 2d 414, 419 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D2173a].

Awarding § 57.105 sanctions is within the trial court's discretion. Swan Landing, 97 So. 3d at 328. But a finding of entitlement must be based upon "substantial, competent evidence presented at the hearing . . . or otherwise before the court and in the record." *Mason v. Highlands Cnty. Bd. of Cty. Comm'rs*, 817 So. 2d 922, 923 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1061a]. The same holds true for any finding of "good faith" under subsection (3). *Ferdie v. Isaacson*, 8 So. 3d 1246, 1250 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D898a].

III. DISCUSSION.

State Farm's motion does not cite to any "substantial, competent evidence" in the record supporting sanctions. *Mason*, 817 So. 2d at

923. That, alone, is a sufficient basis to deny the motion. Without additional evidence, "[f]ailing to state a cause of action is not, in and of itself, a sufficient basis to support a finding that a claim was so lacking in merit as to justify an award of fees pursuant to section 57.105." *Connelly v. Old Bridge Vill. Co-Op, Inc.*, 915 So. 2d 652, 656 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2390a]. *See also MC Liberty Express, Inc. v. All Points Servs., Inc.*, 252 So. 3d 397, 403 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1808a] ("[A]n award of fees under section 57.105 requires more than the moving party succeeding in obtaining a dismissal of the action or the entry of a summary judgment in its favor . . . ."). That is particularly true here, where the trial court dismissed the complaint "[b]ased on the statements of defense counsel." Hrg. Tr. 13:25-14:2 (Apr. 5, 2018).

State Farm went a bit further at the hearing. It argued that policy benefits exhausted on June 21, 2016, and State Farm placed Williams on notice of the exhaustion on June 23, 2016, with a payment log. While that payment log appears as part of Exhibit B to State Farm's motion, it has never been authenticated or verified. *Cf. Albritton v. Ferrera*, 913 So. 2d 5, 8 n.1 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D2099a] (The term "supported by the material facts" means "the party possesses admissible evidence sufficient to establish the fact if accepted by the finder of fact.").

Even if the payment log constituted competent, substantial evidence, I would still deny the motion. Williams' complaint did not seek benefits—State Farm acknowledges as much. Instead, it sought a declaratory judgment that State Farm utilized an impermissible "hybrid method" of calculating payable PIP benefits. At the time, the county courts has sustained like-minded complaints, even in the face of exhausted benefits. *See, e.g., Crespo & Assocs., P.A. a/a/o A. Vilchis v. Progressive Am. Ins. Co.*, 25 Fla. L. Weekly Supp. 1047a, No. 17-CC-2778 (Hillsborough Cnty. Ct., Fla. Feb. 7, 2018); *Crespo & Assocs., P.A. a/a/o Amirali Bhannadia v. State Farm Mut. Ins. Co.*, 26 Fla. L. Weekly Supp. 233a, No. 17-cc-39481 (Hillsborough Cnty. Ct., Fla. Apr. 16, 2018).

Though neither party quite grabs onto it, the crux of the dispute is whether a declaratory judgment suit against an insurer who has paid all benefits owed under the policy is, as a matter of law, not supported by material facts or the application of then-existing law. § 57.105(1). That is, can an insured sue for a declaratory judgment when a defendant alleges the policy benefits have been exhausted? At the time, the answer was yes. *See, e.g., Crespo*, 25 Fla. L. Weekly Supp. 1047a; *Crespo*, 26 Fla. L. Weekly Supp. 233a; *Tampa Bay Imaging, LLC a/a/o Mayumi Artiles v. Amica Mut. Ins. Co.*, 19 Fla. L. Weekly Supp. 749a (Hillsborough Cnty. Ct., Fla. May 11, 2012). *See also Bristol W. Ins. Co. v. MD Readers, Inc.*, 52 So. 3d 48 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2832a].

At the hearing, State Farm raised several cases in support of their argument for sanctions. But most are inapposite, and the others do not requiring sanctions here.[5] The issue simply was not cut-and-dry enough to warrant sanctions under § 57.105. *See MacAlister v. Bevis Const., Inc.*, 164 So. 3d 773, 776 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D1228a]; *Peyton*, 920 So. 2d at 183-84; *Connelly*, 915 So. 2d at 654.

That is not to say that an action seeking a declaration concerning an exhausted policy will *always* be allowed to proceed, *see Bristol W.*, 52 So. 3d at 51-52 (Warner, J., concurring specially), only that State Farm has failed to prove that this particular action was not supported by the material facts or then-existing law from the time it was filed until it was dismissed. Even when a lawsuit is dismissed in its early stages, the § 57.105 movant should "present evidence and establish a record for purposes of demonstrating entitlement to attorney's fees." *Hustad, P.E. v. Architectural Studio, Inc.*, 958 So. 2d 569, 571 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1537b]. State Farm has not surmounted that burden.

Accordingly, Defendant's Motion for Entitlement to Attorney's Fees and Costs is DENIED.

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[1]In fact, at the case management conference, the parties agreed that I could decide this motion because it was not evidentiary and neither Judge Manning nor I needed to make evidentiary findings. That may not be right. *See Soto v. Carrollwood Vill. Phase III Homeowners Ass'n, Inc.*, 326 So. 3d 1181, 1184-85 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1974a]; *Tedrow v. Cannon*, 186 So. 3d 43, 47-48 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D446c]; *Sena v. Pereira*, 179 So. 3d 433, 437 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D2543a]. *See also* Tr. at 29:15-22 (July 3, 2019). But since neither party has sought an evidentiary hearing over the last three years, that issue is waived, and I will not further delay a decision by requiring an evidentiary hearing at this point. *O'Neal v. Darling*, 321 So. 3d 309, 313-14 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1103b].

[2]The transcript of the motion to dismiss hearing is attached as Exhibit B to Williams' response to the motion for sanctions.

[3]Citing *Crespo & Assocs., P.A. a/a/o Veronica Rondon v. State Farm Mut. Auto. Ins. Co.*, 23 Fla. L. Weekly 982b (Hillsborough Cnty. Ct., Fla. Dec. 18, 2015); *DNA Ctr., LLC a/a/o Helen Roy v. State Farm Mut. Auto. Ins. Co.*, 23 Fla. L. Weekly Supp. 1043a (Volusia Cnty. Ct., Fla. Feb. 24, 2016); *Fla. Emergency Physicians Kang & Assocs., M.D. P.A. a/a/o Jonathan Sias v. State Farm Mut. Auto. Ins. Co.*, 23 Fla. L. Weekly Supp. 1052a (Orange Cnty. Ct. Fla. Feb. 10, 2016); *A-Plus Med. & Rehab Ctr. a/a/o Cesar Acevedo v. State Farm Mut. Auto. Ins. Co.*, 24 Fla. L. Weekly Supp. 159b (Miami-Dade Cnty. Ct., Fla. June 8, 2016); *K. McFarlin Usry, D.C., P.A. a/a/o Guivelore Labbe v. State Farm Mut. Auto. Ins. Co.*, 24 Fla. L. Weekly Supp. 760b (Broward Cnty. Ct. July 27, 2016); *Feijoo v. State Farm Mut. Auto. Ins. Co.*, 24 Fla. L. Weekly Supp. 567a (Miami-Dade Cnty. Ct. Aug. 25, 2016); *State Farm Mut. Auto Ins. Co. v. MRI Assocs. of Tampa, Inc.*, 24 Fla. L. Weekly Supp. 512a (13th Jud. Cir. Ct., Sep. 6, 2016).

[4]Citing *Crespo & Assocs., P.A. a/a/o A. Vilchis v. Progressive Am. Ins. Co.*, 25 Fla. L. Weekly Supp. 1047a (Hillsborough Cnty. Ct., Fla. Feb. 7, 2018); *Crespo & Assocs., P.A. a/a/o Amirali Bhannadia v. State Farm Mut. Auto. Ins. Co.*, 26 Fla. L. Weekly Supp. 233a (Hillsborough Cnty. Ct., Fla. Apr. 16, 2018); *Tampa Bay Imaging, LLC a/a/o Mayumi Artiles v. Amica Mut. Ins. Co.*, 19 Fla. L. Weekly Supp. 749a (Hillsborough Cnty. Ct., Fla. May 11, 2012).

[5]*Bain Complete Wellness, LLC a/a/o Kerri McDougald v. Garrison Property & Casualty Insurance Company*, 27 Fla. L. Weekly Supp. 594b (Hillsborough Cnty. Ct., Fla. Sep. 11, 2018), addressed the sufficiency of a pre-suit demand letter. *Fry Enterprises, Inc. v. State Farm Mutual Automobile Insurance Co.*, 26 Fla. L. Weekly Supp. 514a (Hillsborough Cnty. Ct., Fla. July 27, 2018), does not address § 57.105 at all. And *Midland Funding, LLC v. Washington*, 25 Fla. L. Weekly Supp. 577a (Hillsborough Cnty. Ct., Fla. June 6, 2016), deals with the wrong part of § 57.105: the reciprocal fee provision in subsection (7). As does *Portfolio Recovery Assocs., LLC v. Cole*, 24 Fla. L. Weekly Supp. 358a (Hillsborough Cnty. Ct., Fla. June 25, 2015). *Bayside Healthcare Rehab, Inc. a/a/o Carlos Gerena v. Lincoln General Insurance Co.*, 12 Fla. L. Weekly Supp. 159a (Hillsborough Cnty. Ct., Fla. Nov. 2, 2004), deals with the appropriate statute and involves a finding that benefits were exhausted, but the three-paragraph order contains no detail about the nature of the plaintiff's claim, and—as opposed to this case—the trial court actually found benefits had been exhausted before the plaintiff voluntarily dismissed its claim. *Northwoods Sports Medicine & Physical Rehabilitation, Inc. v. State Farm Mutual Automobile Insurance Co.*, 137 So. 3d 1049 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a], stands for the unremarkable position that an insurer has "no further liability on unresolved, pending [PIP] claims" once PIP benefits have been exhausted "through the payment of valid claims." *Id*. at 1057. It does not speak to declaratory judgment actions. Nor does *GEICO Indemnity Co. v. Gables Insurance Recovery, Inc.*, 159 So. 3d 151 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D2561a].

* * *

Insurance—Personal injury protection—Interest—Where insurer paid interest on overdue benefits to medical provider's attorney rather than to provider as specified in demand letter, insurer failed to issue payment in accordance with demand letter and exposed itself to suit for recovery of interest—No merit to argument that exhaustion of benefits precludes suit for unpaid interest

NEW MEDICAL GROUP, INC., a/a/o Martha Ortiz, Plaintiff, v. WINDHAVEN

INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County, General Jurisdiction Division. Case No. 2016-006829-SP-25 (04). June 8, 2017. Carlos Guzman, Judge. Counsel: Thomas F. Rhodes IV, Pacin Levine, P.A., Miami, for Plaintiff. Michael Shifrin, for Defendant.

[Editor's note: Order rendered in 2017.]

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S ENTITLEMENT TO OVERDUE STATUTORY INTEREST AND FINAL JUDGMENT IN FAVOR OF PLAINTIFF

THIS CAUSE having come before the Court on March 14, 2017 on Plaintiff's Motion for Summary Judgment as to Plaintiff's Entitlement to Overdue Statutory Interest, and the Court having considered the argument of the respective parties, hereby rules as follows:

UNDISPUTED FACTS

1. On February 8, 2016, Martha Ortiz was involved in a motor vehicle accident in which she sustained personal injures.

2. Martha Ortiz executed an assignment of benefits with Plaintiff, NEW MEDICAL GROUP, INC. (hereinafter referred to as "New Medical"), and received medical treatment for the injuries she sustained as a result of the February 8, 2016 accident that was reasonable, related, medically necessary and lawfully rendered.

3. New Medical submitted the bills for dates of service which included February 10, 2016 through March 3, 2016 for payment under Defendant, WINDHAVEN INSURANCE COMPANY's (hereinafter referred to as "Windhaven") policy of insurance with Camilo J. Hemelberg. Plaintiff's assignor, Martha Ortiz, was afforded coverage for dates of loss February 8, 2016 under Camilo J. Hemelberg's policy of insurance with Windhaven.

4. For failure to issue payment within 30 days of receipt of New Medical's bills, Windhaven was served with a pre-suit demand letter dated April 25, 2016, demanding overdue payment of dates of service February 10, 2016 through March 3, 2016.

5. The April 25, 2016, pre-suit demand letter prepared by counsel for New Medical, provided specific instructions to Windhaven in order to pay the overdue claim without further consequence. The instructions were both bolded and underlined and read exactly as follows, "**Please make your penalty and postage draft payable to PACIN LEVINE, P.A. with our tax I.D. number being 46-1619758 and your principal and interest draft payable to the health care provider and send all drafts to the PACIN LEVINE, P.A. at the below address.**"

6. In response to New Medical's April 25, 2016 pre-suit demand letter, Windhaven issued three separate drafts. The drafts for benefits was made payable to New Medical. The draft for overdue penalty and postage was made payable to Pacin Levine, P.A. The draft for overdue statutory interest was made payable to Pacin Levine, P.A., in derogation of the payment instructions on New Medical's April 25, 2016 pre-suit demand letter.

7. On July 21, 2016, New Medical filed its Complaint for Damages demanding payment of overdue statutory interest in the amount of $22.02.

8. New Medical contested that their counsel was unable to accept the interest check payable to them as the demand letter was clear as to the drafting instructions.

9. Windhaven raised exhaustion of the $10,000.00 in available PIP Benefits as its affirmative defense in this matter.

10. New Medical does not contest that benefits are exhausted but simply seeks payment of overdue interest.

STANDARD OF REVIEW

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, 130 (Fla. 2000) [25 Fla. L. Weekly S390a]; *see also Collections, U.S.A., Inc. v. City of Homestead*, 816 So.2d 1225, 1227 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D1243a]; Fla. R. Civ. P. 1.510(c).

CONCLUSIONS OF LAW

The sole matter in contention is whether the Windhaven is obligated to pay interest after its timely receipt of the medical bills at issue, in accordance with Florida Statute § 627.736(10). Because Florida Law mandates the payment of interest as a consequence of the unlawful delay in issuance of payment of benefits, and because Windhaven failed to effectuate payment of overdue interest at the demand-level stage of this matter, this Court finds that the amount of $22.20 in interest is due, owing, and subject to Final Judgment.

The Florida Motor Vehicle No-Fault Law (Fla. Stat. § 627.736) was last amended by the Florida Legislature in 2012. Fla. Stat. 627.736(10) reads as follows:

(10) DEMAND LETTER.—

(a) As a condition precedent to filing any action for benefits under this section, written notice of an intent to initiate litigation must be provided to the insurer. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).

(b) The notice must state that it is a "demand letter under s. 627.736" and **state with specificity**:

1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.

2. The claim number or policy number upon which such claim was originally submitted to the insurer.

3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due. A completed form satisfying the requirements of paragraph (5)(d) or the lost-wage statement previously submitted may be used as the itemized statement. To the extent that the demand involves an insurer's withdrawal of payment under paragraph (7)(a) for future treatment not yet rendered, the claimant shall attach a copy of the insurer's notice withdrawing such payment and an itemized statement of the type, frequency, and duration of future treatment claimed to be reasonable and medically necessary.

(c) Each notice required by this subsection must be delivered to the insurer by United States certified or registered mail, return receipt requested. Such postal costs shall be reimbursed by the insurer if requested by the claimant in the notice, when the insurer pays the claim. Such notice must be sent to the person and address specified by the insurer for the purposes of receiving notices under this subsection. Each licensed insurer, whether domestic, foreign, or alien, shall file with the office the name and address of the designated person to whom notices must be sent which the office shall make available on its Internet website. The name and address on file with the office pursuant to s. 624.422 is deemed the authorized representative to accept notice pursuant to this subsection if no other designation has been made.

(d) If, within 30 days after receipt of notice by the insurer, **the overdue claim specified in the notice is paid by the insurer together with applicable interest and a penalty of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of $250, no action may be brought against the insurer.** If the demand involves an insurer's withdrawal of payment under paragraph (7)(a) for future treatment not yet rendered, no action may be brought against the insurer if, within 30 days after its receipt of the notice, the insurer

mails to the person filing the notice a written statement of the insurer's agreement to pay for such treatment in accordance with the notice and to pay a penalty of 10 percent, subject to a maximum penalty of $250, when it pays for such future treatment in accordance with the requirements of this section. To the extent the insurer determines not to pay any amount demanded, the penalty is not payable in any subsequent action. For purposes of this subsection, payment or the insurer's agreement shall be treated as being made on the date a draft or other valid instrument that is equivalent to payment, or the insurer's written statement of agreement, is placed in the United States mail in a properly addressed, postpaid envelope, or if not so posted, on the date of delivery. **The insurer is not obligated to pay any attorney fees if the insurer pays the claim** or mails its agreement to pay for future treatment within the time prescribed by this subsection.
(emphasis added)

It is a well settled tenet of statutory construction that the court must look into the language of the statute and apply the plain and obvious meaning where no ambiguity exists. *Blanton v. City of Pinellas Park*, 887 So.2d 1224, 1230 (Fla. 2004) [29 Fla. L. Weekly S614a]; *Woodham v. Blue Cross & Blue Shield of Florida, Inc.*, 829 So.2d 891, 897 (Fla. 2002) [27 Fla. L. Weekly S834a].

As set forth numerous times by the Florida Supreme Court, "courts must give full effect to all statutory provisions and construe related provisions in harmony with one another." *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 456 (Fla. 1992); *see also Sharer v. Hotel Corp. of America*, 144 So.2d 813, 817 (Fla. 1962); *Unrah v. State*, 669 So.2d 242 (Fla. 1996) [27 Fla. L. Weekly S834a]; *Holly v. Auld*, 450 So.2d 219 (Fla. 1984); *School Bd. Of Palm Beach County v. Survivors Charter Schools, Inc.*, 3 So.3d 1220, 1223 (Fla. 2009) [34 Fla. L. Weekly S251a].

The only means by which all provisions of Florida Statute §627.736 may be given full effect is to enforce the interest provision set forth therein. If the Court were to determine that the interest provision is unenforceable, it renders that provision null and void in contravention of clear legislative intent. *See Nationwide Mutual Fire Ins. Co. v. Southeast Diagnostics, Inc.*, 766 So.2d 229 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D316a] (if the language of the statute is clear and unambiguous, the legislative intent must be derived from the words used without involving construction or speculating as to what the legislature intended). As such, the Court finds that the interest provision of the Florida No-Fault Law is both valid and enforceable.

Black's Law Dictionary defines "**Payment**" as "The performance of a duty, promise, or obligation, or discharge of a debt or liability, by the delivery of money or other value." Based on the undisputed facts of this case, Windhaven failed to deliver payment and failed to perform its obligation under the Florida No-Fault Law to avoid suit. The record evidence is clear that Windhaven failed to pay overdue statutory interest in accordance with both New Medical's pre-suit demand letter and Fla. Stat. §627.736(10). New Medical's pre-suit demand letter stated, with specificity, how Windhaven needed to issue payment of overdue benefits, interest, penalty and postage in order to avoid litigation. Windhaven failed to issue payment in accordance with Plaintiff's pre-suit demand letter and, in doing so, exposed itself to suit for recovery of same.

The Court is not persuaded by Windhaven's affirmative defense of "exhaustion of benefits" which was addressed in New Medical's Motion for Summary Judgment, and hereby rules against Windhaven and in favor of New Medical as to same under the circumstances of this case. Fla. Stat. 627.726 does not leave open for interpretation what the statute intends the $10,000.00 to be used for—it clearly defines the required benefits as medical, disability, and death benefits. As such, a plain reading of the Florida PIP Statute reveals that that Windhaven is not entitled to rob a claimant of statutorily intended benefits due to its own negligence in failing to pay timely submitted medical bills. If Windhaven were correct in its assertion that once benefits were exhausted it need not pay penalty, postage, and interest, an insurer could pay each and every bill it received late, avoid the obligation of paying penalty, postage, and interest on each bill, and then shirk all responsibility to do so once benefits are exhausted. This is nonsensical, and defeats the Legislative intent of the requirement that all overdue interest be paid in full.

Had Windhaven paid the overdue claim specified in New Medical's pre-suit notice, it could have avoided suit entirety. Instead, Windhaven issued a draft for overdue statutory interest which could not have been cashed by either New Medical or counsel for New Medical. Windhaven failed to make payment of overdue statutory interest as a matter of law. Summary Judgement in favor of Plaintiff is both appropriate and warranted under these facts.

ACCORDINGLY, and based on the above findings of fact and conclusions of Law, it is hereby **ORDERED** and **ADJUDGED**, as follows:

1. That Plaintiff's Motion for Summary Judgment as to Plaintiff's Entitlement to Overdue Statutory Interest is **GRANTED**.

2. **IT IS ADJUDGED** that Plaintiff, NEW MEDICAL GROUP, INC., recover from Defendant, WINDHAVEN INSURANCE COMPANY, the sum of $22.02 representing statutorily mandated payment of interest on payment of overdue PIP benefits that shall bear interest at a rate of 4.75% per year, for which let execution issue.

3. That the Court reserves jurisdiction to award Plaintiff attorney's fees and costs associated with this action.

* * *

TOTAL CARE RESTORATION, LLC, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-012978-CC-25, Section CG02. January 12, 2022. Elijah A. Levitt, Judge. Counsel: Robert F. Gonzalez and Leo Manon, III, The Florida Insurance Law Group, Miami, for Plaintiff. Lauren Matta-Burke, Coral Gables, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This cause came before the Court on January 5, 2022, for hearing on Defendant's July 6, 2021, Motion for Summary Judgment, and the Court, being advised in the premises, hereby denies Defendant's Motion.

The affidavits of Plaintiff's corporate representative David Dubis and expert Raul Gonzalez-Casals show a genuine dispute of material fact regarding whether the services provided by Plaintiff were undertaken solely to protect covered property for which Section I.F.1.a. of the policy would allow Defendant to only pay up to $3000 in reasonable costs. Accordingly, Defendant is not entitled to judgment as a matter of law.

* * *

Insurance—Personal injury protection—Declaratory judgment—Petition seeking declaration that insurer wrongfully changed CPT code is not a cloaked breach of contract action for which presuit demand letter was required to be served

CIELO SPORTS AND FAMILY CHIROPRACTIC CENTRE, LLC., a/a/o Celso Alberto Ramirez-Barrios, Plaintiff, v. DAIRYLAND INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-097002. January 22, 2022. Frances M. Perrone, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE having come before the court on January 11, 2022 on Defendant's Motion to Dismiss and/or Motion for More Definite Statement. The court having reviewed the file, considered the motion,

the arguments presented by counsel, applicable law, and being otherwise fully advised, finds as follows:

1. Plaintiff filed this Declaratory action seeking a declaration that Defendant wrongfully changed Plaintiff's CPT code from 76499 to a "non-specific code" in denying the code.

2. Defendant's Motion to Dismiss alleges that Plaintiff's Petition is essentially a cloaked breach of contract action and that Plaintiff was required to serve a PIP Pre Suit Demand Letter pursuant to *F.S.* Section 627.736(10).

3. The Court finds that based upon the cited case law, Plaintiff has properly plead its Petition for Declaratory Judgment.

4. Defendant's Motion to Dismiss is hereby **DENIED**.

5. Plaintiff agreed to file an Amended Petition which lists the correct corporate entity for Defendant.

* * *

Insurance—Discovery—Depositions—Corporate representative—Sanctions are imposed for failure of corporate representative to appear for deposition

FLORIDA WELLNESS CENTER, INC., a/a/o Yoan Aquino, Plaintiff, v. INTEGON PREFERRED INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 21-CC-029351, Division J. December 28, 2021. J. Logan Murphy, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Alex Avarello and Daniel Sobel, McFarlane Law, Coral Springs, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS AND DENYING DEFENDANT'S MOTION TO STRIKE SHAM PLEADING

BEFORE THE COURT are Plaintiff's Motion for Sanctions, which the Court construes as a motion to compel deposition and for fees, and Defendant's Motion to Strike Plaintiff's Motion for Sanctions as a Sham Pleading. The parties appeared for a hearing on December 20, 2021. Upon consideration of the filings and the argument of the parties,

1. Plaintiff's Motion for Sanctions is GRANTED. Fla. R. Civ. P. 1.310(b)(6); *Sybac Solar, GMBH v. 6th St. Solar Energy Park of Gainesville, LLC*, 217 So. 3d 1068 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D771a]; *Carriage Hills Condo., Inc. v. JBH Roofing Construction, Inc.*, 109 So. 3d 329 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D643a].

2. The deposition of Defendant's corporate representative shall occur no later than March 1, 2022.

3. Plaintiff is entitled to the reasonable expenses caused by the failure of Defendant's corporate representative to appear for the deposition. Fla. R. Civ. P. 1.380(d).

4. The parties have 20 days to reach a resolution on the total amount of fees and costs to be awarded under Rule 1.380(d). Upon agreement, Plaintiff shall submit to the Court a proposed order. Should the parties be unable to reach agreement, the matter shall be set for an evidentiary hearing.

5. Defendant's Motion to Strike Plaintiff's Motion for Sanctions as a Sham Pleading is DENIED.

* * *

Insurance—Personal injury protection—Declaratory judgment—Complaint seeking declaration that insured is not required by policy or PIP statute to bring her cell phone records to examination under oath, that request for EUO was untimely, and that insured is entitled to PIP coverage meets pleading requirements for declaratory action—Insured was not required to send demand letter prior to filing action seeking declaration regarding coverage, not money damages—Motion to dismiss is denied

SACHA DE JESUS, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 21-CC-091413, Division N. January 11, 2022. Michael J. Hooi, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Hector Muniz, for Defendant.

ORDER DENYING MOTION FOR DISMISSAL AND PROTECTIVE ORDER AND DIRECTING A RESPONSE TO THE COMPLAINT

After being injured in a May 2021 auto accident, Sacha de Jesus submitted notice of the fact of a covered loss to her insurer, Progressive Select Insurance Company, and filed a claim for personal injury protection (PIP) benefits. Progressive scheduled de Jesus for an examination under oath (EUO), requiring her to bring her cell-phone records from May 14, 2021, to June 14, 2021. Although de Jesus has asserted that she would appear at an EUO, she refuses to bring along her cell-phone records. She does not believe that the applicable insurance policy requires her to do so.

This declaratory action followed. De Jesus asks for a declaration that the policy includes no language requiring her to bring her cell-phone records to an EUO, that Progressive's request for an EUO was untimely under § 627.736(4)(b) and (i), Fla. Stat., and that she is entitled to PIP coverage. Progressive has moved to dismiss the complaint, arguing that because de Jesus did not submit a presuit demand letter under § 627.736(10), Fla. Stat., she has failed to meet all conditions precedent to bringing this action. Indeed, the complaint alleges at paragraph 13 that "DE JESUS has attempted to perform all conditions precedent under PROGRESSIVE's policy in order to be entitled to coverage from PROGRESSIVE, including, but not limited to, DE JESUS timely submitting notice of the fact of a covered loss and attempting to communicate in good faith with PROGRESSIVE at all times." To avoid incurring expenses on a claim for which it believes it has no further liability, Progressive has also moved for a protective order against discovery.

In resolving Progressive's motion to dismiss, the Court applies the four-corners rule. "Under this rule, the court's review is limited to an examination solely of the complaint and its attachments." *Santiago v. Mauna Loa Invs*., LLC, 189 So. 3d 752, 755 (Fla. 2016) [41 Fla. L. Weekly S91a]. "[I]f the factual allegations of the complaint are established by proof or otherwise," rule 1.110's pleading requirements are met, and "the plaintiff will be legally or equitably entitled to the claimed relief against the defendant." *Id.* (citations omitted). Although the Court knows from reviewing the file and the hearing on Progressive's motions on January 5, 2022, that de Jesus has been denied coverage, the denial does not affect the analysis here. The four-corners rule applies.

De Jesus's complaint meets rule 1.110's pleading requirements for this declaratory action. "The court may render declaratory judgments on the existence or nonexistence of any right or any fact upon which the existence or nonexistence of such right does or may depend, whether such right now exists or will arise in the future." § 86.011, Fla. Stat. (cleaned up). Here, de Jesus seeks a declaration of her rights and obligations under the Progressive insurance policy and the PIP statute. She does not seek a benefits award.

Progressive's motion to dismiss fails for that reason. Section 627.736(10) states that the demand letter is "a condition precedent to filing any action for benefits under this section." But de Jesus has not filed an action for benefits. Because her complaint seeks a declaration about coverage, not any money damages for PIP benefits, the statute does not require her to send a presuit demand letter.

Progressive's motion to dismiss is thus denied. Because the action will not be dismissed, the motion for a protective order against discovery is denied as moot. Progressive is directed to respond to the complaint within 10 days after the date of this order.

* * *

Insurance—Summary judgment—Motion for rehearing/reconsideration of order entering summary judgment in favor of insured is denied where insurer did not respond to motion for summary judgment or appear at summary judgment hearing and has not filed affidavits or evidence with motion for rehearing/reconsideration that would create factual issue—Further, arguments presented in insurer's motion are unpersuasive, nonmaterial and unsupported by admissible evidence

MONIQUE MCFARLANE, Plaintiff, v. OCEAN HARBOR CASUALTY INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 21-CC-004707, Division S. January 21, 2022. Lisa Allen, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Russell Steven Kolodziej and August William Mangeney, LDP Law and Associates, Coral Springs, for Defendant.

Order Denying Motion for Rehearing and Reconsideration of the Order Granting Plaintiff's Motion for Summary Judgment Entered on October 28, 2021

[Original Opinion at 29 Fla. L. Weekly Supp. 620a]

This matter came before the Court on December 8, 2021 upon Defendant's Motion for Rehearing and Reconsideration of the Order Granting Plaintiff's Motion for Summary Judgment entered on October 28, 2021. Summary Judgment was granted in Plaintiff's favor based on a review of depositions and affidavits filed by Plaintiff in support of its Motion for Summary Judgment. The Court found that Plaintiff met its initial burden of proof supporting Plaintiff's entitlement to a declaration of coverage under the subject policy; further, Defendant failed to appear at the hearing and failed to file a response in opposition to Plaintiff's Motion for Summary Judgment or any affidavits in opposition prior to the hearing.

On November 5, 2021, Defendant filed a Motion for Rehearing and Reconsideration arguing that the Court's final order conflicts with governing law or otherwise was simply wrong on the merits. Although Defendant, for the first time, proffered legal arguments opposing Plaintiff's Motion for Summary Judgment in its Motion for Rehearing and Reconsideration of the Order Granting Plaintiff's Motion for Summary Judgment, Defendant again failed to provide any affidavits or other admissible evidence that would create a genuine dispute of fact. On December 14, 2021, Defendant's counsel filed an affidavit explaining why he failed to appear at the hearing on October 27, 2021 (counsel incorrectly assumed it was a virtual hearing rather than an in person hearing). Nevertheless, Defendant did not explain why Defendant failed to file any response in opposition, legal argument in opposition, opposing evidence or affidavits to refute Plaintiff's Motion for Summary Judgment prior to the October 27, 2021 hearing. Thus, even if Defendant's counsel had appeared at the October 27th hearing (virtually or in person), Defendant could not have created a genuine dispute as to any material fact. "The judgment sought must be rendered immediately if the pleadings and summary judgment evidence on file show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as matter of law." *Florida Rules of Civil Procedure 1.510(c) (2021).*

If there had been any pleadings, responses, affidavits, or exhibits filed by Defendant prior to the Motion for Summary Judgment hearing, then this Court would be inclined to rehear the matter; however, nothing whatsoever was filed by Defendant in response to Plaintiff's Motion for Summary Judgment. Plaintiff's Notice of Hearing scheduling the October 27, 2021 Motion for Summary Judgment Hearing was filed on July 23, 2021. Thus, Defendant had over three months to prepare and file a response to Defendant's Motion for Summary Judgment. Finally, the Court has reviewed Defendant's untimely arguments in opposition to Plaintiff's Motion for Summary Judgment made in Defendant's Motion for Rehearing and Reconsideration and finds such arguments to be unpersuasive, nonmaterial and unsupported by admissible evidence.

While the Court is aware that common law leans toward allowing the parties to fully litigate a case or controversy, the Defendant's complete lack of response and failure to follow basic rules of civil procedure outweigh any leniency the court may extend as to Defendant's failure to appear at the hearing. Defendant's failure to appear at the October 27th hearing was not the deciding factor in this case. If the Defendant had filed opposition prior to the hearing and simply failed to appear because of a calendaring mistake, this Court would have immediately set aside the Order Granting Final Judgment and reset the matter for hearing. It is clear however that this was not a simple calendaring mistake; rather it appears Defendant was planning to "sandbag" the Plaintiff and make verbal arguments by zoom or telephone without filing any written pleadings, responses, affidavits or other admissible evidence. Such an inappropriate "defense" would have been futile at summary judgment hearing. Based on Defendant's complete failure to follow the Florida Rules of Civil Procedure as set forth in Rule 1.510 pertaining to summary judgment motions, this Court declines to set aside the Order Granting Summary Judgment in Plaintiff's favor as to coverage. To find otherwise would completely undermine *Rule 1.510 of the Florida Rules of Civil Procedure* and award the slothfulness and unprofessionalism of Defendant.

Accordingly, it is ORDERED AND ADJUDGED as follows: Defendant's Motion for Rehearing and Reconsideration of the Order Granting Plaintiff's Motion for Summary Judgment Entered on October 28, 2021 is DENIED.

* * *

Insurance—Personal injury protection—Declaratory judgment—Action seeking declaration regarding insured's doubt about duty to attend in-person examination under oath during pandemic—Competing motions for summary judgment are denied—Insured's evidence is insufficient to support summary judgment on issue of whether insurer's failure to seek EUO after insured filed declaratory action constitutes confession of judgment—Need to consider parol evidence to resolve latent ambiguities in policy as to whether EUO will be in-person, telephonic, or remote precludes summary judgment in favor of insured—Insurer is not entitled to summary judgment based on insured's failure to serve presuit demand letter because demand letter requirement is not applicable to declaratory judgment action that seeks no damages—Insurer has not presented sufficient evidence to warrant entry of summary judgment based on argument that insured's petition seeks impermissible advisory opinion—Need for declaratory judgment is not mooted by insurer's failure to seek EUO subsequent to filing of declaratory action—No merit to argument that insured is not entitled to attorney's fees or costs because action does not seek damages

TYLER HILCHEY, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-023122. January 21, 2022. Michael C. Baggé-Hernández, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

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

THIS MATTER having come before the court on January 10, 2022 on Plaintiff's Amended Motion for Summary Judgment and Defendant's Second Amended Motion for Final Summary Judgment. The court having reviewed the file, considered the motions, the arguments presented by counsel, applicable law, and being otherwise fully

advised, finds,

1. Plaintiff filed this Declaratory action seeking a declaration regarding the Plaintiff's doubt about Plaintiff's duty to attend an in person examination under oath (hereinafter "EUO") on April 28, 2020 during the Covid-19 pandemic.

2. Plaintiff's first argument is that inasmuch as the Defendant no longer sought an EUO subsequent to the filing of the Declaratory action, Defendant's actions constitute a confession of judgment. The Court disagrees with Plaintiff and cites to the *Celotex* trilogy and *Shotz v. City of Plantation Florida*, 344 F.3d 1161 (11th Circuit 2003) [16 Fla. L. Weekly Fed. C1067a] in finding that the moving party has not filed enough supporting evidence to support summary judgment on this issue. The *Celotex* trilogy refers to three U.S. Supreme Court opinions issued in 1986. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986); and *Matsuhita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

3. Plaintiff's second argument is that Defendant's policy language does not require an in person EUO and that any ambiguity in the EUO Notice must be construed against the Defendant and in favor of Plaintiff. The Court points to 2 provisions in Defendant's policy of insurance which addresses an insured's duty to attend an EUO. The first provision being the EUO section on page 13 does not address a location for the EUO. The second provision, which is on page 12, paragraph 3, which states:

"when, where, and as often as we may reasonable require;".

The Court finds that Defendant's EUO notice does not state "location" and does not clarify whether the EUO will be in person, telephonic or remote as it utilizes the word "may". The Court finds there is ambiguity in both the policy language, as well as the EUO notice. Based upon said ambiguities, the Court cites to *Mac-Gray Serv. v. Savannah Associates*, 915 So.2d 657, 659 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2391a] wherein the court distinguished between a latent ambiguity and a patient ambiguity. When a contract is rendered ambiguous by some collateral matter, it has a latent ambiguity, and the court must hear parol evidence to interpret the writing properly. A patent ambiguity, in contrast, appears on the face of the document, and may not be resolved by consideration of parol evidence. The Court finds the aforementioned ambiguities to be a latent ambiguity which requires consideration of parol evidence and precludes summary judgment.

4. As such, Plaintiff's Amended Motion for Summary Judgment is **HEREBY DENIED**.

5. Defendant's first argument in its Second Amended Second Motion for Summary Final Judgment is that Plaintiff failed to file a pre-suit demand letter pursuant to *F.S.* 627.736(10) and, as such, failed to satisfy a condition precedent for an action seeking benefits under the statute. The Court disagrees with Defendant and cites to *MSPA Claims 1, LLC v. First Acceptance Ins. Co.,* (Fla., M.D., 380 F. Supp. 3d 1235). *See also Bristol West Ins. Co. v. MD Readers, Inc.*, 52 So.3d 48 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2832a] concluding that since the declaratory judgment action seeks no damages whatsoever, it is not an action for "action for benefits". Therefore, *Florida Statutes* Section 627.736(10)(a), does not apply and the statutory pre suit demand letter is not required.

6. Defendant's second argument is that Plaintiff's petition merely seeks an impermissible advisory opinion. The Court disagrees with Defendant and finds that Plaintiff has plead the essential elements required under Chapter 86, *Florida Statutes* and that a material issue remains to be determined. The Court is not satisfied that Defendant has presented enough evidence as required by the *Celotex* trilogy, which refers to 3 U.S. Supreme Court opinions from 1986. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986)

7. The Defendant's third argument is that it did not conduct the April 28, 2020 EUO and no longer sought an EUO subsequent to the filing of the Declaratory action, the issues are rendered moot and there is longer a present controversy to be decided. The Court disagrees with Defendant and cites to *Gagliardi v. TJCV Land Tr.*, 889 F.3d 728 (11th Cir. 2018) [27 Fla. L. Weekly Fed. C869a] and *Ahearn v. Mayo Clinic*, 180 So.3d 165 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D2502d].

8. The Defendant's final argument is that Plaintiff is not entitled to attorney's fees or costs because the Petition for Declaratory Judgment does not seek damages. The Court disagrees with Defendant and cites to *O'Malley v. Nationwide Mutual Ins. Co.*, 890 So.2d 1163, 1164 (Fla. 4th DCA 2004) [30 Fla. L. Weekly D5b] which held that the trial court's denial of fees in the present case, grounded on the fact that the tort claimant had paid no money, does not take into account the benefit received by the insured. As it turned out, however, Nationwide furnished the insured precisely what Nationwide was contending the insured was not entitled to in the declaratory action. When Nationwide dismissed the declaratory action, it was thus, the "functional equivalent of a confession of judgment or verdict in favor of the insured. *Wollard v. Lloyd's & Companies of Lloyd's*, 429 So.2d 217 (Fla. 1983).

9. As such, Defendant's Second Amended Second Motion For Summary Final Judgment is **HEREBY DENIED**.

* * *

Insurance—Discovery—Failure to respond—Waiver of all objections except attorney-client and work product privileges

FLORES MEDICAL CENTER, INC., a/a/o Ada Paz, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-006605. January 19, 2022. Jack Gutman, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL DISCOVERY

THIS MATTER having come before the court on January 19, 2022 on Plaintiff's Motion to Compel Discovery. The court having reviewed the file, considered the motion, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds,

1. On March 1, 2021, Plaintiff propounded a Request to Produce on Defendant.

2. Defendant failed to file a response to said Request to Produce. As such, Defendant has waived all objections, except attorney client and work product privilege.

3. Defendant has ten (10) days to file appropriate responses.

4. Plaintiff's Motion to Compel Discovery is **HEREBY GRANTED**.

* * *

Insurance—Civil procedure—Attachments to complaint—Motion to dismiss for failure to attach actual invoice, bills, and HCFA form to complaint is denied

AXIS CHIROPRACTIC & REHAB CENTER, INC., a/a/o Alfred Rivas, Plaintiff, v. LM GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No 21-CC-056449. January 25, 2022. Gaston J. Fernandez, Senior Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE having come before the court on January 24, 2022 on Defendant's Motion to Dismiss and/or Motion for More Definite

Statement. The court having reviewed the file, considered the motion, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds as follows:

1. Defendant's Motion to Dismiss alleges that F.R.C.P. 1.130(a) requires Plaintiff to attach the actual invoice, medical bills and/or HCFA forms to the complaint.

2. Defendant's Motion to Dismiss is hereby **DENIED**.

3. Defendant has 20 days in which to file an answer to Plaintiff's complaint.

* * *

Insurance—Personal injury protection—Jurisdiction—Foreign insurer—Although traffic accident that led to PIP claim occurred in Florida, insurer, a foreign corporation which does not operate, conduct, or carry on business in Florida, is not subject to personal jurisdiction in Florida

CONDE CENTER FOR CHIROPRACTIC NEUROLOGY, INC., a/a/o Scott Morganlander, Plaintiff, v. NEW JERSEY MANUFACTURERS INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County, County Civil Division RD. Case No. 50-2021-SC-021751-XXXX-SB. December 20, 2021. Reginald R. Corlew, Judge. Counsel: Michael Koretsky, Ged Lawyers, LLP, Boca Raton, for Plaintiff. Evan A. Zuckerman, Vernis & Bowling of Broward, P.A., Hollywood, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

THIS MATTER having come before the Court for hearing on December 16, 2021 upon the Defendant's Motion to Dismiss, the Court having considered the arguments of the parties and being otherwise fully advised in the premises, **ORDERS** and **ADJUDGES** as follows:

1. Defendant's Motion to Dismiss for Lack of Personal Jurisdiction is **GRANTED** for the following reasons:

2. The basis for the Defendant's Motion to Dismiss is that this Court does not have jurisdiction over the Defendant as it is a New Jersey corporation that issued a policy to New Jersey insureds.

3. While the motor vehicle accident that led to the claim for PIP benefits occurred in Florida, the Court finds, as set forth in the unrebutted affidavit from Defendant's Vice President Daniel Toadvine, that Defendant is a foreign corporation which does not operate, conduct or engage in the carrying on of a business or business venture in the State of Florida.

4. The Court has reviewed the case law provided by the parties, particularly *Kight v. New Jersey Manufacturers Insurance Company*, 441 So.2d 189 (Fla. 5th DCA 1983); *Meyer v. Auto Club Insurance Association*, 492 So.2d 1314 (Fla. 1986) and *Tennessee Farmers Mutual Insurance Company v. Sheliah Meador*, 467 So.2d 471, (5th DCA 1985).

5. The Court finds that the Defendant is not subject to personal jurisdiction in the State of Florida under the facts of this particular case and the criteria set out in the above-referenced case law.

* * *

Insurance—Automobile—Windshield repair—Bad faith action—Discovery—Claims file—Scope of discovery—Plaintiff in first-party bad faith action against insurer is entitled to discovery of relevant documents contained in claim file for period of time prior to filing of bad faith complaint, including materials in claims file during litigation of underlying claim for breach of contract—Certain notes for dates not relevant to plaintiff's allegations will remain under seal, as no good cause has been shown for discovery of this material

BROWARD INSURANCE RECOVERY CENTER, LLC, a/a/o Jay Kim, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE21012888, Division 53. January 3, 2022. Robert W. Lee, Judge. Counsel: Joseph R. Dawson, Dawson Law Firm, Fort Lauderdale, for Plaintiff. Michael P. Orta, Cole Scott & Kissane, Jacksonville, for Defendant.

ORDER ON IN CAMERA INSPECTION OF DEFENDANT'S RESPONSE TO SUPPLEMENTAL REQUEST TO PRODUCE

This cause came before the Court on November 2, 2021 for hearing of the Plaintiff's Motion to Overrule Objections to Plaintiff's Supplemental Request to Produce. On November 3, 2021, the Court issued its detailed Order requiring production of certain documents, and requiring others be produced to the Court for in camera inspection based on Defendant's assertion of trade secret and work product. On November 17, 2021, by Notice of Transmission of Confidential Materials, the Defendant provided a copy of these documents to the Court.

How This Bad Faith Action Arose. This is a bad faith action for reimbursement for a damaged windshield from Defendant. The date of loss was April 5, 2017, which is the date of the repair of the chip in the windshield for which Clear Vision billed Progressive a total of $90.10. On April 13, 2017, Progressive remitted a payment of $63.60, which reflected a reduced amount of $26.50. At that same time, Progressive demanded that the dispute be submitted to appraisal and appointed Auto Glass Inspection Services of Arizona as its chosen appraiser. On June 15, 2017, Plaintiff filed a Statement of Claim against Defendant under Case No.: COCE 17-002924 (53) alleging breach of contract. Ultimately, a Final Judgment entered on that case on March 29, 2018, but was reversed on May 21, 2020, and the Defendant's claim that the case was required to be submitted to appraisal was upheld.

The dispute was submitted to appraisal and the Plaintiff prevailed at the appraisal. Thereafter, on March 5, 2021, the Plaintiff filed the present action against the Defendant Complaint alleging statutory bad faith following this claim related to windshield repair because the Plaintiff prevailed at appraisal.

The Discovery Dispute. On August 10, 2021, the Plaintiff filed a Supplemental Request to Produce on August 10, 2021, seeking:

> A copy of the claims file created by the adjusters and other employees of Progressive regarding this claim, including all internal emails, phone logs, memoranda or other such documents reflecting the adjusting of the claim, in existence prior to the receipt of the Complaint for bad faith. As to any document or documents for which a claim of privilege of any type is claimed, please provide a detailed Privilege Log for subsequent judicial determination of the privilege consistent with the analysis of the Florida Supreme Court in *Allstate Indemn. Co. v. Ruiz,* 899 So. 2d 1121, 1126 (Fla. 2005) [30 Fla. L. Weekly S219c].

The Court heard Plaintiff's Motion to Overrule Objections on November 2, 2021, and the next day, entered an Order granting the Motion as to the contents of the claim file prior to June 15, 2017, which was the filing of the breach of contract lawsuit. Further, in that Order, at ¶ 18, the Court permitted the filing of a Memorandum of Law on the applicability of the work product privilege "to claims file materials sought in a bad faith action for the period of time after the filing of the bad faith action itself." At the hearing, it became clear that Plaintiff is seeking only the matters in the claim file from April 5, 2017, the date of the loss, through the ***filing*** of the bad faith lawsuit on March 5, 2021, but not subsequent to that date. This would include the materials in the claims file during the time of the breach of contract lawsuit filed on June 15, 2017.

The Court's Initial Ruling. In the Court's initial Order, the Court required documents as follows:

Paragraph 10 of Order. "The Court defers ruling on whether the 'Pricing Data' listed in the Defendant's Privilege Log is a trade secret. Defendant shall submit the documents to the Court, bate stamped, for

an in camera review." On December 17, 2021, the Defendant amended its Response to state that there are no documents responsive to this inquiry. (Plaintiff's Supplemental Request #1)

Paragraph 15 of Order. "The Court defers ruling on the Defendant's assertions of privilege based on trade secret, proprietary, commercial information or financial date. Defendant shall submit the materials responsive to this discovery to the Court for an in camera review." On December 17, 2021, the Defendant amended its Response to state that there are no documents responsive to this inquiry. (Plaintiff's Supplemental Request #6)

Paragraph 16 of Order. "The Court defers ruling on the Defendant's assertion of work product on 'all claims file materials subsequent to Plaintiff filing its action on June 15, 2017.' Defendant shall submit to the Court the materials responsive to this discovery for an in camera review."

Further, the Court authorized either party to submit to the Court, no later than November 17,2021, a memorandum of law on the issue of the applicability of the work product privilege to claims file materials sought in a bad faith action for the period of time after the filing of the bad faith action itself. On November 10, 2021, the Plaintiff filed its Memorandum of Law. On November 17, 2021, the Defendant submitted its seven (7) pages, unpaginated, to the Court pertaining to the claims file request, consisting of computer-generated notes. These notes date from April 6, 2017 until January 11, 2021.

The Legal Issue. Whether the Plaintiff is entitled to claims file documents for all dates prior to the filing of the complaint for bad faith on March 5, 2021, including those matters in the claim file during the litigation of the underlying claim for breach of contract as to work product matters.

The Plaintiff argues that the documents contained in the claim file are discoverable for the period of time prior to the filing of the bad faith complaint, as discovery of this material is necessary to enable Plaintiff to establish whether the insurance company "acted reasonably in evaluating the claim prior to a determination of the damages." *Zaleski v. State Farm Fla. Ins. Co.,* 315 So. 3d 7, 12 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D416b]. The issue of the scope of permissible discovery in an action for first party bad faith was addressed by the Florida Supreme Court in *Allstate Indemnity Company v. Ruiz,* 899 So. 2d 1121 (1999) [30 Fla. L. Weekly S219c]. In *Ruiz,* the issue was whether an insured who brought action to recover against his insurance agent and insurance company due to the agent's alleged negligence in deleting the vehicle from the policy. The *Ruiz* ruled in favor of the disclosure of the claim file prior to the bad faith action being filed, and indicated that claim file materials post-bad faith lawsuit filing may be discoverable upon a showing of good cause and after an *in camera* inspection:

> Consistent with the analysis outlined, we hold that in connection with evaluating the obligation to process claims in good faith under section 624.155, all materials, including documents, memoranda, and letters, contained in the underlying claim and related litigation file material that was created up to and including the date of resolution of the underlying disputed matter and pertain in any way to coverage, benefits, liability, or damages, should also be produced in a first-party bad faith action. Further, all such materials prepared after the resolution of the underlying disputed matter and initiation of the bad faith action may be subject to production upon a showing of good cause or pursuant to an order of the court following an in-camera inspection. *See* Fla. R. Civ. Pro. 1.280(b), 1.350; *Fla. Farm Bureau Gen. Ins. Co. v. Copertino*, 810 So.2d 1076, 1079 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D652a].
>
> *Ruiz*, at 1129-30.

In *Ruiz,* that court rationalized the right to matters which might ordinarily be protected as work product in order to give Fla. Stat. § 624.155 its intended statutory purpose and recognized that, if such discovery was precluded, the statutory purpose would be thwarted. That court further stated that:

> [W]e conclude that to continue to recognize any such distinction and restriction would not only hamper but would impair the viability of first-party bad faith actions in a manner that would thwart the legislative intent in creating the right of action in the first instance. Just as we have concluded in the context of third-party actions, we conclude that the claim file type material presents virtually the only source of direct evidence with regard to the essential issue of the insurance company's handling of the insured's claim. The claims file is a unique, contemporaneously prepared history of the company's handling of the claim; in an action such as this the need for the information in the file is not only substantial, but overwhelming."). Given the Legislature's recognition of the need to require that insurance companies deal fairly and act in good faith and the decision to provide insureds the right to institute first-party bad faith actions against their insurers, there is simply no logical or legally tenable basis upon which to deny access to the very information that is necessary to advance such action but also necessary to fairly evaluate the allegations of bad faith-information to which they would have unfettered access in the third-party bad faith context.
>
> *Id.* at 1128. Based upon the foregoing, it would appear that Plaintiff is entitled to the claims file for all dates prior to the March 5, 2021 filing of the bad faith lawsuit. While Plaintiff may be entitled to the claims file after that date, no such request is made as of this date, and if one were made, this Court would be required to review any materials or other claims of privilege, either work product or attorney-client privilege *in camera* to determine whether the matters are discoverable or not. At this point, however, all that is sought it is the claims file material for all dates prior to the service of this complaint alleging bad faith, and if any work-product privilege is asserted, that a privilege log be filed along so that the Court may conduct an *in camera* review regarding the privilege claim.

However, the standard set forth in *Ruiz* is "good cause," not carte blanche. In the Court's view, this is analyzed in the context Plaintiff's allegations of bad faith. Having done so, the Court concludes that the Plaintiff has demonstrated good cause for production of the notes generated from April 6, 2017 through April 18, 2017, as well as the note generated for July 9, 2020. As for the remaining dates, the Court concludes no good cause has been shown as the notes for the remaining dates are simply not relevant to Plaintiff's allegations in this case. As a result, it is hereby

ORDERED that, after 10 days from the date of this Order, the Court intends to release to Plaintiff the notes referenced above. The remaing notes shall remain under seal.

* * *

Insurance—Arbitration—Confirmation of award—Judgment must be entered in accordance with arbitrator's decision where parties did not request trial de novo within deadline for such request

PATH MEDICAL LLC, Plaintiff, v. LYNDON SOUTHERN INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE20035072, Division 53. January 19, 2022. Robert W. Lee, Judge.

FINAL JUDGMENT ON ARBITRATOR'S DECISION IN FAVOR OF DEFENDANT

THIS CAUSE came before the Court for consideration of the notice of filing Arbitration Decision filed by the Arbitrator Eric M. Ellsley, and the Court's having reviewed the docket, the entire Court file, and the relevant legal authorities; and having been sufficiently advised in the premises, the Court finds as follows:

This case was submitted to mandatory arbitration, as permitted by the rules and controlling case law. The arbitration hearing was held on December 7, 2021. On December 21, 2021, the arbitrator served his decision on the parties. Under Rule 1.820(h), Fla. R. Civ. P., any party objecting to the decision had 20 days to *file* (not merely *serve*) a request for trial de novo. The deadline was therefore January 10, 2022. The Court has confirmed with the Clerk of Courts that it is current with docketing and filing through that date. No party filed a request for trial de novo. As a result, the court "*must* enforce the decision of the arbitrator and has no discretion to do otherwise" (emphasis added). *Bacon Family Partners, L.P. v. Apollo Condominium Ass'n*, 852 So.2d 882, 888 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D1795a]. *See also Johnson v. Levine*, 736 So.2d 1235, 1238 n.3 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1456a]; *Klein v. J.L. Howard, Inc.*, 600 So.2d 511, 512 (Fla. 4th DCA 1992). Accordingly, the Court has this day unsealed the Arbitrator's decision, which is filed with the Clerk and made part of the record. A review of the decision reveals that the arbitrator conducted "a hearing which provide[d] both parties the opportunity to present their respective positions." Rule 11.060(b)(2), Fla. R. Ct.-Appointed Arb. (2012). The arbitrator found in favor of the Defendant. Accordingly, it is hereby

ADJUDGED THAT:

The Plaintiff, PATH MEDICAL LLC shall take nothing in this action, and the Defendant, LYNDON SOUTHERN INSURANCE COMPANY, shall go hence without day. The Court retains jurisdiction to determine any issues involving fees and costs.

The case management conference set for February 10, 2022 and the pretrial conference set for March 4, 2022 are accordingly CANCELED.

* * *

Insurance—Property—Standing—Assignment—Motion to dismiss on ground that assignment does not comply with statutory change that makes it more difficult for policyholder to assign its rights is denied—Statute cannot be applied retroactively to policy that predates effective date—Further, assignment that states that service provided was not meant to protect, repair, restore, or replace damaged property or mitigate against further damage does not fit statutory definition of "assignment agreement" contained in section 627.7152

AIR QUALITY ASSESSORS OF FLORIDA, a/a/o Eric Appel, Plaintiff, v. FIRST PROTECTIVE INSURANCE COMPANY d/b/a FRONTLINE INSURANCE, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE-21-011786. December 13, 2021. Betsy Benson, Judge. Counsel: Andrew Steadman, Weisser Elazar & Kantor, PLLC, Fort Lauderdale, for Plaintiff. Jason Little and Jennifer Ortega, Simon Reed & Salazar, Miami, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before this Court for hearing on December 3, 2021, on Defendant's Motion for Summary Judgment. Based upon a review of the motion, Plaintiff's Response in Opposition, argument of counsel, a complete review of the file, and this Court being otherwise fully advised in the premises, the Court hereby finds as follows:

FACTUAL BACKGROUND

1. Plaintiff brings this action based upon an after-loss assignment of insurance proceeds executed by the insured, who is the owner of the property insured by a policy of insurance (the "Policy") issued by Defendant.

2. Pursuant to the allegations contained in the Amended Complaint and the attachments thereto, the property owned by the insured was damaged on or about September 10, 2017.

3. The Policy had effective dates of April 8, 2017, to April 8, 2018.

4. On August 20, 2020, the insured assigned a portion of his rights under the Policy to Plaintiff by way of a "Contract for Services" and "Assignment of Insurance Claim Benefits." In exchange, as alleged in the Amended Complaint, the Plaintiff performed certain services at the property.

CONCLUSIONS OF LAW

I. Because the policy at issue in this matter predated the enactment of section 627.7152, the assignment of benefits need not comply with the requirements contained in the statute.

The Florida Supreme Court has conclusively held that substantive changes to statutes may not be retroactively applied to insurance policies issued before the effective date of the statutory change. *Menendez v. Progressive Express Ins. Co.,* 35 So. 3d 873, 875 (Fla. 2010) [35 Fla. L. Weekly S222b]. Although this Court notes that *Menendez* was focused on Florida's personal injury protection statute, the Florida Supreme Court has subsequently applied the holding in *Menendez* to other types of cases. *See, e.g., North Carillon, LLC v. CRC 603, LLC,* 135 So. 3d 274, 275 (Fla. 2014) [39 Fla. L. Weekly S39b] (applying *Menendez* to analysis of an amendment to Florida's Condominium Act). Florida's District Courts of Appeal have likewise applied *Menendez* to homeowner's insurance disputes. *See, e.g., Roker v. Tower Hill Preferred Ins. Co.,* 164 So. 3d 690, 692-93 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D764b].

This Court agrees with Plaintiff's argument that the assignment of benefits in this matter is not required to comply with section 627.7152. An assignee stands in the shoes of the insured, and the insured's insurable interest vested at the time of the loss. *See Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co.,* 185 So. 3d 638, 642 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D349a]. Pursuant to *Menendez,* the later-enacted statute, section 627.7152, may not be retroactively applied to limit the rights of the insured (or the assignee), whose rights under the policy vested prior to the statute. Thus, the assignment of benefits in this matter is not bound by the requirements contained in section 627.7152. This Court notes that several other trial courts have reached the same conclusion in recently published opinions. *See, e.g., Industry Standard Experts, LLC v. Citizens Property Ins. Corp.,* 29 Fla. L. Weekly Supp. 369a (Fla. Broward Cty. Ct. May 15, 2021); *Industry Standard Experts, LLC v. Citizens Prop. Ins. Corp.,* 29 Fla. L. Weekly Supp. 342a (Fla. Miami-Dade Cty. Ct. July 4, 2021); *The Kidwell Grp. LLC d/b/a Air Quality Assessors of Fla. a/a/o Clark Stephens v. Am. Integrity Ins. Co. of Fla.,* 29 Fla. L. Weekly Supp. 366a (Fla. Seminole Cty. Ct. Sept. 17, 2020); *The Kidwell Grp., LLC d/b/a Air Quality Assessors of Fla. a/a/o Henry Carpenter v. Heritage Prop. & Cas. Ins. Co.,* 29 Fla. L. Weekly Supp. 368a (Fla. Lee Cty. Ct. June 11, 2021).

In *Mold Inspection & Testing of S. Fla., LLC a/a/o Jose Villalobos v. State Farm Fla. Ins. Co.,* 28 Fla. L. Weekly Supp. 854b (Fla. Miami-Dade County Court Oct. 24, 2020), the Miami-Dade County Court noted that the Middle District of Florida applied the same reasoning:

> The Court noted that the statutory change could not be applied retroactively and further pointed out that the application of the statute **was not to the date the AOB was executed** or to the date the lawsuit was filed, but rather to **the date the insurance policy was issued**. In this case, the policy was issued before the effective date of the change. Because the policy at issue in this case was issued before the effective date of the statutory change set forth in Fla. Stat. § 627.7152(10), the insurance company's motion to strike the contractor's claim for attorney's fees under Fla Stat. § 627.428 was denied.

Id. (citing *CMR Construction,* 2020 U.S. Dist. LEXIS 8301, at *3-4) (emphasis added).

The statute cannot restrict rights that vested when the policy was issued. The policy at issue in this matter was issued in 2017, and thus predated the statute.

II. Because the assignment of benefits in this matter is not an "assignment agreement" as defined by section 627.7152, the assignment of benefits need not comply with the requirements contained in the statute.

Section 627.7152 defines an "assignment agreement" as "any instrument by which post-loss benefits . . . are assigned . . . to or from a person providing services **to protect, repair, restore, or replace property or to mitigate against further damage to the property.**" § 627.7152(1)(b), Fla. Stat. (2021) (emphasis added). The terms of the assignment of benefits in this matter states that Plaintiff's services were "in no way meant to protect, repair, restore, or replace damaged property or to mitigate against further damage to property as defined by Florida Statutes section 627.7152; however, the services to be rendered are directly related and necessary as a result of the above-referenced loss."

Because the assignment of benefits in this matter, on its face, does not fit the definition of "assignment agreement" contained in section 627.7152(1)(b), the assignment of benefits likewise is not required to comply with the various requirements listed in section 627.7152(2)(a).

This Court takes judicial notice of Senate Bill 468 (2022), which was filed by Plaintiff in this matter, which shows that the Florida Legislature is currently considering an amendment of section 627.7152(1)(b) that would expand the definition of "assignment agreement." The proposed new definition would add "including, but not limited to, scopes of service, to inspect, protect, repair, restore, or replace property or to mitigate against further damage to the property." This expanded definition demonstrates that the current form of the statute does not contemplate every possible assignment of benefits under a homeowner's insurance policy.

Further, this Court notes that several other trial courts in Florida have recently reached the same conclusion in published opinions. *See, e.g., The Kidwell Grp. LLC d/b/a Air Quality Assessors of Fla. a/a/o Ricky Jones v. United Prop. and Casualty Ins. Co.,* 29 Fla. L. Weekly Supp. 361a (Fla. Palm Beach Cty. Ct. May 10, 2021); *The Kidwell Grp., LLC d/b/a Air Quality Assessors of Fla. a/a/o Bryan Berger v. State Farm Fla. Ins. Co.,* 29 Fla. L. Weekly Supp. 335b (Fla. St. Johns Cty. Ct. Oct. 15, 2020); *The Kidwell Grp., LLC d/b/a Air Quality Assessors of Fla. a/a/o Jennifer Bowie v. United Prop. & Cas. Ins. Co.,* 29 Fla. L. Weekly Supp. 335a (Fla. Volusia Cty. Ct. April 5, 2021); *The Kidwell Grp., LLC a/b/a Air Quality Assessors of Fla. a/a/o Brian Holley v. First Protective Ins. Co. d/b/a Frontline Ins. Co.,* 29 Fla. L. Weekly Supp. 359a (Fla. Bay Cty. Ct. May 19, 2021).

For the foregoing reasons, Defendant's Motion for Summary Judgment is denied.

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

1. Defendant's Motion for Summary Judgment is DENIED.

* * *

Landlord-tenant—Damage to premises—Where tenant agreed in lease to leave hair salon in same or better condition than condition at start of lease, but tenant left extensive dye stains on premises, landlord is entitled to be reimbursed for painting expense—In absence of evidence of amount it would cost to replace or repair damaged equipment, court can only award nominal damages—Claim for cost of styling products used by tenant is denied where there is no evidence of agreement for tenant to pay for use of products or of the cost of products

DILENIA PEREZ, Plaintiff, v. BRANDON ALI SHERMAN, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE21066435, Division 53. January 13, 2022. Robert W. Lee, Judge.

FINAL JUDGMENT FOR PLAINTIFF

This cause came before the Court for trial on January 12, 2022. The Court finds that the Plaintiff has proved her case in part by the greater weight of credible, competent evidence. The Court has thoroughly considered the testimony, admissions and evidence presented, and has also considered argument and reviewed the relevant legal authorities. On the evidence presented, the Court finds as follows:

This case involves a claim of damages to a hair salon occurring during a month-to-month tenancy pursuant to a written lease. The Plaintiff landlord seeks $6,100.00 from the Defendant tenant for three things: repainting the interior of the premises; repairing or replacing damaged equipment; and use of styling products.

Under the lease agreement, the Defendant "agree[d] to accept the premises in their present condition, and at the time of leaving premises will be the same or better conditions." Additionally, the agreement provided that at the time of signing the agreement, the Defendant acknowledged that the "premises are in good clean condition." The evidence demonstrated that the Defendant and his workers left extensive hair dye stains over much of the walls and doors, well beyond what one might be consider ordinary wear and tear. However, even if this were ordinary wear and tear, the terms of the written agreement required the Defendant to put the premises back in the condition at the inception of the lease. This the Defendant did not do, resulting in a painting expense of $2,350.00 that the Plaintiff will now have to incur. The Plaintiff is entitled to be reimbursed for this expense.

As for the damaged equipment, while the Plaintiff produced evidence that a hair dryer and floor mat were damaged, she failed to present competent evidence of the amount it would cost to repair or replace these items. As a result, the Court can award no more than $10.00 in nominal damages.

Finally, for the claim of use of styling products, the Court finds that the Plaintiff's evidence is insufficient for the Court to conclude that there was an agreement for the Defendant to pay for these products (it was not addressed in the written agreement). Moreover, even if it were addressed, the Plaintiff failed to present competent evidence of the cost of this product. Accordingly,

IT IS ADJUDGED THAT:

The Plaintiff, DILENIA PEREZ, [Editor's note: Address redacted], Fort Lauderdale FL 33316, shall recover from the Defendant, BRANDON ELI SHERMAN, [Editor's note: Address redacted], Fort Lauderdale FL 33312, the sum of $2,360.00, with costs in the amount of $397.00, for a total of $2,757.60, which shall bear interest at the rate of 4.25% per annum until paid, for which sums let execution issue forthwith.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Sufficiency of pleading—Complaint in PIP case is not required to explain a plaintiff's legal position on how insurer made an error in calculating its payment of benefits—Nothing in rule 1.110(b) requires a plaintiff to anticipate a defendant's defenses, and to anticipatorily set forth its avoidances

GREGORY L. DOKKA, D.C., P.A., Plaintiff, v. ALLSTATE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. CO1NX21058540, Division 53. February 2, 2022. Robert W. Lee, Judge.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS, BUT GRANTING DEFENDANT'S MOTION FOR MORE DEFINITE STATEMENT

This cause came before the Court for consideration of the Defendant's Motion to Dismiss and Motion for More Definite Statement.

This Court has hundreds of pending PIP cases in which Allstate is the defendant. In many of these cases, Allstate is filing what appears to be a cookie-cutter Motion to Dismiss and/or Motion for Definite

Statement challenging the sufficiency of the allegations of any law firm that files a PIP lawsuit against it. The Court therefore set an omnibus hearing on July 16, 2021 on 22 of the Motions, advising the parties that it was the Court's intention to issue an Order governing this issue going forward in this Division, with the likelihood that there would be no future hearings on this issue, but that the Court would rule based on the documents filed of record in any individual case. At the hearing, 4 attorneys showed on behalf of Allstate (two from Shutts & Bowen, and two from Allstate in-house counsel), and 7 attorneys showed on behalf of three different law firms on behalf of various plaintiffs. (The plaintiff's firm of Demesmin & Dover was also noticed of the hearing, but did not appear.) The hearing lasted for more than 2 hours.

In each case at the hearing, the parties acknowledged that Allstate has not challenged the relatedness and medical necessity of the medical bills. Both sides acknowledged that rarely if ever does Allstate challenge those two components of Plaintiff's prima facie case. Rather, Allstate has either made a partial payment on the bills, or declined to pay the bills because of a deductible or exhaustion issue. Allstate's contention appears to be that the plaintiffs are required to set forth in their complaints not just the factual basis of their allegations, but also their legal position as to why Allstate's decision to reduce the amount to be paid was incorrect.

To be sure, the plaintiffs' allegations in the cases set for hearing were lacking in clarity. The same lack of clarity continues in the instant case. For instance, in the instant case, the Plaintiff alleges in paragraph 20 that it "it submitted properly completed insurance claim forms," without attaching them to the complaint. In paragraph 24, the Plaintiff states that Allstate "has failed to pay the Insured's covered losses," without stating what they are. Moreover, in paragraph 1, the Plaintiff merely states the jurisdictional amount of the case (less than $100.00), failing again to state the precise amount it is seeking. (And potentially raising the issue that the amount claimed due in this case is de minimus.)

Certainly, these allegations are problematic. First, by the time these lawsuits are filed against Allstate, the Plaintiff knows Allstate's position—either it "denied coverage" (which the parties suggest is not generally the case), OR it denied payment of a particular bill or bills, or a particular CPT code on a bill or bills, OR it paid a bill but did not pay everything the plaintiff was seeking. In some cases involving multiple bills, Allstate may have done a combination of these things—paid some in full and reduced others. Additionally, as with the cases set for hearing, the Plaintiff didn't set forth the amounts that it claims are due. And even if prejudgment interest or a penalty is also due, the Plaintiff certainly can craft an allegation that sets forth the amount that Allstate did not pay, with an additional allegation that that unpaid amount continues to accrue interest and penalty.

As became clear at the hearing, Allstate isn't satisfied though with merely knowing what the amounts claimed due are, and whether they were denied or reduced. Instead, Allstate wants the plaintiffs to allege the legal reason they disagree with Allstate's decision. For instance, if Allstate claims in its presuit explanation of benefits that an amount was properly paid under the Medicare fee schedules, it wants the plaintiff to explain its legal position on how Allstate made an error in the calculation. The Court disagrees.

Rule 1.110(b), Fla. R. Civ. P., sets forth what has to be in a complaint—it must state a cause of action, along with a "short and plain statement of the ultimate facts showing the pleader is entitled to relief." In each of the challenged cases, the plaintiffs have in fact set forth a cause of action. In these cases before the Court, any deficiencies arguably go to the "short and plain statement of the ultimate facts." There is nothing in the Rule that requires a plaintiff to anticipate the defendant's defenses, and to anticipatorily set forth its avoidances.

In a PIP case, the plaintiff's prima facie case requires that they prove their charges are reasonable. If the plaintiff meets its burden, the burden then shifts to the insurer to demonstrate why their payment was correct—whether it be a challenge to plaintiff's prima facie case, or whether the insurer raises the safe harbor defense of the fee schedules, or whether the insurer claims that the deductible applies or exhaustion has occurred. Then, if the plaintiff claims that the insurer erred in calculating the amount paid, it can raise any avoidance it might believe appropriate—whether Allstate used the wrong fee schedule, that it miscalculated under Medicare guidelines, etc. Just as the plaintiff knows the amount it is seeking, Allstate certainly knows why it paid what it paid.

Accordingly, the Defendant's Motion to Dismiss is DENIED, and the Motion for More Definite Statement is GRANTED in part as follows. Within 15 days, the Plaintiff shall file an Amended Complaint amending the original Complaint by specifying the amount claimed due and unpaid, the specific date(s) of service reduced or unpaid, and specifically alleging whether the Defendant has "denied coverage for, withheld or reduced the medical bills" at issue in this case. Additionally, the Plaintiff is advised to make these allegations with more specificity in any cases filed in this Division in the future.

* * *

Liens—Construction—Foreclosure—Summary judgment is entered in favor of roofing subcontractor in action to foreclose construction lien where subcontractor fully stated and proved claim for lien foreclosure, owner provided no evidence to support claim that subcontractor failed to satisfy condition precedent to suit, and award of amount sought by lien would not unjustly enrich subcontractor

ARMORED HOLDINGS CORP., d/b/a ARMORED ROOFING, Plaintiff, v. PILLEM, LLC, Defendant. County Court, 20th Judicial Circuit in and for Lee County, Small Claims Division. Case No. 20-CC-001630. January 13, 2022. Erik Leontiev, Judge. Counsel: Jason S. Lambert and Carolina Saavedra, Dinsmore & Shohl LLP, Tampa, for Plaintiff. Ruth D. Orange, Naples, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This cause came before the Court on Armored Holdings Corp. d/b/a Armored Roofing's ("Armored") Motion for Summary Judgment ("Motion"), and following a hearing and argument by the Parties' counsel, the Court makes the following findings:

A. As an initial matter, the Court has considered the Motion and memorandum filed in support of the Motion; the authorities contained therein and referenced at the hearing on the Motion; the Affidavit of Keegan Manning in Support of Armored's Motion; the deposition transcript of Homere Hyppolite, owner of Pillem, LLC; and the statement of claim filed by Pillem, LLC in this Court and referenced in Armored's Request for Judicial Notice (collectively, the "Summary Judgment Evidence". The Court has also considered the arguments of counsel for both Armored and Defendant, Pillem, LLC. Defendant, Pillem, LLC filed no opposition to the Motion.

B. The Summary Judgment evidence before the Court reflects that Pillem, LLC ("Pillem") hired Britannia Development Company ("BDC") to replace the roof at 2929 7th Street SW, Lehigh Acres, FL 33976 (the "Property"). BDC in turn hired Armored to perform the work required under BDC's contract with Pillem. BDC was to pay Armored $4,947.60 for this work.

C. Armored started its work at the Property on June 12, 2019 and finished it on June 14, 2019. On June 24, 2019, Armored served its notice to owner on Pillem, and received the green return receipt cards back reflecting timely delivery of the notice to owner to Pillem.

D. On August 8, 2019, Armored recorded a construction lien in Official Records Instrument # 2019000183817 of the Public Records of Lee County, Florida against the Property in the amount of

$4,947.60 because it had not yet been paid by BDC. Armored timely served a copy of its lien on Pillem, and received the green return receipt cards back reflecting delivery of a copy of the lien to Pillem.

E. On March 12, 2020, Armored served its contractor's payment affidavit on Pillem via Federal Express.

F. During his deposition, Mr. Hyppolite testified on behalf of Pillem that he received the notice to owner, the lien, and the contractor's final payment affidavit from Armored.

G. On March 31, 2020, Armored filed this lawsuit against Pillem seeking to foreclose its construction lien. Pillem asserted three affirmative defenses in response to that complaint: (1) failure to state a cause of action; (2) failure of condition precedent; and (3) unjust enrichment.

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

1. In order to prevail on its Motion, Armored was required to establish that no genuine issue of material fact exists as to its compliance with Chapter 713, *Florida Statutes. See Grant v. Wester,* 679 So. 2d 1301, 1307 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D2149a] (noting that lienor who proves compliance with Chapter 713, Florida Statutes is entitled to the lien and such lien may be foreclosed upon)

2. In this case, compliance requires (1) service of a notice to owner in compliance with § 713.06(2), *Florida Statutes*; (2) recording and service of a construction lien in compliance with § 713.08, *Florida Statutes*; and (3) service of a contractor's payment affidavit in compliance with § 713.06(3)(d)(1), *Florida Statutes.*

3. Based on the Summary Judgment Evidence, the Court concludes that Armored Roofing timely and properly served its notice to owner, recorded and served its construction lien, and served its contractor's payment affidavit. Accordingly, Armored met its burden under §§ 713.06 and 713.08, *Florida Statutes,* and established that it is entitled to its construction lien against the Property.

4. Turning to Pillem's affirmative defenses, the Court concludes that these defenses are legally insufficient and/or factually disproves, and therefore do not create a triable issue of fact sufficient to avoid summary judgment.

5. The Summary Judgment evidence illustrates that Armored fully stated and proved a claim for lien foreclosure. Pillem provided no evidence to support its contention that Armored failed to satisfy a condition precedent to filing its lawsuit, and indeed, the Summary Judgment Evidence reveals that Armored complied with the only applicable condition precedent to bringing this action. Finally, awarding Armored the amount sought by its construction lien does not and would not unjustly enrich Armored.

Accordingly, the Motion is hereby GRANTED.

1. Armored is entitled to the face value of its lien in the amount of $4,947.60, plus costs and statutory interest. The Court reserves jurisdiction to rule on any forthcoming motion for attorneys' fees Armored may file.

2. Armored Holdings Corp. d/b/a Armored Roofing, located at 3208 US-19 Alt, Suite A, Palm Harbor, FL 34683 shall recover from Pillem, LLC, located at 4843 Devon Cir, Naples, FL 34112, the sum of $4,947.60, plus interest, plus costs, plus attorneys' fees in an amount to be determined by this Court, FOR WHICH LET EXECUTION NOW ISSUE. These amounts shall bear interest at the rate of 4.25%. This rate shall be adjusted annually on January 1st of each year pursuant to § 55.03, *Florida Statutes.*

3. Further, this Court retains jurisdiction to enter an Amended Final Judgment setting the amount of interest and costs to which Armored is entitled, and any attorneys' fees the Court determines Armored is entitled to. This Court also retains jurisdiction to order the sale of the Property at auction in the event the Amended Final Judgment is not timely satisfied.

* * *