Volume 29, Number 12, April 29, 2022

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 781-820

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

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

SUMMARIES

Summaries of selected opinions or orders published in this issue.

- **ATTORNEY'S FEES—TORTS—DEFAMATION—CYBERSTALKING—ANTI-SLAPP STATUTE. A circuit court awarded fees, costs, and appellate fees to a defendant, an opponent of retail pet sales, who prevailed in having an action for defamation and cyberstalking brought by the owner of a commercial retail pet sales business dismissed under the Anti-SLAPP statute. The court rejected the argument fees awardable to the defendant were limited to those incurred in defense of the defamation claim, finding that the statute is applicable to any lawsuit, cause of action, or claim filed without merit primarily because a person has exercised a free speech right in connection with public issue.** *MARQUEZ v. LAZAROW. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed January 18, 2022. Full Txt at Circuit Courts-Original Section, page 797a.*

- **TORTS—CONVERSION. An automobile dealership's removal of finance company's valid lien on trade-in vehicle through the submission of a forged lien satisfaction form to the Department of Motor Vehicles and the subsequent sale of the vehicle to an innocent purchaser constitutes conversion. The prooper measure of damages for the conversion is the fair market value of the vehicle, not merely the remaining payment owed on the vehicle. The exception to the general rule of damages for common law conversion, holding that one who has a special interest in a converted property can only recover the value of that interest, is not applicable where the dealership and the finance company were never in privity of contract.** *NATIONWIDE FINANCIAL SERVICES, LLC v. HOLLYWOOD IMPORTS LIMITED, INC. County Court, Seventeenth Judicial Circuit in and for Broward County. Filed January 26, 2022. Full Text at County Courts Section, page 814c.*

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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.

Subject Matter Index and Tables

Page prefixes in the subject matter index and tables identify the courts in the following manner:

10CIR 25	**Circuit Court - Appellate** (**Bold** type) (10th Circuit, page 25)
20CIR 10	Circuit Court - Original (20th Circuit, page 10)
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M	Miscellaneous Reports

Bold denotes decision by circuit court in its appellate capacity.

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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Implied consent warning—No merit to claim that finding that licensee was read implied consent warning is refuted by DVD demonstrating that warning given differed from warning provided by statute—Inconsistencies in record do not negate hearing officer's findings

DONALD ROBERT KIMBALL, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 1st Judicial Circuit (Appellate) in and for Escambia County. Case No. 2019-CA-0309, Division J. December 13, 2021. Counsel: Gregory B. Wilhelm, for Petitioner. Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING AMENDED PETITION FOR WRIT OF CERTIORARI

(COLEMAN L. ROBINSON, J.) **THIS CAUSE** is before the Court on Petitioner's "Amended Petition for Writ of Certiorari," filed on September 16, 2019, and Respondent's response, filed June 29, 2020. Petitioner seeks certiorari review of Respondent's final order suspending his driving privileges for refusing to submit to a breath, blood, or urine test under section 322.2615, Florida Statutes.

A circuit court's review of an administrative agency decision is limited to the following three-part standard of review: 1) Whether procedural due process was accorded; 2) whether the essential requirements of law were observed; and 3) whether the administrative findings and judgment are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. Generally, "[t]he circuit court in this process performs a 'review'; it does not sit as a trial court to consider new evidence or make additional findings." *Vichich v. Dep't of Highway Safety & Motor Vehicles,* 799 So. 2d 1069, 1073 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D2290a]. "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." *Dept. of Highway Safety and Motor Vehicles v. Hirtzel,* 163 So. 3d 527 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1107a] (citations omitted).

Petitioner raises multiple claims, focusing on the alleged differences between the arresting officer's spoken implied consent warning and the verbiage used in the written implied consent warning form. Petitioner claims that the arresting officer's sworn affidavit of refusal, sworn arrest report, and the implied consent warning document are "refuted" by a DVD demonstrating that the warning given by law enforcement was not in compliance with section 316.1932(1)(a) 1. a., Florida Statutes. Petitioner further alleges that there is no competent, substantial evidence to show that he was provided a proper implied consent warning by law enforcement, and consequently, the hearing officer's ruling departed from the essential requirements of law.

This Court is not permitted to reweigh or re-evaluate conflicting evidence presented before the hearing officer. *State, Dept. of Highway Safety and Motor Vehicles v. Wiggins,* 151 So. 3d 457, 463 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1894a].[1] "The existence of inconsistencies or contradictions in the overall evidentiary record does not negate a hearing officer's findings; an evidentiary record need not have one-sided purity to prevail." *Id.* at 464 (citation omitted). Based on a review of the petition and the record, including the transcripts of the hearing on this matter, the Court finds that the limited three-part standard of review has been met: Petitioner was accorded due process, the essential requirements of law were observed, and the administrative findings and judgment are supported by competent substantial evidence. Consequently, certiorari relief is not warranted.

ACCORDINGLY, it is hereby **ORDERED and ADJUDGED** that Petitioner's "Amended Petition for Writ of Certiorari" is **DENIED**.

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[1]There is a *narrow* exception to the rule prohibiting reweighing of the evidence. *See Wiggins v. Florida Dep't of Highway Safety & Motor Vehicles,* 209 So. 3d 1165, 1166 (Fla. 2017) [42 Fla. L. Weekly S85a] ("[I]n this context of section 322.2615 first-tier review, a circuit court must review and consider video evidence of the events which are of record as part of its competent, substantial evidence analysis. . . . . [I]n this limited context that evidence which is totally contradicted and totally negated and refuted by video evidence of record, is not competent, substantial evidence."). The physical video evidence of the stop was *not* made a part of the record in this case. However, the transcript of the portions of the recording played at the formal review hearing fails to suggest that this narrow exception would have applied even if the recording were part of the record.

* * *

Licensing—Driver's license—Cancellation—Licensee's termination from Special Supervision Services Program and cancellation of business-only license was supported by competent substantial evidence of positive test for heroin

WILLIAM T. WILFORD, Petitioner, v. FLORIDA DEPT. OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 3rd Judicial Circuit (Appellate) in and for Madison County. Case No. 2021-29-CA. November 15, 2021. Counsel: Chuck Collins, for Petitioner. Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Defendant.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(MELISSA G. OLIN, J.) **THIS CAUSE** came before the Court on the Petitioner's "Petition for Writ of Certiorari," filed with the Madison County Clerk of Court on June 25, 2021. Upon consideration of the petition, Department's response, record, and applicable law, this Court finds and concludes as follows:

Factual and Procedural Background

On April 7, 1988, the Petitioner's driving privilege was permanently revoked due to four DUI convictions. The Petitioner entered the Special Supervision Services Program in 2015, and the North Florida Safety Council (hereinafter "NFSC") was responsible for monitoring the Petitioner while he was in this DUI program. The Petitioner signed a Special Supervision Services Statement of Abstinence with NFSC on September 25, 2015, acknowledging that he was aware of NFSC's prohibition of engaging in certain behaviors which would constitute substance abuse. This included taking illegal drugs, which would subject the Petitioner to termination from the DUI program. On October 11, 2016, after his acceptance in the program, the Petitioner was issued a driver's license with an employment only restriction.

On October 27, 2020, the Petitioner signed a Special Supervision Services Case Management Plan Agreement, in which he agreed to submit to chemical testing at any time as directed by the DUI program (a minimum of 1-2 times per year). Pursuant to his agreement with NFSC, the Petitioner underwent a drug test on March 5, 2021. The Petitioner tested positive for heroin, noted as 6-acetylmorphine GC/MS. This test was confirmed by a Medical Review Officer employed by D.R.S. Medical Review Service on March 29, 2021. The Medical Review Officer further stated that the morphine prescription provided by the Petitioner did not explain the positive result for heroin in his toxicology report. Rather, the test results indicated that the Petitioner tested negative for opiates, but he would have tested positive for opiates if he had morphine in his system. The Defendant was found in violation of his Special Supervision Services Statement of Abstinence and Case Management Plan Agreement. As such, the

Petitioner was terminated from the program on April 26, 2021. As a result of his termination from the program, the Department of Highway Safety and Motor Vehicles cancelled the Petitioner's driving privilege.

The Defendant appealed NFSC's determination to a licensed DUI program in the Eighth Judicial Circuit, pursuant to Florida Administrative Code rule 15A-10.031. A meeting with the Eighth Circuit DUI program was conducted, and the Petitioner submitted evidence indicating that he had a prescription for morphine at the time of the toxicology test. The Eighth Circuit DUI program ultimately agreed with NFSC's decision to remove him from the SSS program and prohibit him from reenrolling in the future. This petition follows.

In the instant petition, the Petitioner argues that "the Department's refusal to allow him into the program: is not supported by competent/substantial evidence, departs from the essential requirements of law, and violates [the Defendant's] right to due process. *Petition at 2*. Specifically, the Petitioner alleges that his toxicology report only shows that he tested positive for morphine, and at the time of the test, he was taking prescribed morphine medication. The Petitioner further alleges that NFSC was provided with a copy of his morphine prescription, but NFSC still found that the Petitioner "would no longer be able to participate in the SSS program." *Petition at 4*. As relief, the Petitioner seeks a writ of certiorari "quashing the Department's determination that he is ineligible to participate in the SSS program." *Petition at 2*.

Standard of Review

A circuit court's review of an administrative agency decision is limited to the following three-part standard of review: (1) Whether procedural due process was accorded; (2) Whether the essential requirements of law were observed; and (3) Whether the administrative findings and judgment are supported by competent substantial evidence. *Haines City Community Development v. Heggs*, 658 So. 2d 523 (Fla. 1995) [20 Fla. L. Weekly S318a]. "[T]he circuit court is not entitled to reweigh the evidence; it may only review the evidence to determine whether it supported the hearing officer's findings." *Department of Highway Safety and Motor Vehicles v. Stenmark,* 941 So.2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a].

In this matter, the Petitioner asserts that the Department erred on all three levels: that he was denied due process, that the decision departs from the essential requirements of law, and that the decision was not supported by competent substantial evidence. However, the first two claims made by the Petitioner are conclusory, and the Petitioner does not expand on these claims or provide any evidence to support these conclusory statements. The only real argument made by the Petitioner is that the Department's order was not based on competent substantial evidence; thus, that is the only claim this Court will consider.

Analysis—Competent Substantial Evidence

Competent substantial evidence is "such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred." *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957). In other words, competent substantial evidence is such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *City of Miami v. Jean-Phillipe,* 232 So. 3d 1138, 1145 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D2418b].

To determine whether a final administrative decision is supported by competent substantial evidence, the circuit court must review the record for evidence supporting the finding. *See Blake v. St. Johns River Power Park Svs. Employees' Ret. Plan,* 275 So. 3d 804, 808-09 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D1757a] (citing *Dep't of Hwy. Safety & Motor Vehicles v. Wiggins,* 151 So. 3d 457, 464 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1894a]) ("The sole starting (and ending) point is a search of the record for competent, substantial evidence *supporting* the decision."). The circuit court must defer to the hearing officer's findings unless no competent, substantial evidence supports the findings. *See Dep't of Hwy. Safety & Motor Vehicles v. Hirtzel,* 163 So. 3d 527, 529 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1107a] (citing *Wiggins,* 151 So. 3d at 465).

In the instant case, the record is clear that the Petitioner tested positive for heroin, and the use of an illegal substance was in clear violation of the Petitioner's SSS Statement of Abstinence and Case Management Plan Agreement. Accordingly, there was competent substantial evidence to support the termination of the Petitioner from the DUI program and the Department's cancellation of his license for failure to remain in compliance with his DUI program.

Therefore, it is **ORDERED:**

The Petitioner's "Petition for Writ of Certiorari" is **DENIED.**

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearing officer—Departure from neutrality—No merit to argument that licensee was denied right to hearing with appearance of neutrality because training conducted by Department of Highway Safety and Motor Vehicles evidences bias in favor of law enforcement and department and against drivers—Lawfulness of detention—Officer had reasonable suspicion to detain licensee for DUI investigation following stop of vehicle for speeding where licensee stopped in erratic manner, provided work order in response to request for his registration, and had odor of alcohol—Lawfulness of arrest—Officer had probable cause for arrest based on licensee's driving pattern and conduct after stop—No merit to argument that finding of probable cause was unsupported by competent substantial evidence because there was discrepancy between officer's report of driving pattern and video evidence—Video evidence did not totally contradict, negate, or refute officer's statement of events

MICHAEL ERIC STEVENS, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2018-AP-49, Division CR-H. January 29, 2021. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: L. Lee Lockett, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

OPINION

(MARIANNE AHO, J.) This cause is before this Court on Petitioner, Michael Eric Stevens's "Petition for Writ of Certiorari," filed on May 9, 2018. The Petition raises two arguments for review: (1) Whether or not the Department failed to afford Petitioner his due process right to a hearing with the appearance of impartiality; and (2) Whether or not the Department's order was supported by competent, substantial evidence when the hearing officer determined Officer Moeller legally detained and arrested Petitioner.

On certiorari review of an administrative action, this Court's standard of review is "limited to a determination of whether procedural due process was accorded, whether the essential requirements of the law had been observed, and whether the administrative order was supported by competent, substantial evidence." *Dep't of Highway Safety and Motor Vehicles v. Luttrell,* 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a]; *see also Dep't of Highway Safety and Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a].

(1)

Petitioner asserts the Department denied his due process right to a hearing with the appearance of impartiality. On February 14, 2019, this Court entered an Order Staying Proceedings until the First District Court of Appeal issued opinions in three cases involving the same

issue raised by Petitioner. Since this Court entered that Order, the First District Court of Appeal per curiam denied second-tier certiorari review in each of those cases. *Dep't of Highway Safety and Motor Vehicles v. Sarris,* No. 1D18-2081, 2019 WL 994049, at *1 (Fla. 1st DCA Mar. 1, 2019); *Skinner v. Dep't of Highway Safety and Motor Vehicles,* 266 So. 3d 820 (Fla. 1st DCA 2019); *Fernandez v. Dep't of Highway Safety and Motor Vehicles,* 276 So. 3d 277 (Fla. 1st DCA 2019).

Nevertheless, Petitioner's argument regarding the right to a hearing with the appearance of impartiality has been repeatedly rejected by the Fourth Circuit. *See e.g., Meadows v. Dep't of Highway Safety and Motor Vehicles,* 26 Fla. L. Weekly Supp. 699a (Fla. 4th. Cir. Sept. 27, 2018); *Eman v. Dep't of Highway Safety and Motor Vehicles,* 16-2017-AP-000056-XXXX, (Fla. 4th Cir. May 22, 2017); *Spear v. Dep't of Highway Safety and Motor Vehicles,* 16-2017-CA-000579-XXXX (Fla. 4th Cir. June 15, 2017); *Bruschi v. Dep't of Highway Safety and Motor Vehicles,* 16-2017-AP-000065-XXXX (Fla. 4th Cir. Oct. 5, 2017). While not binding authority, this Court finds the reasoning in those opinions to be persuasive. Accordingly, Petitioner's claim is denied.

(2)

Petitioner argues that the Department's order was supported by competent, substantial evidence when the hearing officer determined Officer Moeller had reasonable suspicion to detain Petitioner for a DUI investigation and probable cause to arrest Petitioner.

Law enforcement may temporarily detain a driver for a DUI investigation based on reasonable suspicion. *State v. Taylor,* 648 So. 2d 701, 703-04 (Fla. 1995) [20 Fla. L. Weekly S6b]. A reasonable suspicion "is one which has a factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge and experience." *State v. Davis,* 849 So. 2d 398, 400 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1477a]. Florida courts have determined a combination of speeding, the smell of alcohol, and bloodshot or watery eyes may lead to sufficient reasonable suspicion sufficient to detain a driver for a DUI investigation. *State v. Castaneda,* 79 So. 3d 41, 42 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1347b]; *see also Origi v. State,* 912 So. 2d 69, 71, 72 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a] (finding a police officer had sufficient reasonable suspicion to detain a driver for a DUI investigation where the latter drove at a high rate of speed, smelled of alcohol, and had bloodshot eyes); *Mendez v. State,* 678 So. 2d 388, 390 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1592a] (finding that the officer was justified in conducting a DUI investigation where the driver's face was flushed, she had bloodshot eyes, and her vehicle was illegally parked).

Probable cause sufficient to support an arrest "exists where the facts and circumstances allow a reasonable officer to conclude that an offense has been committed." *Mathis v. Coats,* 24 So. 3d 1284, 1288 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D142b]. Determining the existence of probable cause requires considering the totality of the circumstances as analyzed in the context of the officer's knowledge, experience, and special training. *Id*.

Here, competent, substantial evidence supported the hearing officer's finding that Officer Moeller legally detained Petitioner for a DUI investigation. Officer Moeller observed Petitioner driving almost twenty miles per hour over the speed limit on J. Turner Butler Boulevard. As Officer Moeller activated his vehicle's lights to conduct a traffic stop, Petitioner applied his brakes in the travel lane and veered slightly into the left lane before slowly pulling his vehicle over to the right shoulder of the road. After stopping Petitioner, Officer Moeller requested Petitioner's license and registration, but Petitioner provided Officer Moeller with a work order that he believed to be his registration. Officer Moeller detected the odor of alcohol, Petitioner had a flushed face, and Petitioner stated he had consumed alcohol before attending a basketball game. The record, therefore, contains competent, substantial evidence to support the hearing officer's conclusion that Officer Moeller had reasonable suspicion to detain Petitioner for a DUI investigation.

The DVD, Arrest and Booking Report, and testimony from the formal review hearing also provide competent, substantial evidence to support the finding that Officer Moeller had probable cause to arrest Petitioner. These include the above observations, as well as Petitioner's driving pattern and conduct during the stop. Although Petitioner argues a discrepancy exists between the DVD and Officer Moeller's observations of Petitioner's driving after the former activated his lights, Officer Moeller's statement of events is not "totally contradicted and totally negated and refuted by video evidence of record . . . ." *Wiggins v. Dept of Highway Safety and Motor Vehicles,* 209 So. 3d 1165, 1166 (Fla. 2017) [42 Fla. L. Weekly S85a]. This Court declines to reweigh the evidence and substitute its judgment for that of the hearing officer. *See Dep't of Highway Safety and Motor Vehicles v. Favino,* 667 So. 2d 305, 309 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a]. The totality of the evidence before the hearing officer constitutes competent, substantial evidence to support finding Officer Moeller had probable cause to arrest Petitioner. Therefore, Petitioner's claim is denied.

Based on the foregoing, the "Petition for Writ of Certiorari" is **DENIED**.

* * *

Licensing—Driver's license—Suspension—Appeals—Certiorari—Mootness—Where term of license suspension expired during pendency of petition for writ of certiorari, issue of validity of suspension is moot—Petition dismissed

GREGORY ALTMAN, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 21-CA-755. UCN Case No. 512021CA000755CAAXES. December 6, 2021. Rehearing Denied February 2, 2022. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DISMISSING PETITION

Petitioner Gregory Altman seeks certiorari review of the "Findings of Fact, Conclusions of Law and Decision" of the Hearing Officer of the Bureau of Administrative Reviews, Department of Highway Safety and Motor Vehicles issued on February 25, 2021. Because the suspension period of Petitioner's driver license expired during the pendency of this petition, review of the hearing officer's order is moot. Accordingly, the petition is dismissed.

While the petition in this case was pending, Petitioner informed the Court via his Reply that the suspension period of Petitioner's driver license had expired. The purpose of a formal review before a hearing officer is to determine whether the suspension of the petitioner's driver license is valid. Because the suspension has expired, "the issue of the validity of the suspension of [the petitioner's] driver license is moot." *McLaughlin v. Dep't of Highway Safety & Motor Vehicles,* 128 So. 3d 815 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D596a].

Even if this Court determined that the hearing officer erred, under *McLaughlin* the Court could not remand the case for a new hearing. And this Court's jurisdiction is limited to quashing or upholding the hearing officer's order. The Court has no jurisdiction to directly order the Department to remove the underlying suspension from the driving record.

The Court notes that the Fourth District Court of Appeal has certified conflict with the Second District on the mootness issue. *See Gordon v. Dep't of Highway Safety & Motor Vehicles,* 166 So. 3d

902, 903 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1368b]. This conflict has not been resolved by the Supreme Court of Florida. Thus, this Court is bound by the Second District's holding.

Accordingly, it is:

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is hereby **DISMISSED.** (KIMBERLY SHARPE BYRD, LINDA BABB, and KIMBERLY CAMPBELL, JJ.)

ORDER DENYING PETITIONER'S MOTION FOR REHEARING

THIS CAUSE came before the Court on the Petitioner's Motion for Rehearing, filed December 10, 2021, by the Petitioner, Gregory Altman, and the Respondent's Response to Petitioner's Motion for Rehearing, filed December 22, 2021. The Petitioner correctly points out that at the time the Court entered the Order Dismissing Petition, on November 29, 2021, the Petitioner's license suspension was still in effect, as the expiration was December 19, 2021. As Petitioner's license suspension has now expired, the outcome is the same as the Court is still bound by the holding in *McLaughlin v. Dep't of Highway Safety & Motor Vehicles,* 128 So. 3d 815 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D596a] (concluding that because the suspension has expired, the issue of the validity of the suspension of the petitioner's driver license is moot).

The Court notes that the Florida Supreme Court, on December 9, 2021, declined to accept jurisdiction to resolve the inter-district conflict between *McLaughlin* and other cases on this issue. *See Cordaro v. Dep't of Highway Safety & Motor Vehicles*, 2021 WL 5853778 (Fla. Dec. 9, 2021).

Accordingly, it is:

ORDERED AND ADJUDGED that the Petitioner's Motion for Rehearing is hereby **DENIED.** (KIMBERLY SHARPE BYRD, LINDA BABB, and KIMBERLY CAMPBELL, JJ.)

* * *

Counties—Code enforcement—Appeals—Timeliness—Administrative order suspending time limits in connection with pandemic could not and did not extend 30-day deadline for filing notices of appeal—Untimely appeal is dismissed

YVONNE SOUCHET, Appellant, v. MIAMI-DADE COUNTY CODE ENFORCEMENT, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2021-16 AP 01. January 27, 2022.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

ORDER GRANTING APPELLEE, MIAMI-DADE COUNTY CODE ENFORCEMENT'S MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

(PER CURIAM.) This is an appeal from an administrative order of a hearing officer for Miami-Dade County Code Enforcement. A civil violation notice had been issued to Appellant, Yvonne Souchet ("Appellant" or "Souchet") who sought an administrative hearing to appeal the violation. A hearing was held on February 20, 2020 before a Miami-Dade County Code Enforcement hearing officer. The order affirming the violation was rendered the same day of the hearing on February 20, 2020. Appellant did not file a notice of appeal until 415 days later on April 9, 2021.

Florida Rule of Appellate Procedure 9.110(c) governs review of final administrative orders. Rule 9.110 (c) provides that:

> In an appeal to review final orders of lower administrative tribunals, the appellant shall file the notice with the clerk of the lower administrative tribunal within **30 days of rendition of the order to be reviewed**, and shall also file a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the court.

(emphasis added).

Similarly, Section 162.11, Florida Statutes, provides that:

> 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).

It is undisputed that the notice of appeal was not filed within the 30-day period allowed by the rules. Because the notice of appeal was untimely filed, this Court lacks jurisdiction to entertain the appeal. As a result, this appeal must be dismissed. *See Miami-Dade County v. Peart*, 843 So. 2d 363, 364 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1073b] (finding that the notice of appeal filed 31 days after the administrative hearing officer rendered her decision deprived the circuit court of jurisdiction to hear the appeal) (citing *Crapp v. Criminal Justice Standards & Training Comm'n*, 753 So. 2d 787 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D822f] ("[a]n appellate court cannot exercise jurisdiction over a cause where a notice of appeal has not been timely filed")).

However, Appellant argues that this appeal is timely, relying on Eleventh Judicial Circuit Administrative Orders addressing court closures and extensions of time in connection with the COVID-19 pandemic. For example, one such Administrative Order, AO 20-04 dated March 25, 2020, provides that "[a]ll time limits set by judicial order and/or authorized by rule and statute applicable to civil (inclusive of circuit and county), family, domestic violence, dependency, probate, small claims, traffic, bond forfeiture, and appellate proceedings are further suspended until the close of business day on Monday, April 20, 2020."

While that Circuit Court Administrative Order states that deadlines are extended for appellate proceedings, AO 20-04 does not specifically state that the 30-day deadline in Florida Rule of Appellate Procedure 9.110(c) for filing an appeal is extended, nor could it so state. 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 (Fla. 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).

Based on the foregoing authorities, we find that this appeal is untimely and must therefore be **DISMISSED.** (TRAWICK, WALSH and SANTOVENIA, JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Fraud—Department of Highway Safety and Motor Vehicles' removal of fraud-based suspension from licensee's driving record during pendency of appeal of order upholding suspension is tantamount to confession of error—Appellate court conducting certiorari review does not have authority to order department to reinstate driver's license examination results, medical clearances, and application information that was deleted upon imposition of suspension—Attorney's fees—Award of attorney's fees under section 120.595(5) is not appropriate where there is no showing of gross abuse of department's discretion—Further, licensee has not shown that he is "small business party" entitled to fee award under section 57.111

JORGE LUIS MARTINEZ GONZALEZ, Petitioner, v. STATE OF FLORIDA DEPT. OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2021-1 AP 01. February 14, 2022. On a Petition for Writ of Certiorari from a December 10, 2020 final order of a hearing officer affirming the suspension of Petitioner's driver's license by the Florida Department of Highway Safety and Motor Vehicles. Counsel: Maria Del Carmen Calzon, Maria Del Carmen Calzon, P.A., for Petitioner. Elana J. Jones, Assistant General Counsel, Department of Highway Safety & Motor Vehicles for Respondent.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

OPINION

(SANTOVENIA, J.) Petitioner, Jorge Luis Martinez Gonzalez ("Petitioner") appeals from a December 10, 2020 final order ("Order") of a hearing officer affirming the suspension of his driver's license by the Florida Department of Highway Safety and Motor Vehicles ("Department"). Petitioner's driver's license was suspended for fraud pursuant to Section 322.27, Fla. Stat. On January 12, 2021, Petitioner filed the instant Petition.

FACTUAL BACKGROUND

On September 5, 2019, a suspected fraud was communicated to the Department involving applications for a Florida driver's license and a Florida identification card by two different individuals using the same name of a third individual. The Department transferred the suspected fraud investigation to the Florida Highway Patrol ("FHP"). FHP conducted an investigation using facial recognition software and identified the Petitioner and another individual as the two individuals who had allegedly submitted fraudulent applications to the Department on August 12, 2019 and September 5, 2019, respectively. FHP transmitted its report and findings to the Department through a "fraud package". The Department suspended the Petitioner's Florida driver's license for one year based on the fraud package.

On December 7, 2020, a formal review hearing ("Hearing") was held at Petitioner's request. Following the Hearing, Hearing Officer Jeannine George entered the Order sustaining the suspension of Petitioner's Florida driver's license and driving privileges for violation of Section 322.27, Fla. Stat. The Order states that "upon review of the Department's records and information received at the review, this officer finds, that there is competent substantial evidence to find that the Petitioner's driving privilege was properly suspended by the Department."

During the pendency of this case, the Department removed the suspension for fraud from Petitioner's driving record effective September 9, 2021. In its Response to the Petition, the Department requests that the Petition be dismissed as moot based on the removal of the suspension from Petitioner's driving record. In its Reply, the Petitioner argues that the Petition is not moot because the Department has not rendered a written order rescinding the Order that is the subject of this case. Petitioner asks the court to treat the Department's Response as a confession of error and to quash the Order below.

STANDARD OF REVIEW

Circuit court review of the Order upon the Petition is governed by a three-part standard of review: (1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *See Haines City Comm. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (citing *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 625-626 (Fla. 1982)).

DISCUSSION

Petitioner contends that the Department departed from the essential requirements of law when it concluded that it had competent substantial evidence to suspend the Petitioner's driver's license and driving privileges based upon the fraud package and investigation. Petitioner also argues that he was not accorded procedural due process because he was not provided with the Department's fraud package in advance of the Hearing, despite repeated requests. Indeed, Petitioner avers that the fraud package was provided to Petitioner only after the Order affirming the license suspension.

Petitioner also alleges that the Department denied Petitioner procedural due process and likewise deviated from the essential requirements of the law when it denied Petitioner's request for a copy of the audio-recorded Hearing proceedings absent a court order.

The Department's Response to the Petition neither refutes nor even addresses Petitioner's arguments.

Confession of Error

The Department's Response does not specifically state that the Department is confessing error. However, we elect to treat the Department's Response as a confession of error, finding that the removal of the suspension for fraud from the Petitioner's driving record is tantamount to an admission that the suspension was incorrectly entered. *See Crews v. Crews*, 629 So. 2d 1094, 1095 (Fla. 5th DCA 1994) (stipulation in appellee's brief to reversal of order on appeal treated as confession of error); *Barfield v Dept. of State, Division of Licensing*, 568 So. 2d 493, 494 (Fla. 1st DCA 1990) (Department's motion to dismiss appeal as moot treated "as in the nature of a confession of error"). *See also I.J.-L. v. Dept. of Children and Family Services*, 990 So. 2d 1266, 1267 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D2340b] (appellee's motion for relinquishment treated as a confession of error); *Boggs v. Farm Credit Bank of Columbia*, 545 So. 2d 516, 517 (Fla. 3d DCA 1989) (appellee's motion to dismiss appeal treated as a confession of error); *Olsten Staffing Services v. Cooks*, 694 So. 2d 52 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D369a] (appellee's motion to dismiss treated as a confession of error); *Barber v. Farcas*, 615 So. 2d 820 (Fla. 1st DCA 1993) (motion for remand treated as a confession of error); *Hudson v. Singletary*, 614 So. 2d 13 (Fla. 1st DCA 1993) (motion for relinquishment treated as a confession of error); *Lambrix v. Dugger*, 586 So. 2d 1071, 1072 (Fla. 1st DCA 1991) (motion for remand treated as a confession of error); *Wiley v. State,* 578 So. 2d 903 (Fla. 1st DCA 1991) (motion to relinquish jurisdiction for resentencing, agreeing with appellant that he is entitled to the relief he seeks, treated as a confession of error); *In the Interest of T.S.,* 504 So. 2d 61 (Fla. 1st DCA 1987) (motion to relinquish jurisdiction construed as a confession of error).

Petitioner also requests full reinstatement of his driver's license examination/CDL driver license examination results, medical clearances and application information which were previously deleted by the Department upon imposition of the suspension hold. However, on certiorari review, this court lacks authority to direct the Department to take those actions. *See Miami-Dade Cnty. v. Snapp Industries, Inc.*, 319 So. 3d 739 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1029a] ("As

an appellate court granting a petition for certiorari, the circuit court could only quash the special magistrate's findings, conclusions, and order. A direction to the administrative agency to dismiss the enforcement action exceeds that authority.") (citing *Monroe Cnty. v. Carter*, 41 So. 3d 954, 958 n.6 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1638d]).

Attorney's Fees

Petitioner's Motion for Attorney's Fees was filed contemporaneously with his Reply. Petitioner asserts entitlement to attorney's fees under two statutes, Section 120.595(5), Fla. Stat. and Section 57.111, Fla. Stat., the "Florida Equal Access to Justice Act".

Section 120.595(5), Fla. Stat. provides, in relevant part, that:

> When there is an appeal, the court in its discretion may award reasonable attorney's fees and reasonable costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that **the agency action which precipitated the appeal was a gross abuse of the agency's discretion**. . .

(emphasis added). There is no record here or showing by Petitioner of gross abuse of the Department's discretion which would justify an award of attorney's fees to Petitioner pursuant to Section 120.595(5), Fla. Stat.

Section 57.111(4)(a), Fla. Stat., states:

> Unless otherwise provided by law an award of attorney's fees and costs shall be made to a prevailing small business party[1] in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

Petitioner fails to show how he is a small business party or prevailing small business party for purposes of entitlement to attorney's fees under Section 57.111. *See Daniels v. Florida Dept. of Health*, 898 So. 2d 61, 69 (Fla. 2005) [30 Fla. L. Weekly S143a] (individual not a "small business party" where agency's complaint brought against individual and not her corporation); *Florida Real Estate Commission v. Shealy*, 647 So. 2d 151, 152 (Fla. 1st DCA 1994) (appellee individual was not a qualifying small business party under Section 57.111, which must be a corporation, a partnership, or a sole proprietor of an unincorporated business).

Here, Petitioner has shown no cognizable contractual or statutory basis for the award of fees. *See State Dept. of Highway Safety & Motor Vehicles v. Trauth*, 41 So. 3d 916, 918 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1480a] ("the Department's persistence, even obduracy, involves a close question of law. . .[that] is not one that lacks any plausible factual and legal basis, and its actions have not abused the judicial process") (distinguishing *Moakley v. Smallwood*, 826 So.2d 221, 226-227 (Fla. 2002) [27 Fla. L. Weekly S357b] (held that "a trial court possesses the inherent authority to impose attorneys' fees against an attorney for bad faith conduct"; "must be based upon an express finding of bad faith conduct and must be supported by detailed factual findings describing the specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorneys' fees."). There is no record here of the bad faith required for an award of attorney's fees pursuant to *Moxley*.

For the foregoing reasons, the Petition for Writ of Certiorari is GRANTED and the Order is QUASHED. Petitioner's Motion for Attorney's Fees is DENIED. (TRAWICK and WALSH, JJ. concur.)

[1]Fla. Stat. 57.111(d)(1)(c) defines "small business party" as "an individual whose net worth did not exceed $2 million at the time the action is initiated by a state agency when the action is brought against that individual's license to engage in the practice or operation of a business, profession, or trade. . ." Section 57.111(c), Fla. Stat. defines a "small business party" as a "prevailing small business party" when "[a] final judgment or order has been entered in favor of the small business party and such judgment or order has not been reversed on appeal or the time for seeking judicial review of the judgment or order has expired."

* * *

Licensing—Driver's license—Suspension—Refusal to submit to urine test—Law enforcement's failure to forward copy of licensee's driver's license to Department of Highway Safety and Motor Vehicles as required by statute was error, but error did not deprive licensee of procedural due process—Hearing officer's failure to invalidate suspension because of error did not constitute departure from essential requirements of law—Competent substantial evidence supported suspension, despite absence of license, where license number was included in documentary evidence

STEPHANIE HILTON, Petitioner, v. STATE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Circuit Civil Division. Case No. 21-CA-5226, Division E. November 4, 2021. Counsel: Roberto R. Castillo, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(ANNE-LEIGH GAYLORD MOE, J.) Petitioner Stephanie Hilton seeks issuance of a writ of certiorari following a May 25, 2021 final order upholding the suspension of her driving privilege. For the reasons stated here, the petition is denied.

I. JURISDICTION

This Court has jurisdiction. §§ 322.31; 322.2615(13), Fla. Stat.

II. STANDARD OF REVIEW

When reviewing the decision of an administrative agency, the scope of the circuit court's review is limited to whether Petitioner received due process, whether competent, substantial evidence supports the decision, and whether the decision departs from the essential requirements of law. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982).

III. FACTS AND PROCEDURAL HISTORY

On April 15, 2021 at 8:47 p.m., Trooper Nottingham of the Florida Highway Patrol arrived to the scene of a one-vehicle accident. He observed damage on the driver's side of a pick-up truck, as well as damage to a utility pole and fence that the vehicle had hit.

The owner of the truck was at the scene and he identified Petitioner as the driver. He advised Trooper Nottingham that Petitioner is the mother of his children, she appeared to be impaired, and that she was at her house. A witness to the accident advised Trooper Nottingham that he had seen the crash and saw Petitioner get out of the truck. The witness added that Petitioner fell to the ground. He was concerned for her safety as well as that of the two children that were also in the vehicle. The witness told law enforcement that they had offered to drive Petitioner and the children home.

Trooper Nottingham met with Petitioner at her address. She seemed unaware that there had been a crash. According to Trooper Nottingham, Petitioner was unsteady on her feet, had bloodshot eyes, pinpoint pupils, droopy eyelids, and slurred speech. She strayed off topic several times. Thereafter, Trooper Nottingham began a DUI investigation.

After receiving Miranda warning, Petitioner admitted she was driving at the time of the crash and that she did not attempt to contact law enforcement about the incident. She admitted to smoking marijuana two hours before. She consented to perform field sobriety exercises and performed them very poorly.

Petitioner was then transported to the Pasco County Jail. While en route to the jail, Petitioner consumed a pill. She dropped another pill, which a law enforcement officer retrieved. The pill was later identified as oxycodone. At the jail, Petitioner was read implied consent and, based on her evident impairment and admission to smoking

marijuana, was asked to submit to a urine test. After considering the request for a few minutes, Petitioner refused, resulting in the administrative suspension of her driving privilege.

Petitioner sought formal review of the suspension in accordance with section 322.2615, Fla. Stat. The formal review hearing was held May 19, 2021. There were no witnesses; the hearing officer was presented with documentary evidence only. Petitioner's attorney moved to invalidate the suspension because Petitioner's driver license was not included in evidence, arguing that the statute mandates the inclusion its inclusion in the record. Although Petitioner's tangible driver license card was not in evidence, the license number was included in the documentary evidence, including the traffic citations, arrest report, and refusal affidavit. The hearing officer denied Petitioner's motion to invalidate the suspension on the ground that the license itself had not been furnished, stating that Petitioner's identity was not at issue in the proceeding. This petition followed.

IV. ANALYSIS

Petitioner contends that the failure to include the license in the hearing packet provided to the hearing officer violated her due process rights, and the hearing officer's refusal to invalidate her license suspension departed from the essential requirements of law.

A. Due Process

The right to due process is secured in the Florida Constitution. Art. I, § 9, Fla. Const. Within that right are both substantive and procedural components. Procedural due process relates to the procedure employed by the government when it makes decisions that affect the rights of its citizens, whereas substantive due process protects citizens from the deprivation of fundamental rights. *See, e.g., Bondar v. Town of Jupiter Inlet Colony,* 321 So. 3d 774, 783 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1034a] (citing *Hillcrest Prop., LLP v. Pasco Cnty.,* 915 F. 3d 1292, 1297 (11th Cir. 2019) [27 Fla. L. Weekly Fed. C1688a] (discussing the Due Process Clause of the United States Constitution and noting that without a compelling state interest and an infringement that is narrowly tailored to serve that interest, the government may not violate such rights "at all, no matter what process is provided.")). A citizen's right to procedural due process requires that he or she receive "fair treatment through the proper administration of justice." *Dept. of Law Enforcement v. Real Prop.,* 588 So. 2d 957, 960 (Fla. 1991).

It is the right to procedural due process that entitles citizens to notice of a proceeding that may impact their rights, and a meaningful opportunity to be heard at that proceeding. *Massey v. Charlotte County,* 842 So. 2d 142, 146 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D407b]. "The specific parameters of the notice and opportunity to be required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding." *Id.* at 146.

Here, Petitioner contends that her procedural due process was violated when the law enforcement officer failed to forward a copy of her driver license as required by the statute. She is correct about the statute's requirement, and she is correct that the officer failed to satisfy that requirement. However, the procedural due process analysis focuses on whether she was given fair notice and the opportunity to be heard in an orderly proceeding. She was given both. The failure to comply with the statutory requirement to forward the driver license was an error, but that error did not deprive her of a meaningful hearing and it did not deprive her of procedural due process.

B. Essential Requirements of the Law

The statute plainly requires that the law enforcement officer "shall forward to the department, within 5 days after issuing the notice of suspension, the driver license . . ." Section 322.2615(2)(a), Fla. Stat. Use of the word "shall" means that this is mandatory. *See, e.g., Izaguirre v. Beach Walk Resort/Travelers Ins.,* 272 So. 3d 819, 820 (Fla. lst DCA 2019) [44 Fla. L. Weekly D1306a] ("Based on its plain and ordinary meaning, the word 'shall' in a statute usually has a mandatory connotation."). However, the officer's failure to comply with a mandatory statutory provision does not necessarily compel the conclusion that the hearing officer's failure to invalidate the suspension amounted to a departure from the essential requirement of the law.

The word "essential" in the legal standard matters, too. In considering a petition for certiorari, the legal standard is not whether the hearing officer departed from any requirement in the law; it is whether the hearing officer departed from an "essential" requirement of the law. In considering what constitutes an essential requirement of the law, it is relevant that Petitioner's identity was not an issue in dispute at the hearing. Further, the absence of the tangible driver license did not result in a lack of substantial competent evidence. The license number was included in the documentary evidence, including the traffic citations, arrest report, and refusal affidavit.

Here, it cannot reasonably be said that the tangible driver license itself was essential to this proceeding. The statute required the officer to forward the driver license, but the hearing officer did not depart from the essential requirements of the law in refusing to invalidate the suspension on that basis.

V. CONCLUSION

Certiorari is not available to review every departure from the law. *Haines City Comm. Dev't v. Heggs,* 658 So. 2d 523, 528 (Fla. 1995) [20 Fla. L. Weekly S318a] (citing *Combs v. State,* 436 So. 2d 93, 95-96 (Fla. 1983)). Only where there "has been a violation of clearly established principle of law resulting in a miscarriage of justice" should a writ of certiorari be granted. *Id*. at 528.

In this instance, the Petitioner was given due process, and the hearing officer did not depart from any essential requirement of the law as it related to this case. Put differently, the trooper made an error in failing to comply with the statutory requirement, but the error was harmless and under these circumstances certiorari should not be granted. *Department of Highway Safety and Motor Vehicles v. Chamizo,* 753 So. 2d 749, 752 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D711e].

It is therefore ORDERED that the petition is DENIED in Tampa, Hillsborough County, Florida, on this 4th day of November, 2021.

* * *

Counties—Code enforcement—Stay—Vacation—Special magistrate had authority to lift stay magistrate had imposed on accrual of code enforcement fines despite facts that mandate had not issued in circuit court's appellate decision affirming code enforcement orders and second tier certiorari proceeding regarding orders was pending before district court of appeal—Special magistrate erred, however, in making unfrozen fines retroactive to date of freezing where action had effect of rendering stay a nullity

LAWRANCE PROPERTIES, LLC, Petitioner, v. HILLSBOROUGH COUNTY, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Civil Division. Case No. 20-CA-8479, Division X. L.T. Case No. CE 18005494. January 10, 2022. On review of a decision of the Code Enforcement Special Magistrate for Hillsborough County, Florida. Counsel: Geoffrey Todd Hodges, G. T. Hodges, P.A., Lutz, for Petitioner. Kenneth C. Pope, Senior Assistant County Attorney, and Christine Beck, County Attorney, Tampa, for Respondent.

APPELLATE OPINION

(ROBIN FUSON, J.) Appellant Lawrance Properties, LLC ("Lawrance") appeals a decision of the Code Enforcement Special Magistrate ("special magistrate") vacating a stay pending appeal, which restarted the running of a daily fine for existing code violations, and which made the fines retroactive to the date the stay was originally

imposed. Lawrance contends the special magistrate lacked jurisdiction to vacate the stay during the pendency of the appeal and subsequent writ proceeding in the District Court of Appeal. Because there is no automatic stay in appeals, much less in certiorari proceedings, and the rules of appellate procedure afford lower tribunals the jurisdiction to impose, modify, and vacate stays pending appeal, neither a mandate nor an appellate decision is required for a lower tribunal's exercise of jurisdiction over a stay. Lawrance is correct, however, that the special magistrate's determination to make the unfrozen fines retroactive to the date they were originally frozen is error because it had the effect of rendering the stay a nullity.

CASE HISTORY

This dispute has a long, contentious, and at times, circuitous litigation history. Lawrance operated a farm stand, which has been referred to as an "ag-stand." Ag-stands of 150 square feet or fewer are not regulated by the county. Typically, these are limited to selling products grown or harvested from the farm. In this case, the subject ag-stand is a significantly more substantial 3000+ square-foot building with refrigeration cases. The structure contains for sale a number of items that are not products of the farm on which it sits. When neighbors complained about accumulations of junk, trash, debris, and other nuisances from the property, the structure came to code enforcement's attention.

On April 20, 2018, the county issued its first notice of violation related to Lawrance's operation of the so-called ag-stand. The citation issued because the structure had been constructed without proper site plan approval, conditional use approval, and permitting. The notice directed Lawrance to obtain proper approvals or remove the structure, but he did not. A final notice issued on May 31, 2018. The notice advised Lawrance that a fine would be imposed for further noncompliance. Lawrance still did not comply. Instead, Lawrance attempted to show that the property should be considered greenbelted (agricultural), which, by law, would exempt him from further regulation by the county. Because the property was not formally designated as greenbelt, the special magistrate issued an order imposing a fine on September 17, 2018. It afforded Lawrance until November 13, 2018 to comply or face a daily $200.00 fine. Lawrance appealed the order to the circuit court.[1]

On November 26, 2018, code enforcement notified Lawrance that the property remained in noncompliance with the special magistrate's September 17, 2018 Order. Therefore, a $200.00 per day fine began. Lawrance contested the finding of noncompliance, and on February 8, 2019 a hearing was held. At the hearing, Lawrance continued to argue the property's alleged greenbelt status, which was still being considered in a proceeding before the value adjustment board (informally referred to as the VAB). By this time, Lawrance had accrued substantial fines. Since the property's alleged greenbelt status was under consideration in another administrative proceeding, the special magistrate continued the hearing, and in an order dated February 11, 2019, froze any further imposition of the fines. Because the VAB did not immediately make its determination as to the property's greenbelt status, the code enforcement matter was continued several times.

The special magistrate took the matter up again on July 19, 2019. At the time of the hearing, the VAB's determination was final. The conclusions the VAB reached were that a) the farm stand was an integral part of the farming operation; and b) that the property under the farm stand was not greenbelted. Faced with these seemingly inconsistent positions, the special magistrate denied Lawrance's contest and reaffirmed the original order finding violation and imposing fine.[2] Ostensibly because of the apparent inconsistency within the VAB's determination, the special magistrate suggested that Lawrance appeal the special magistrate's decision. The special magistrate maintained the stay on the fine pending the outcome of the appeal. A written order memorializing the decision was issued July 22, 2019.

Lawrance appealed the July 22, 2019 Order Denying Contest. The appeal was consolidated with the appeal of the April 20, 2018, Order. Although activity in the case continued, the running of fines remained frozen.

The circuit court issued its appellate opinion July 20, 2020.[3] A mandate issued December 20, 2020. Lawrance filed a (second-tier) petition for writ of certiorari in the Second District Court of Appeal seeking review of the circuit court's appellate decision. On October 1, 2020 the special magistrate issued a new notice of hearing for October 7, 2020. Lawrance filed an emergency motion to restrain further action by the special magistrate and for other relief in case no. 19-CA-10333, an ancillary prohibition proceeding that had been denied earlier.[4] Also on October 7, 2020, the County filed a motion to lift the stay, which the circuit court granted the following day. The court's order lifting the stay, as well as denying rehearing and emergency relief, was later affirmed on appeal.[5]

On October 16, 2020, a hearing was held before the special magistrate on the fines. Lawrance's attorney argued that the freeze of the fine could not be altered because an "appeal," which was actually a second tier certiorari proceeding, was pending before the District Court of Appeal and because the circuit court had not yet issued a mandate. The special magistrate determined that a second-tier certiorari does not automatically stay enforcement proceedings. Moreover, neither the circuit court nor district court had issued a stay. The special magistrate issued an order resuming the fine, and retroactively applied the fines that had been frozen. This appeal followed.

LEGAL ANALYSIS

Decisions of code enforcement boards and magistrates are reviewed on appeal to determine whether the party was afforded due process, whether the decision comports with the essential requirements of law, and whether competent, substantial evidence supports the decision. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

Lawrance first contends that the special magistrate lacked subject matter jurisdiction to enter the October 16, 2020 Order unfreezing the fines because a second tier certiorari petition had been filed in the district court and a mandate had not been issued following the circuit court's appellate decision. Lawrance maintains that jurisdiction resumes in the lower tribunal only upon issuance of a mandate by the appellate court. Generally, that is a correct statement of the law. It is improper for a lower tribunal to interfere with an appellate court's jurisdiction with regard to substantive issues. *Florida Patient's Compensation Fund v. Scherer,* 558 So. 2d 411 (Fla. 1990). Typically, that means there can be no substantive alteration of the final judgment after the court accepts jurisdiction, although clerical errors may be corrected. *State, Dept. of Environmental Regulation v. Apelgren,* 611 So. 2d 72 (Fla 4th DCA 1992). However, Lawrance's argument fails because lower tribunals retain jurisdiction over collateral matters, including the enforcement of a judgment, during the pendency of an appeal. *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.,* 639 So. 3d 606, 608-09 (Fla. 1994)([lower tribunal] always retains jurisdiction to enforce its own orders); *Finklestein v. N. Broward Hosp. Dist.,* 484 So. 2d 1241, 1243 (Fla. 1986) (attorney's fees constitute collateral and independent claim). Jurisdiction over stays is addressed specifically in Florida Rule of Appellate Procedure 9.310.

Lawrance also incorrectly assumes that a stay is automatic for the duration of any appellate proceeding. Whether or not to impose a stay relates to enforcement of the judgment. Unless otherwise provided by

general law, enforcement of a final judgment is not automatically stayed pending appeal. Enforcement of the judgment may or may not be stayed at the discretion of the lower tribunal. Fla. R. App. P. 9.310(a) provides that a stay may be lifted or modified because continuing jurisdiction to grant, modify, or deny stays remains in the lower tribunal. In an administrative proceeding, a party may obtain a stay by filing a motion seeking such relief in the lower tribunal, or, for good cause shown, with the appellate court. *See* Fla. R. App. P.9.190(e). Lawrance could have sought review of the lifting of the stay during the pendency of the appellate proceedings in the district court of appeal. *See* Fla. R. App. P. 9.310(f) (review of orders entered by lower tribunals under this rule shall be by the court on motion.).

Nor did the second tier certiorari petition filed to review the circuit court's appellate decision automatically stay enforcement of the judgment. Petitions for writ of certiorari to review even nonfinal orders do not stay underlying proceedings, including entry of a final judgment. *Spielvogel v. Crown Realty Associates,* 465 So. 2d 532, 533 (Fla. 4th DCA 1984)(*cf.* Fla. R. App. P.9.130(f), which prohibits entry of final judgment during pendency of *appeal* of nonfinal order; there is no such rule regarding certiorari petitions). The judgment here was not only final, but it had been affirmed on appeal. In short, the special magistrate had jurisdiction during the pendency of the second tier certiorari proceeding to vacate the stay on the fine such that a daily fine could resume.

Lawrance next correctly argues that the special magistrate departed from the essential requirements of law when he made the fines retroactive. Making the fines retroactive rendered the freeze a nullity. The amount of the fine should be what had accumulated at the time the fines were frozen, adding what accrued since the freeze, or stay, was lifted, if applicable.

Lawrance finally argues that his due process rights were violated because the notice of hearing did not specify that the issue of re-imposing the fine was to be considered. This issue lacks merit because the record is clear that Lawrance knew the purpose of the hearing and communicated with opposing counsel challenging the re-imposition of the fine in advance of the hearing. Moreover, not only did Lawrance's counsel not object to the hearing on due process grounds, he argued the substantive issue at length. By failing to object, Lawrance waived the issue, precluding the right to raise it for the first time on appeal. *Anderson v. School Bd. of Seminole Cnty.,* 830 So. 2d 952, 953 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D2542b]*; Dober v. Worrell,* 401 So. 2d 1322, 1323-24 (Fla. 1981).

It is therefore ORDERED that the special magistrate's October 16, 2020 Order is AFFIRMED, in part, to the extent it lifts the freeze on the running of the fine. It is FURTHER ORDERED that the Order is REVERSED, in part, to the extent it imposes liability for fines that accrued during the pendency of the stay. This cause is REMANDED to the special magistrate for proceedings consistent with this opinion. (FUSON, GABBARD, JJ., and BARTON, SR. JUDGE).

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[1]Several filings were consolidated into the appeal, which became case no. 19-CA-8634. It is unnecessary to discuss the procedural details involved to determine the issues in this appeal, but it is worth noting that the multiple filings delayed the appeal's resolution.

[2]The circuit court, acting in its appellate capacity, determined that even if a *building* is deemed an integral part of a farming operation when the land under it is not used for a bona fide agricultural purposes, the construction of the building is not exempt from regulation. *See Lawrance Properties, LLC, v. Hillsborough County,* 28 Fla. L. Weekly Supp. 470a (Fla. 13th Jud. Cir. [Appellate] August 12, 2020), *petition denied* 321 So. 3d 734 (Fla. 2d DCA 2021).

[3]*Lawrance Properties, LLC, v. Hillsborough County,* 28 Fla. L. Weekly Supp. 470a (Fla. 13th Jud. Cir. [Appellate] August 12, 2020), *petition denied* 321 So. 3d 734 (Fla. 2d DCA 2021).

[4]Although the petition for writ of prohibition in *Lawrance Properties, LLC, v. Hillsborough County,* case no. 19-CA-10333, had been denied November 4, 2019, the court, for reasons unknown, entered a stay on November 19, 2019, nunc pro tunc to November 12, 2019, which remained undisturbed until the County filed a motion to lift it. An order lifting the stay was entered October 8, 2020.

[5]*Lawrance Properties, LLC, v. Hillsborough County,* 317 So. 3d 100 (Fla. 2d DCA 2021).

* * *

Appeals—Dismissal—Failure to file initial brief

ROYAL PALM BUSINESS CENTER, LLC, Appellant, v. CITY OF POMPANO BEACH, FLORIDA, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE21007778, Division AP. January 11, 2022.

FINAL ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon this Court's Order Extending Time dated December 7, 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. Appellant filed a Notice of Appeal on April 15, 2021, and was subsequently granted THREE (3) extensions of time, in addition to the TWO (2) Show Cause Orders directing Appellant to file an Initial Brief and Appendix. In this Court's December 7, 2021 Order, Appelant was directed that no further extensions would be granted and a failure to comply would result in the dismissal of this Appeal. As of the date of this Order, Appellant has failed to file an Initial Brief and Appendix.

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

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

* * *

800 MARINE TECHNICAL CENTER, INC., Plaintiff, v. CITY OF DANIA BEACH, FLORIDA, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19022246, Division AW. February 14, 2022. John Bowman, Judge.

ORDER DIRECTING CLERK TO ISSUE MANDATE AND RE-CLOSE CASE

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, on Respondent City's Motion for Issuance of Mandate and Closure of Court File, filed on November 20, 2020. After having considered the motion, the court file, applicable law, and being otherwise fully advised in the premises, it is hereby **ORDERED** that:

1. Respondent City's Motion for Issuance of Mandate and Closure of Court File is **GRANTED**.
2. The Broward County Clerk of Court is hereby **DIRECTED** to issue a mandate pursuant to Florida Rule of Appellate Procedure 9.340 in accordance with this Court's July 30, 2020, Order Denying Petition for Writ of Certiorari.
3. Thereafter, the Broward County Clerk of Courts is **DIRECTED** to re-close this matter.

* * *

PICTURE TWO, LLC, Plaintiff, v. CITY OF DEERFIELD BEACH, FLORIDA, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE21021476, Division AP. February 1, 2022.

ORDER VACATING AND ACCEPTING APPELLANT'S NOTICE OF VOLUNTARY DISMISSAL WITH PREJUDICE

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon this Appellant's Response to Order to Show Cause and Notice of Voluntary Dismissal with Prejudice, dated January 13, 2022. Upon review of the response, this Court finds as

follows:

On January 20, 2022, this Court entered a Final Order of Dismissal for Appellant's failure to respond to the Order to Show Cause Regarding Untimely Notice of Appeal, dated December 16, 2021. At the time of the entry of the Final Order of Dismissal, the Court file did not yet reflect that Appellant had filed a response. The Court, upon discovery and review of the timely filed response, and after due consideration hereby **ORDERS**, as follows:

1. This Court's January 20, 2022, Final Order of Dismissal is **VACATED**.

2. Appellant's Response to Order to Show Cause and Notice of Voluntary Dismissal with Prejudice, dated January 13, 2022, is deemed timely filed.

3. Appellant's Notice of Voluntary Dismissal with Prejudice is **ACCEPTED** by this Court.

4. The Clerk of Court is **DIRECTED** to keep this case assigned as "disposed" by way of Appellant's Voluntary Dismissal with Prejudice.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Finding that licensee refused to submit to breath test after being read implied consent warning incident to lawful arrest was supported by competent substantial evidence indicating that licensee was read warning and refused to submit to breath test at crash scene and that warning was read again at jail after licensee had been placed under arrest, and licensee again refused to submit to breath test

ANARELI T. RAMIREZ, Petitioner, v. STATE OF FLORIDA, DEP'T OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 20th Judicial Circuit (Appellate) in and for Collier County. Case No. 21-AP-02. October 27, 2021. Counsel: J. Derek Verderamo, for Petitioner. Roberto R. Castillo, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(LAUREN L. BRODIE, J.) THIS CAUSE comes before the Court on Anareli Ramirez's "Petition for Writ of Certiorari," pursuant to Fla. Stat. § 322.31, filed March 31, 2021. Having reviewed the petition, Petitioner's appendix, Respondent's response, and the applicable law, the Court finds as follows:

1. Petitioner requests for the Court to "enter an Order directing the Respondent to remove [the instant] suspension from Petitioner's driving history, restore her full driving privilege, and return her license immediately; since "[t]he record lacks competent and substantial evidence to support that the Petitioner refused a breath test after being read implied consent subsequent to a lawful arrest based on a conflict in the evidence presented at the formal review hearing." (Pet. at 4-5).

2. On December 15, 2020, Collier County Sheriff's Office ("CCSO") responded to a hit and run crash, where one vehicle left the scene, and a second vehicle followed it. (P.A. DDL-3). Officer R. Anthony of CCSO arrived to the suspect vehicle's location, and made contact with Petitioner after witnessing Petitioner and other unknown subjects go inside a residence upon his arrival. (*Id.*). Petitioner identified herself as the driver of the vehicle involved in the crash. (*Id.,* T. 12:20-13:2). Officer Anthony could smell the odor of alcoholic beverages coming from Petitioner's person, observed that she was swaying, and had glassy eyes. (P.A. DDL-3). Additionally, Officer Anthony observed a "12 pack of Modelo beer next to the rear passenger door, and a partially drank beer bottle in the cup holder next to Petitioner's purse and cell phone . . . in the front seat" of the vehicle involved in the crash. (*Id.*). Officer Aponte of CCSO aided in conducting a DUI investigation with her Spanish language skills, during which Petitioner stated she drank two beers. Officer Aponte read Petitioner "implied consent" for a breath test in the Spanish language, and Petitioner refused after declining to perform field sobriety exercises. (*Id.*; P.A. Tr. 15:10-16:9). Officer Anthony handcuffed and placed Petitioner under arrest based on his observations and Petitioner's refusal to perform field sobriety exercises. (P.A. DDL-1, DDL-3). At the jail center, Petitioner was again offered the opportunity to provide a breath sample, but she refused. (P.A. DDL-3, DDL-4). Petitioner's driving license was suspended pursuant to Fla. Stat. § 322.2615 by a Department order (P.A. Order).

3. At the formal review hearing held on February 24, 2021, the hearing officer was presented with the issue of whether sufficient cause existed to sustain Petitioner's license suspension. Petitioner moved to invalidate the suspension on the ground that Petitioner was not read implied consent to a lawful arrest. (Pet. at 3). The documents reviewed by the hearing officer included the Florida DUI Uniform Traffic Citation (DDL-1), Probable Cause/Arrest Affidavit (DDL-2), Florida Traffic Crash Report (DDL-3), Affidavit of Refusal to Submit to Breath Test (DDL-4), Florida Uniform Traffic Citation (DDL-5), Florida Uniform Traffic Citation (DDL-6), and the Victim Notification Information Form (DDL-7).

4. In the Final Order of License Suspension, dated March 4, 2021, the hearing officer found that: (1) the law enforcement officer had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages; (2) Petitioner refused to submit to any such test after requested to do so by a law enforcement officer, subsequent to a lawful arrest; (3) and that Petitioner was told that if she refused to submit to such test her privilege to operate a motor vehicle would be suspended for a period of one year, or in the case of a second or subsequent refusal, for a period of eighteen months. (P.A. Order).

5. Petitioner argues that Officer Anthony's testimony (that it was clear that implied consent was read to Petitioner, that petitioner refused the breath test, and was then placed under arrest) is in conflict with Fla. Stat. § 316.1932(1)(a). Specifically, Petitioner puts emphasis on, that the physical breath test "must be *incidental* to a lawful arrest and administered at the request of a law enforcement officer who has reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle within this state while driving under the influence of alcoholic beverages." (Pet. at 5) (citing 316.1932(1)(a)) (emphasis added). Petitioner argues that she was not under arrest before the first implied consent was read.

6. 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. *Haines City Community Development v. Heggs,* 658 So. 2d 523 (Fla. 1995) [20 Fla. L. Weekly S318a]. The Court is not entitled to reweigh the evidence, to reevaluate the credibility of the evidence, or to substitute its judgment for that of the agency. *Id.* Moreover, Fla. Stat. § 322.2615(7) requires that Respondent "determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension." Lastly, preponderance of the evidence is "[p]roof which leads the hearing officer to find that the existence of a contested fact is more probable than its nonexistence." *Smith v. State,* 753 So. 2d 703 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D664a].

7. Here, the testimony provided at the hearing lacked inconsistencies with the documentary evidence. The evidence reflects that two breath test requests were made: The first, after Officer Aponte read the informed consent to Petitioner at the vehicle's location; and the second, at the jail center after Petitioner was arrested. (P.A. DDL-3, DDL-4). Petitioner denied both requests; the first, after refusing to perform field sobriety exercises. (*Id.*). Even if the first implied consent

reading was not made incident to arrest, the record reflects that Petitioner was arrested, and was read the informed consent warning again at the jail center. (P.A. DDL- 2, DDL-1, DDL-4, DDL-3). The case at bar is eerily similar to the circumstances in *Dep't of Highway Safety & Motor Vehicles v. Perry,* 751 So. 2d 1277 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D669a]. In *Perry,* highway patrol responded to a hit and run crash; the victim identified respondent as the driver that hit her and then left the scene; and that during the contact with respondent, the patrol officer noticed odor of alcohol, blood shot eyes, and slurred speech. *Id.* at 1278. Moreover, the patrol officer completed his crash investigation, and conducted a criminal one for DUI. *Id.* Respondent was read Miranda and was requested to perform field sobriety exercises. Respondent refused. The patrol officer then placed respondent under arrest for DUI and read respondent the implied consent warnings, after which respondent refused to take the intoxilyzer test. *Id.* The court held that the arrest report included in the record showed implied consent warnings were given, and that respondent refused to take the test—thereby granting certiorari and quashing the order which quashed the suspension.

8. On certiorari review, this Court cannot substitute its findings for that of the hearing officer and cannot reweigh the evidence. Having considered the record, and being mindful of the limited scope of review, the Court finds that Petitioner has failed to demonstrate that the essential requirements of law have not been observed or that she was deprived of procedural due process. The record does contain competent substantial evidence to support the findings of the hearing officer.

Accordingly, it is,

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is DENIED.

* * *

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CIRCUIT COURTS—ORIGINAL

Insurance—Property—Condition precedent to suit—Notice of intent to initiate litigation—Failure to provide—Dismissal

ALYSHA BREDEMUS AND JASON MAZZOTA, Plaintiffs, v. FAMILY SECURITY INSURANCE COMPANY, INC., Defendant. Circuit Court, 1st Judicial Circuit in and for Escambia County. Case No. 2021-CA-002251, Division N. January 27, 2022. Gary L. Bergosh, Judge. Counsel: Daniel Rosenbaum, for Plaintiffs. Christopher S. Dutton, Dutton Law Group, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S AMENDED MOTION TO DISMISS FOR FAILURE TO COMPLY WITH CONDITION PRECEDENT TO SUIT

THIS CAUSE, having come before the Court on December 16, 2021 on Defendant's Amended Motion to Dismiss for Failure to Comply with Condition Precedent to Suit, and the Court, having heard argument of counsel and otherwise being fully advised of the premises, finds that *Menendez v. Progressive Express Ins. Co.*, 35 So. 3d 873 (Fla. 2010) [35 Fla. L. Weekly S222b] is distinguishable to the factual and legal issues presented in this case, and retroactive application of Florida Statute § 627.70152 does not violate constitutional principles. Plaintiffs' suit is thus subject to the requirements of Florida Statute § 627.70152, and Plaintiffs were required to provide a written notice of intent to initiate litigation prior to the commencement of this suit.

It is hereby **ORDERED AND ADJUDGED** that Defendant's Amended Motion to Dismiss for Failure to Comply with Condition Precedent to Suit is **GRANTED**. This case is dismissed without prejudice.

* * *

Municipal corporations—Ordinances—Vacation rentals—State preemption—Town ordinance related to vacation rentals is not preempted by section 509.032(7) where ordinance does not prohibit vacation rentals or regulate duration or frequency of rentals—Constitutionality of ordinance—Speech—Ordinance that creates disclosure obligations on parties who manage or operate vacation rentals does not violate free speech rights where ordinance only requires dissemination of factual information, not political or ideological messages

MANAGEMENT PROPERTIES, LLC, a Florida limited liability company, Plaintiff, v. THE TOWN OF REDINGTON SHORES, a Florida municipal corporation, Defendant. Circuit Court, 6th Judicial Circuit in and for Pinellas County, Civil Division. Case No. 21-003002-CI. January 28, 2022. Thomas M. Ramsberger, Judge. Counsel: Joseph Kenny, Weber, Crabb & Wein, St. Petersburg, for Plaintiff. Robert Michael Eschenfelder, Trask Daigneault, LLP, Clearwater, for Defendant.

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

THIS CAUSE having come to be heard and considered on July 20th 2021 on Defendant's *Motion for Judgment on the Pleadings* and Plaintiff's *Motion for Summary Judgment*, and the Court having heard arguments of counsel, considered the pleadings, affidavits, testimony, and the Parties' respective memoranda of law, and being otherwise advised in the premises, the Court makes the following findings and orders:

1. August 5th 2020, the Town adopted Ordinance 20-06, which created § 90-116 of the Town Code. Section 90-116 established a variety of regulations which must be followed by persons or entities operating vacation rentals in the Town.

2. February 10th 2021, the Town adopted Ordinance 21-03 making certain amendments to § 90-116 not at issue in this litigation.

3. The Plaintiff markets a residential home located at 17820 Lee Avenue, Redington Shores, as a vacation rental.

4. On June 18th 2021, Plaintiff filed a three-count *Complaint* against the Town seeking declaratory relief. The *Complaint* alleged that Town Code § 90-116 is preempted by Florida Statutes § 509.032(7)(b), that § 90-116(D)(2)(a) and (b) of the Town Code violates Art. I, § 4 of the Florida Constitution (free speech) by requiring vacation rental operators to provide written notice of the Town's vacation rental rules to guests, and by requiring vacation rental operators to report violations of the Town's vacation rental rules of which the operator knows or should know to law enforcement or the Town, and that even if the Ordinance was not preempted, Plaintiff had certain grandfathered rights.

5. The Town filed its *Answer* on July 14th 2021.

6. On October 1st 2021, the Town filed a *Motion for Judgment on the Pleadings*.

7. On November 15th 2021, the Plaintiff filed a *Motion for Summary Judgment*, and on December 13th 2021, Plaintiff filed an *Amended Motion for Summary Judgment* to remove argument on Count III and on December 27th 2021, Plaintiff filed a *Notice of Voluntary Dismissal of Count III of the Complaint*.

8. The Court, upon properly-filed *Notice of Hearing* and *Cross-Notice of Hearing* filed by the Parties, conducted an almost two hour hearing on the competing motions on January 20th 2022.

Applicable Standards

The purpose of a motion for judgment on the pleadings is to test the legal sufficiency of a cause of action or defense. *Talcott Resolution Life Insurance Company v. Novation Capital LLC*, 261 So. 3d 580 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2745b]. A motion for judgment on the pleadings filed pursuant to Rule 1.140(c) must be decided wholly on the pleadings and may only be granted if the moving party is clearly entitled to a judgment as a matter of law. *Swim Industries Corp. v. Cavalier Mfg. Co., Inc.*, 559 So. 2d 301 (Fla. 2d DCA 1990). Pursuant to Fla. R. Civ. P. 1.130(b), any exhibits attached to the pleadings must be considered a part thereof for all purposes. Thus, attachments to pleadings shall be considered on a motion for judgment on the pleadings. *Glen Garron, LLC v. Buchwald*, 210 So.3d 229 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D308a]. If the defendant has filed a motion for judgment on the pleadings, the trial judge must treat all the allegations in the complaint as true, and all disputed allegations in the answer as false. The inquiry is then limited to a determination whether the complaint states a cause of action. *Shay v. First Federal of Miami, Inc.*, 429 So. 2d 64 (Fla. 3d DCA 1983).

Under the Florida Supreme Court's recent adoption of the Federal Court Rule 56 summary judgment standard, the new Fla. R. Civ. Pro. 1.510(a) now provides that a party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court shall state on the record the reasons for granting or denying the motion. *In re Amends. to Fla. Rule of Civ. Pro. 1.510*, 317 So.3d 72 (Fla. 2021) [46 Fla. L. Weekly S95a].

During the hearing on the competing motions, counsel for both Parties confirmed that there were no material issues of fact, and that the issues were questions of law.

Statutory Preemption

Plaintiff's first contention is that Town Code § 90-116 is preempted by Florida Statutes § 509.032(7). Subsection (7) provides as follows:

> (a) The regulation of public lodging establishments and public food service establishments, including, but not limited to, sanitation standards, inspections, training and testing of personnel, and matters related to the nutritional content and marketing of foods offered in such establishments, is preempted to the state. This paragraph does not preempt the authority of a local government or local enforcement district to conduct inspections of public lodging and public food service establishments for compliance with the Florida Building Code and the Florida Fire Prevention Code. . .
>
> (b) A local law, ordinance, or regulation may not prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals. This paragraph does not apply to any local law, ordinance, or regulation adopted on or before June 1, 2011.

Under its constitutional and statutory home rule powers, a municipality may legislate concurrently with the Legislature on any subject which has not been preempted to the State. *Wyche v. State*, 619 So.2d 231, 237-38 (Fla. 1993); *Barragan v. City of Miami*, 545 So.2d 252, 254 (Fla. 1989).

Preemption may be either express or implied. "Express preemption requires a specific statement; the pre-emption cannot be made by implication nor by inference." *Fla. League of Cities, Inc. v. Dep't of Ins. & Treasurer*, 540 So.2d 850, 856 (Fla. 1st DCA 1989). "Preemption essentially takes a topic or a field in which local government might otherwise establish appropriate local laws and reserves that topic for regulation exclusively by the legislature." *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So.2d 1011, 1018 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D205a]. Implied preemption:

> occurs when the state legislative scheme is pervasive and the local legislation would present a danger of conflict with that pervasive scheme. In other words, preemption is implied when the legislative scheme is so pervasive as to virtually evidence an intent to preempt the particular area or field of operation, and where strong public policy reasons exist for finding such an area or field to be preempted by the Legislature.

D'Agastino v. City of Miami, 220 So.3d 410, 421 (Fla. 2017) [42 Fla. L. Weekly S682a].

The Parties' competing motions do not draw the court's attention to any Florida appellate court opinion directly addressing the preemptive scope of Florida Statutes § 509.032(7), and it does not appear any exists. However, the Town drew the Court's attention to several circuit court opinions addressing similar vacation rental rules preemption arguments. In *30 Cinnamon Beach Way, LLC v. Flagler County*, case no. 2015-CA-167 (Fla. 7th Judicial Circuit (June 1st 2015), affd., 183 So.3d 373 (Table), 2016 WL 194800 (Fla. 5th DCA 2016), a vacation rental company sought to invalidate a Flagler County ordinance enacting regulations for vacation rental units, alleging they were preempted by Florida Statutes § 509.032(7). While the opinion only dealt with the denial of the plaintiff's emergency motion for preliminary injunction, the circuit court ruled that it could not determine the Flagler ordinance was preempted as it did not prohibit vacation rentals, or regulate the duration or frequency of rentals. The Town also drew the Court's attention to *Florida Gulf Coast Vacation Homes, LLC v. City of Anna Maria*, 2016 WL 7647544, *1 (Fla. 12th Circuit Court, April 11th 2016), wherein the court granted summary judgment to the City in a similar vacation rule rental challenge because the City's occupancy limits did not prohibit vacation rentals, or regulate the frequency or duration of such rentals. At the hearing, the Town also drew the Court's attention to footnote four to the opinion in *Mojito Splash, LLC v. City of Holmes Beach*, 326 So.3d 137, n. 4 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1725a].

While *Mojito Splash* was a Bert Harris Act case, it related to the adoption by Holmes Beach of vacation rental occupancy rules. The plaintiff had argued in part that the City's rules were preempted by Florida Statutes § 509.032(7). However, the court dismissed this argument in footnote four as follows:

> As part its argument that Ordinance 08-05 lacked "teeth," Mojito suggests that a 2011 amendment to section 509.032(7), Florida Statutes (2018), preempted the City from adopting any ordinance regulating vacation rentals. See ch. 2011-119, § 7(b), Laws of Fla. (prohibiting "[a] local law, ordinance, or regulation" from "restrict[ing]," "prohibit[ing]," or "regulat[ing] vacation rentals based solely on their classification, use, or occupancy"). However, Mojito overlooks the language exempting "any local law, ordinance, or regulation adopted before June 1, 2011." *Id*. In any case, the legislature amended section 509.032(7) in 2014 to remove the preemptive language covering occupancy restrictions in vacation rentals. See ch. 2014-71, § (7)(b), Laws of Fla. Thus, the City was not preempted from adopting Ordinances 15-12 and 16-02, as consistent with its 2009 amendment to its Comprehensive Plan. See *City of Miami v. AIRBNB, Inc*., 260 So. 3d 478, 482 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2700a] (holding that the City's 2016 re-adoption of the zoning code was not preempted because its substantive content was identical to the provision already in place in 2009, during the period protected by section 509.032(7)(b)'s grandfather clause).

The foregoing language is best characterized as *dicta*. However, it is at least consistent with the Town's position that § 90-116 is not preempted by the statute. While the Court did carefully consider the Plaintiff's arguments as to why § 90-116 is in fact preempted by Florida Statutes § 509.032(7), the Court agrees with the arguments presented by the Town, and finds that § 90-116 is not preempted by Florida Statutes § 509.032(7), since it does not prohibit vacation rentals, nor regulate the duration or frequency of rentals.

Speech

Part of the Town's vacation rental rules create disclosure obligations on responsible parties, including companies such as Plaintiff which manage or operate vacation rentals in the Town. Specifically, § 90-116(D)(2)(a) requires vacation rental operators to provide written notice to occupants of the vacation rental standards set forth in 90-116, as well as all other applicable laws, ordinances or regulations concerning noise, public nuisance, vehicle parking, solid waste collection, common area usage, and any other applicable law or regulation. In addition, § 90-116(D)(2)(b) requires vacation rental operators to report any violations of 90-116, or of such other law or regulation the vacation rental operator knows or should know to the Town or law enforcement.

In Count II of the *Complaint*, Plaintiff argues that these provisions are a violation of Florida Constitution Art. I § 4 since they compel Plaintiff to engage in speech it does not desire speak. In relevant part, Florida Constitution Art. I, § 4 provides:

> **Freedom of speech and press**
>
> Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.

As a preliminary matter, the Parties were not in agreement as to the correct test to be applied to this claim. The Town argued that the rational basis test should be applied. Plaintiff argued that the Court should apply strict scrutiny as the speech in question could not be categorized as commercial speech, but if the Court concluded the speech in question constitutes commercial speech, then at minimum intermediate scrutiny, would apply. Both Parties cited cases in the First Amendment realm applying different levels of scrutiny. The Court determines that the speech in question constitutes commercial

speech, and that the disclosure requirements in § 90-116(D)(2)(a) and (b) will survive under either intermediate scrutiny or rational basis for the following reasons.

The scope of protection accorded to freedom of expression in Florida is the same as is required under First Amendment to the United States Constitution, and Florida's courts must apply the principles of freedom of expression as announced in decisions of Supreme Court of the United States. *O.P-G. v. State*, 290 So.3d 950 (Fla. 3rd DCA 2019) [44 Fla. L. Weekly D2548a], rehearing denied. It has long been held that the First Amendment prohibits the government from compelling citizens to express beliefs that they do not hold, see, e.g., *West Virginia State Bd. of Ed. v. Barnett*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). This is particularly true where the requirement is to disseminate a particular political or ideological message. See, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974) (holding unconstitutional a state statute requiring newspapers to publish the replies of political candidates whom they had criticized); *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (holding that a state may not require a citizen to display the state motto on his license plate); *Pacific Gas and Electric Co. v. Pub. Utilities Comm'n*, 475 U.S. 1, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (holding that a state may not order utility company to distribute the literature of hostile groups with its own billing statements and newsletters).

The Town's argument is that § 90-116(D)(2)(a) and (b) does not require Plaintiff to disseminate a political or ideological message, and only requires the dissemination of factual information. The Town suggested that cases such as *Connecticut Bar Ass'n v. U.S.*, 620 F.3d 81 (2d Cir. 2010) (approving required disclosures in the Bankruptcy Abuse Prevention and Consumer Protection Act); *New York State Restaurant Ass'n v. New York City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (finding no constitutional violation where the city's ordinance required restaurants to post calorie content information on their menus); and *National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001) (finding no free speech violation where a state law required manufacturers of mercury-containing light bulbs label their bulbs as containing mercury, and stating the proper method of disposal).

While the Plaintiff referred to cases wherein improper compelled speech was found, the Court finds that the type of mandatory disclosure requirements in § 90-116(D)(2)(a) and (b) do not require the Plaintiff to express a political or ideological message, and only require the disclosure of factual information. Therefore, the Court finds § 90-116(D)(2)(a) and (b) do not violate Art. I § 4 of the Florida Constitution.

Based on the foregoing, it is therefore **ORDERED AND ADJUDGED** that Defendant's *Motion for Judgment on the Pleadings* is hereby **GRANTED**. Plaintiff's Motion for Summary Judgment is **DENIED**. The Court will enter a separate *Final Judgment* in this matter.

* * *

Criminal law—Evidence—Blood test results—Motion to suppress blood test results is denied—Manner in which blood sample was stored and tested meets *Daubert* standard and standard of section 90.702, results are relevant and reliable, and probative value is not substantially outweighed by danger of unfair prejudice, confusion of issues, misleading jury, or presentation of cumulative evidence

STATE OF FLORIDA, v. ALEX EDWARD JAMISON, Defendant. Circuit Court, 7th Judicial Circuit in and for Volusia County. Case No. 2018-303661-CFDB, Division 40. November 4, 2020. Sandra Upchurch, Judge.

ORDER DENYING DEFENDANT'S MOTION TO EXCLUDE BLOOD TEST RESULTS

THIS CAUSE having come before the Court on the Defendant's Motion to Exclude Blood Test Results filed on July 24, 2020. The Court heard testimony on August 25, 2020 and September 8, 2020,and reviewed the parties' closing arguments presented in written format entitled Memorandum of Law In Support of Motion to Exclude Blood Test Results Pursuant to Florida Statutes Section 90.702 and Request for Daubert Hearing (filed by the Defense on September 2, 2020), State Memorandum of Law In Support of Our Opposition to the Defendant's Motion to Suppress (filed by the State on October 8, 2020) and Defendant's Reply to State Memorandum of Law in Support of Our Position to the Defendant's Motion to Suppress (filed by the defense on October 15, 2020).

The State has shown by a preponderance of the evidence that the manner in which the blood sample was stored and tested by FDLE meets the Daubert standard as set forth in *Daubert v. Merrill Down Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993), and the scientifically reliable standards under *Florida Statutes, Section* 90.702. The evidence presented at the hearings demonstrates the test results are relevant and reliable therefore admissible. Further, this Court does not find the test results' probative value to be substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury or needless presentation of cumulative evidence. It is,

ORDERED AND ADJUDGED that the Defendant's Motion to Exclude Blood Test Results is hereby DENIED.

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose household residents over age 15 and correct garaging address of insured vehicles

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. WILKERIA KELLY, Defendant. Circuit Court, 8th Judicial Circuit in and for Alachua County, Civil Division. Case No. 01-2021-CA-1175. February 22, 2022. Monica Brasington, Judge. Counsel: Dustin J. Sjong, Savage Villoch Law, PLLC, Tampa, for Plaintiff. Wilkeria Kelly, Pro se, Gainesville, Defendant.

FINAL SUMMARY JUDGMENT

THIS CAUSE, having come before this Court at the Hearing on February 21, 2022, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY'S ("Plaintiff's"), Motion for Final Summary Judgment against the Defendant, WILKERIA KELLY ("Defendant"), and the Court, having considered the Motion and record evidence, and heard argument of Counsel and otherwise being advised in the premises. Plaintiff's counsel appeared at the hearing; Defendant failed to appear. It is hereby,

ORDERED AND ADJUDGED that said Motion is hereby **GRANTED** as follows:

Factual Background

1. This is a declaratory action stemming from an automobile accident that was reported as occurring on February 25, 2021. Claims were made seeking benefits under the rescinded insurance contract.

2. As alleged in Direct General's Complaint for Declaratory Relief, Defendant signed an application for automobile insurance ("Application") wherein the Defendant failed to disclose on the Application all resident household members over the age of 15 that lived with her along with the correct and updated garaging address(es) for the Insured Vehicles listed under the Policy. Specifically, Defendant failed to disclose that her grandmother, Linda Farley, and her aunt, Shania Taylor, lived with her on the Inception Date of the policy. Further, Defendant failed to disclose that the two vehicles listed on the Application were garaged at different addresses.

3. The Defendant provided all of the answers to all questions on the Application and electronically signed the Application.

4. Material considerations in Direct General's underwriting decision and calculation of premiums include, but are not limited to, the disclosure at policy inception of all household members aged 15 years or older and the garaging address(es) of the Insured Vehicles listed under the Policy.

5. Direct General provided evidence that disclosure on the Application of any resident household members 15 years of age or older and the correct garaging address(es) for the Insured Vehicles listed under the Policy is material to Direct General's underwriting decision so that Direct General can accurately determine whether any such risks are acceptable or not.

6. The Defendant's misrepresentations and omissions on the Application regarding the unlisted household members and different garaging addresses factor into the risk exposure for which Direct General must be compensated.

7. The Defendant admitted during her Examination under Oath that her grandmother and aunt resided with her on the Inception Date and that the Insured Vehicles listed under the Policy were garaged at different addresses.

8. The Defendant's misrepresentations and omissions on the Application caused Plaintiff to issue the Insurance Contract to Defendant based on her material misrepresentations.

9. Defendant indicated that had the Defendant disclosed on the Application all resident household members over the age of 15 and the multiple garaging addresses, Plaintiff, in good faith, would not have issued the Insurance Contract to Defendant, as the split garaging addresses would have been deemed an unacceptable risk.

10. Due to Defendant's material misrepresentations and omissions, Plaintiff rescinded the Insurance Contract and returned the premiums pursuant to the terms, provisions, and conditions of the Insurance Policy.

11. Plaintiff filed this declaratory action pursuant to Chapter 86 of the Florida Statutes to determine its rights under the Insurance Contract.

12. Plaintiff asserts that Defendant, on her Application, made material misrepresentations or, at minimum, incorrect statements that were material to Plaintiff's underwriting decision which resulted in the issuance of the Insurance Contract that Plaintiff, in good faith, would not have issued to Defendant had the Defendant disclosed the multiple garaging addresses, as this would have been deemed an unacceptable risk.

13. There is no genuine dispute of material fact that Defendant failed to disclose on the Application that her grandmother and aunt lived with her on the Inception Date and that the Insured Vehicles listed under the Policy had different garaging addresses. The Defendant admitted same under oath.

14. Further, as evidenced by the Affidavit of Rose Chrustic attached to Plaintiff's Motion, the Defendant's omissions and misrepresentations are *material to Plaintiff's underwriting decision.* Plaintiff claims it is entitled to a summary judgment against the Defendant. Further, any alleged assignments of benefits are without effect because the Insurance Contract is rescinded and void *ab initio.*

15. The Defendant cannot present any evidence in opposition to the Plaintiff's Motion that she made material misrepresentations or omissions on the Application because she has already admitted under oath that her grandmother and aunt lived with her on the Inception Date and that the Insured Vehicles listed under the Policy had split garaging addresses.

16. No reasonable jury could find for the non-moving party here. This is true because the record evidence, including the Defendant's own admissions under oath, indisputably evidence the fact that she failed to disclose household members over the age of 15 and the correct garaging addresses for both Insured Vehicles listed under the Policy on the Application. Further, Rose Chrustic's affidavit verifies the materiality of the Defendant's misrepresentations and omissions.

17. This court must interpret an insurance contract according to the plain and unambiguous language to give effect to the policy as written. *Allstate Ins. Co. v. Orthopedic Specialists*, 212 So.3d. 973, 975 (Fla. 2017) [42 Fla. L. Weekly S38a]. The plain language of the contract does not provide coverage for the Defendant, and Plaintiff is entitled to summary judgment as a matter of law.

18. The "INFORMATION RE: OPERATORS, DRIVERS AND HOUSEHOLD MEMBERS" section of the Application is clear and unambiguous where it requests disclosure of "ALL persons age 15 years and older who reside with Applicant, whether or not they (1) operate any of the vehicles listed above, or (2) are licensed to drive."

19. Further, the "Vehicle Information" section of the Application is clear and unambiguous where it requests disclosure of any garaging address or zip code "if different from the mailing address listed above," i.e. the policy address.

Conclusion

The record is clear that Plaintiff contracted with the Defendant to provide automobile insurance based on misrepresentations and omissions made in the Application by the Defendant. Defendant failed to disclose resident household members over the age of 15 on the Application, specifically her grandmother, Linda Farley, and aunt, Shania Taylor. Further, Defendant failed to disclose the correct garaging address(es) for all Insured Vehicles listed under the Policy. Non-disclosure of resident household members 15 years of age or older and multiple garaging addresses are material to Plaintiff's underwriting decision. There is no genuine dispute of material fact that Defendant made material misrepresentations on the Application because Defendant admitted under oath that Defendant's grandmother and aunt lived with Defendant as resident household members on the Inception Date and that the Insured Vehicles listed under the Policy have different garaging addresses. Defendant did not disclose these individuals or any additional garaging address(es) on the Application.

There is no genuine dispute of material fact that Defendant made material misrepresentations on the Application, and Plaintiff would not have issued the Insurance Contract had it known of the material misrepresentations and omissions. According to section 627.409, Florida Statutes, a material misrepresentation exists if the insurer in good faith would not have issued the insurance policy on the same terms, if at all, had the true facts been known. *See also United Auto. Ins. Co. v. Salgado,* 22 So.3d. 594, 599 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D1578a] ("Where a misstatement or omission materially affects the insurer's risk, or would have changed the insurer's decision whether to issue the policy and its terms, [section 627.4091 may preclude recovery.") *Accord Certain Underwriters at Lloyd's London v. Jimenez* 197 So.3d. 597, 602 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1431a].

Had Defendant disclosed all requested and required information on the Application, the information would have been material to the Plaintiff's underwriting decision which was made in reliance on Defendant's misrepresentations and omissions.

Based upon the foregoing, the Court grants Plaintiff's Motion for Summary Judgment. The contract between the parties is void ab initio. Plaintiff has no duty to defend or indemnify any named insured or omnibus insured on the Insurance Contract for any claim(s) for benefits that have been or will be made by claimant under the Insurance Contract.

* * *

Attorney's fees—Torts—Defamation—Cyberstalking—Anti-SLAPP statute—Fees, costs, and appellate fees awarded to defendant/opponent of retail pet sales who prevailed in having action for defamation and cyberstalking brought by owner of commercial retail pet sales business dismissed under Anti-SLAPP statute—No merit to argument that defendant is entitled to attorney's fees under Anti-SLAPP statute only for defamation claim—Statute is applicable to any lawsuit, cause of action, or claim filed without merit primarily because a person has exercised free speech right in connection with public issue—No merit to argument that defendant is not entitled to attorney's fees incurred prior to filing of second amended complaint, as defendant claimed at all times that action was filed in violation of Anti-SLAPP statute

LUIS MARQUEZ, Plaintiff, v. MICHELE LAZAROW, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-023903-CA-01, Section CA31. January 18, 2022. Migna Sanchez-Llorens, Judge. Counsel: Juan-Carlos Planas, Law Firm of Juan-Carlos Planas, P.A., Coral Gables, for Plaintiff. Thomas R. Julin and Timothy J. McGinn, Gunster, Yoakley & Stewart, P.A., Miami, for Defendant.

[Editor's note: Final Summary Judgment in this case published at 27 Fla. L. Weekly Supp. 954b]

ORDER ON ATTORNEY'S FEES AND COSTS

THIS CAUSE came before this Court on (1) Defendant Michele Lazarow's Motion for Attorney's Fees, dated February 3, 2020, and (2) Defendant Michele Lazarow's Motion for Determination of Amount of Appellate Attorney's Fees, to Award Attorney's Fees for Fees, and to Tax Expert Fee Costs, dated December 18, 2020 ("**Motions**").

In advance of the Court's hearing on the Motions, Michele Lazarow ("**Lazarow**" or "**Defendant**") filed two declarations from her counsel, records of her counsel's fees billed, and two expert declarations regarding the reasonableness of the fees billed. Plaintiff Luis Marquez ("**Marquez**" or "**Plaintiff**") filed three responses to the Motions, to which Lazarow timely replied. The parties stipulated to all 21 exhibits offered by Defendant, which were admitted at the hearing.

During a two-and-a-half-hour evidentiary hearing, the Court heard the testimony of four witnesses: Defendant Michele Lazarow, defense attorney Thomas R. Julin ("**Julin**"), defense attorney Timothy J. McGinn ("**McGinn**"), and defense fee expert Karen W. Kammer ("**Kammer**"); and the Motions were fully argued. A court reporter was present throughout the hearing. The Court having considered the parties' submissions, the sworn witness testimony, and the arguments of counsel, and otherwise being duly advised in the premises, **FINDS** as follows:

BACKGROUND

On August 12, 2019, Marquez commenced this action with the filing of an Emergency Verified Complaint for Declaratory and Injunctive Relief. Marquez's complaint requested a declaration that Lazarow's alleged harassment of him on social media amounted to cyberstalking and an injunction barring Lazarow from mentioning or referencing Marquez on social media.

Lazarow moved under Section 768.295, Florida Statutes ("**Anti-SLAPP Statute**") to dismiss Marquez's complaint with prejudice or for summary judgment. Lazarow filed a Declaration and exhibits in support of her motion. Defendant requested her costs and attorney's fees on the ground that Marquez had filed a meritless lawsuit against her in retaliation for her exercise of her right of free speech in connection with a public issue. Lazarow's motion was set for a hearing on October 31, 2019.

Prior to the hearing, Marquez moved to amend his complaint twice. Similar to his initial complaint, Marquez's proposed second amended complaint requested a Declaration that Lazarow's alleged harassment of him on social media amounted to cyberstalking and requested an injunction barring Lazarow from mentioning him again. Marquez also asserted a claim for defamation. The predecessor judge granted Marquez's motion to amend his complaint.

Lazarow promptly moved under the Anti-SLAPP Statute to dismiss Marquez's second amended complaint with prejudice or for summary judgment. Lazarow, through her counsel, then filed her Declaration and exhibits in support of her motion. Lazarow again requested her costs and attorney's fees on the grounds that Marquez had filed a meritless lawsuit against her in retaliation for her exercise of her right to free speech in connection with a public issue.

The predecessor judge heard argument on Lazarow's Anti-SLAPP Motion on January 7, 2020, and entered a Final Summary Judgment in favor of Lazarow. In addition, with respect to the Anti-SLAPP Statute, the predecessor judge also held: "The record here establishes, and the Court finds on the basis of the undisputed facts, that this lawsuit is without merit and that Marquez brought the suit primarily because Lazarow exercised her constitutional right of free speech in connection with a public issue."

Marquez appealed the Final Summary Judgment. In both his initial brief and his reply, Marquez asserted that the predecessor judge had erred in holding that he had violated the Anti-SLAPP Statute and that Lazarow was entitled to recover from him the fees and costs she had incurred.

During the pendency of Marquez's appeal, on February 3, 2020, Lazarow filed with this Court her first motion for attorney's fees and supporting declarations from her lead counsel, Julin, and fee expert, Kammer. Lazarow requested $67,609.50 pursuant to the Anti-SLAPP Statute.

Lazarow also filed with the Third District Court of Appeal a motion, under the Anti-SLAPP Statute, for an award of "her attorneys' fees incurred in defense of this appeal." Marquez did not file papers in opposition to Lazarow's appellate motion.

On November 18, 2020, the Third District Court of Appeal affirmed the predecessor judge's Final Summary Judgment *per curiam*, granted Lazarow's appellate fee motion, and remanded the matter to this Court for a determination on the amount of fees to be awarded.[1]

On December 18, 2020, Lazarow filed a motion to determine the amount of appellate attorney's fees, to award additional attorney's fees pursuant to the Anti-SLAPP Statute, and to tax expert costs. Lazarow requested $57,078.50 in appellate attorney's fees, $8,909.50 in attorney's fees pertaining to the fee litigation, and $1,950.00 in taxable expert costs (in addition to the $67,609.50 in attorney's fees requested in her initial fee motion). In support of her motion, Lazarow filed supporting declarations from her lead counsel, Julin, and fee expert, Kammer.

On February 9, 2021, this Court entered its Standing Order on Motion to Determine Amount of Attorney's Fees and Costs. The Order directed Marquez to "respond in writing to each item of costs and fees" and, for each contested item, to "state the basis for objection and cite the supporting authority." The Order cautioned in bolded text: "Any item not addressed shall be deemed agreed to and any objection thereto waived."

On February 24, 2021, Marquez filed a response to the Motions. Marquez generally objected to any award of fees for the time Lazarow's counsel had billed prior to the filing of Marquez's second amended complaint and to two-thirds of the time Lazarow's counsel had billed thereafter on the ground that Lazarow should be entitled to recover only those fees she incurred in responding to his defamation claim.

On March 26, 2021, after Lazarow noted Marquez's non-compliance with the Court's order, Marquez filed a sur-reply in which he again generally argued that Lazarow should not be awarded fees she

had incurred prior to the filing of his second amended complaint and that Lazarow could be awarded, at most, fees incurred in responding to his defamation claim.

i. ***Entitlement to Fees***

Lazarow's entitlement to fees is settled. The predecessor judge previously held Lazarow is entitled to attorney's fees under the Anti-SLAPP Statute, Marquez appealed that aspect of the predecessor judge's Final Summary Judgment, and the Third District Court of Appeal both affirmed the predecessor judge without an opinion and awarded Lazarow her appellate attorney's fees under the Anti-SLAPP Statute.

Nevertheless, Marquez has continued to litigate Lazarow's entitlement to fees, arguing that Lazarow should only be awarded those fees which were incurred (i) after he filed his second amended complaint and (ii) in connection with responding to his defamation cause of action, not his cyberstalking claims.

Section 768.295, Florida Statutes, provides:

> A person . . . may not file . . . any lawsuit, cause of action, [or] claim . . . against another person . . . without merit and primarily because such person . . . has exercised the constitutional right of free speech in connection with a public issue . . . as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution.[2]

This section further provides: "The court shall award the prevailing party reasonable attorney fees and costs incurred in connection with a claim that an action was filed in violation of this section."[3]

The predecessor judge held—and the Third District Court of Appeal affirmed—that this action was filed in violation of the Anti-SLAPP Statute. Contrary to Marquez's argument, the predecessor judge did not hold that Marquez had filed only his second amended complaint or his defamation cause of action in violation of the Anti-SLAPP Statute. The predecessor judge specifically held "that *this lawsuit* is without merit and that Marquez brought *the suit* primarily because Lazarow exercised her constitutional right of free speech in connection with a public issue."[4]

Marquez claim that the Anti-SLAPP Statute cannot apply to his cyberstalking claims. However, the Anti-SLAPP Statute unambiguously provides that a party may not file *any* lawsuit, cause of action, or claim without merit primarily because a person has exercised her constitutional right of free speech in connection with a public issue.[5] *Any* cause of action includes causes of action for cyberstalking.

Marquez's asserts that Lazarow is not entitled to the attorney's fees she incurred prior to the filing of his second amended complaint is likewise without merit. However, the Anti-SLAPP Statute requires the Court to award Lazarow the "reasonable attorney fees and costs [she] incurred in connection with [her] claim that [this] action was filed in violation of this section."[6] Lazarow claimed, at all times, that Marquez filed this action in violation of the Anti-SLAPP Statute. Lazarow responded to Marquez's initial complaint with a motion under the Anti-SLAPP Statute, opposed Marquez's motion for leave to amend his initial complaint in the face of that motion, and then responded to Marquez's second amended complaint with a motion under the Anti-SLAPP Statute. In doing so, Lazarow asserted a single, consistent claim that this action was filed in violation of the Anti-SLAPP Statute.

Thus, as the predecessor judge previously held, Lazarow is entitled to the reasonable attorney's fees and costs she incurred in connection with her claim that this action was filed in violation of the Anti-SLAPP Statute. In this action, the entirety of the litigation—principally, the preparation of Lazarow's first motion under the Anti-SLAPP Statute, Lazarow's opposition to Marquez's motions to amend, the preparation of Lazarow's second motion under the AntiSLAPP Statute, oral argument on that motion, and all matters pertaining to Marquez's appeal—concerned Lazarow's claim that this action was filed in violation of the Anti-SLAPP Statute. Lazarow is thus entitled to all reasonable attorney's fees and costs she incurred in this action.

Lazarow is also entitled to expert fee costs she has incurred in connection with the trial-level fee litigation. However, the Court is denying the attorney's fees Lazarow incurred in litigating her entitlement to fees.[7]

ATTORNEY'S FEES

Defendant has the burden to present evidence detailing the nature and extent of services performed, and to present expert testimony on the reasonableness of attorney's fees.[8] In order to meet her burden, Defendant must produce detailed time records, kept contemporaneously as services were performed by her attorneys.[9] Further, Defendant provided expert testimony on the reasonableness of fees which was offered by Kammer.

In *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1151 (Fla. 1985), the Florida Supreme Court directed the trial courts to follow a lodestar approach when computing a reasonable fee. Since then, the criteria set forth in *Rowe* has been laid down in the Rules Regulating Florida Bar, Rule 4-1.5(b). Specifically, Rule 4-1.5(b) states:

> **(b) Factors to Be Considered in Determining Reasonable Fees and Costs.**
>
> (1) Factors to be considered as guides in determining a reasonable fee include:
>
> (A) the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (B) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (C) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;
>
> (D) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;
>
> (E) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;
>
> (F) the nature and length of the professional relationship with the client;
>
> (G) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and
>
> (H) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

i. ***Defendant's Attorney's Fees Hourly Rates***

Kammer testified that the rates charged by Lazarow's counsel were reasonable, given the complexity of this action, the significance of the issues presented, the free speech rights implicated by Marquez's claims, and the time constraints posed by Marquez's initial request for emergency relief. Kammer also testified that Lazarow's counsels' rates are consistent with the rates charged by attorneys of similar qualification and skill in South Florida.[10]

Based on Kammer's testimony and Declaration, the absence of any objection from Marquez's counsel, Kammer's experience and familiarity with the South Florida legal market, the Court enters the following hourly rates for Defendant's counsel:

- Thomas Julin: $830/hour for trial services and $865/hour for appeal services[11]
- Timothy McGinn: $465/hour for trial services and $485/hour for appeal services[12]

Based on the above, the Court finds that the hourly rates for the

above attorneys are comparable and reasonable market rates for competent counsel in the South Florida market for similar legal services. The Court also finds the fees incurred by Defendant with respect to her fee expert, Kammer, to be reasonable and finds the fees in the amount of $1,950.00 are properly charged in this matter.[13]

The Court has considered Plaintiff's specific objection to allegations of excessive or unnecessary claims on Defendant's invoices. The Court has reviewed the invoices and line items and has considered the objections, and expert's testimony; thereafter, the Court made adjustments.

The moving party bears the burden of presenting records that detail the work performed.[14] "Inadequate documentation may result in a reduction in the number of hours claimed, as will a claim for hours that the court finds to be excessive or unnecessary."[15] Additionally, " '[f]ee applicants are expected to exercise 'billing judgment,' and if they do not, 'courts are obligated to do it for them, to cut the amount of hours for which payment is sought, pruning out those that are excessive, redundant, or otherwise unnecessary.' "[16]

Trial Counsel Fees

Timekeeper	Position	Hourly Rate	Hours Billed	Total Fees
Thomas Julian	Senior Attorney	$830.00	42.5	$ 35,275.00
Timothy McGinn	Associate Attorney[17]	$465.00	41.2	$ 19,158.00
TOTAL			83.7	**$ 54,433.00**

The Court awards a lodestar amount of **$ 54,433.00** for trial level services. This is based on a finding of a reasonable hourly rate of $830/hour for Mr. Julin for trial services multiplied by the reduced 42.5 hours contemporaneously recorded by Defendant and the reasonable hourly rate of $465/hour for Mr. McGinn for trial services multiplied by the reduced 41.2 hours contemporaneously recorded by Defendant.[18]

Appellate Counsel Fees

Timekeeper	Position	Hourly Rate	Hours Billed	Total Fees
Thomas Julian	Senior Attorney	$865.00	40.0	$ 34,600.00
Timothy McGinn	Associate Attorney[19]	$485.00	43.5	$ 21,097.50
TOTAL			83.5	**$ 55,697.50**

The Court awards a lodestar amount of **$ 55,697.50** for appellate services. This is based on a finding of a reasonable hourly rate of $865/hour for Mr. Julin for appellate services multiplied by the reduced 40.0 hours contemporaneously recorded by Defendant and the reasonable hourly rate of $485/hour for Mr. McGinn for appellate services multiplied by the reduced 43.5 hours contemporaneously recorded by Defendant.[20]

In reaching this conclusion, the Court carefully considered the declarations of Mr. Julin and Ms. Kammer, counsel's billing records, the witnesses' sworn testimony and Marquez's objections to specific billing entries. Additionally, the Court finds the taxable costs Lazarow incurred in retaining Kammer as an expert were reasonable.

Taking into consideration all the relevant criteria from the Rule and the case law, the Court rules that the total lodestar amount of **$ 110,130.50** is the fair and reasonable amount to be assessed against Plaintiff Luis Marquez as to attorney's fees. In addition, the attorney's fees being awarded in this final judgment are subject to an award of prejudgment interest. [21]

Based on the foregoing, it is hereby,

ORDERED and **ADJUDGED** as follows:

Michele Lazarow is entitled to $110,130.50 in attorneys' fees, $1,950.00 in taxable costs—a total of **$112,080.50**—as well as pre-judgment and post-judgment interest as set forth below:

(1) Michele Lazarow shall recover from Luis Marquez $54,433.00 in trial-level attorney's fees incurred in obtaining a final judgment, together with pre-judgment interest-at the rate of 6.83 percent per annum for the period of January 10, 2020, through the date of entry of this judgment, for which let execution issue;

(2) Michele Lazarow shall recover from Luis Marquez $1,950.00 in taxable costs incurred for Karen W. Kammer's expert services for the litigation of trial-level attorney's fees, for which let execution issue;

(3) Michele Lazarow shall recover from Luis Marquez $55,697.50 in appellate-level attorney's fees, together with pre-judgment interest at the rate of 5.37 percent per annum for the period of November 18, 2020, through the date of entry of this judgment, for which let execution issue; and

(4) That post-judgment interest shall accrue on the foregoing sums at the rate of 4.25 percent per annum from the date of entry of this judgment until the judgment is fully satisfied.

Additionally, Luis Marquez shall complete under oath Florida Rule of Civil Procedure Form 1.977 (Fact Information Sheet), including all required attachments, and serve it upon Michele Lazarow's counsel within 45 days from the date of entry of this judgment, unless the judgment is satisfied or post-judgment discovery is stayed.

This Court shall retain jurisdiction to enter further orders regarding Luis Marquez's completion and service of Form 1.977 and post-judgment discovery; to enforce the terms of this judgment; to award additional attorneys' fees in the event further proceedings are necessary to enforce this judgment; and to hear additional motions for fees and costs incurred in proceedings subsequent to those that were the subject of the Motions addressed herein.

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[1]*Marquez v. Lazarow,* No. 3D20-100, 2020 WL 6778490 (Fla. 3d DCA Nov. 18, 2020).

[2]Fla. Stat. § 768.295(3) (2018).

[3]Fla. Stat. § 768.295(4).

[4]Final Summ. J., Index 26 at 7 (emphasis added).

[5]Fla. Stat. § 768.295.

[6]Fla. Stat. § 768.295(4).

[7]The Court notes there is no evidence in the form of testimony or invoice reflecting the $8,909.50 amount Defendant requests for litigating her entitlement to fees. Therefore, without evidence, the Court cannot grant.

[8]*Morton v. Heathcock*, 913 So. 2d 662 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2163a]; *see also Cozzo v. Cozzo*, 186 So. 3d 1054 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2652a].

[9]Julin Decl. Ex. 1, Ex. 2, Ex. 3; *Haines v. Sophia*, 711 So. 2d 209 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1241b]; *M. Serra Corp. v. Garcia,* 426 So. 2d 1118 (Fla. 1st DCA 1983), *rev. 'd*, 434 So. 2d 887 (Fla. 1983); *Brevard Cnty. Sch. Bd. v. Walters*, 396 So. 2d 1197 (Fla. 1st DCA 1981).

[10]Marquez did not contest the reasonableness of Lazarow's counsels' rates.

[11]The Court notes that Mr. Julin is an attorney with approximately four decades of experience.

[12]The Court notes that Mr. McGinn is an attorney with a decade of experience.

[13]Julin Decl. Ex. 4, Index 107.

[14]*Rowe*, 472 So. 2d 1150.

[15]*Id*.

[16]*22nd Century Props., LLC v. FPH Props., LLC*, 160 So. 3d 135, 142 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D782a] (quoting *PNC Bank, N.A. v. Starlight Props. & Holdings, LLC*, 6:13-cv-408, 2014 WL 2574040, at *11 (M.D. Fla. June 9, 2014)).

[17]Mr. McGinn is junior to Mr. Julian.

[18]Julin Decl. Ex. 1, Index 104.

[19]Mr. McGinn is junior to Mr. Julian.

[20]Julin Decl. Ex. 1, Index 107.

[21]*See Quality Eng'red Installation, Inc. v. Higley S., Inc.*, 670 So. 2d 929 (Fla. 1996) [21 Fla. L. Weekly S141a].

* * *

Insurance—Class actions—Standing—Class representative whose individual claim was paid in full by insurer prior to class certification no longer has standing to pursue individual claims or putative class claims

STUART WEBER, an individual, on his own behalf, and on behalf of all others similarly situated, Plaintiffs, v. USAA GENERAL INDEMNITY COMPANY, Defendant. Circuit Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 18-CA-5265, Division F. April 13, 2020. Amended Summary Final Judgment, June 12, 2020. Richard A. Nielsen, Judge. Counsel: Christa L. Collins, Collins Law PL, Saint Petersburg, for Plaintiff. Marcy Levine Aldrich, Akerman LLP, Miami; and Leslie E. Joughin, III and Jason L. Margolin, Akerman LLP, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS' STANDING

THIS CAUSE came on for hearing before the court on September 20, 2019 on the Defendant's Motion for Summary Judgment as to Plaintiffs' Standing (the "Motion"). Having reviewed the Motion and the Notice of Payment of Plaintiff's Individual Claim attached to the Motion as Exhibit 1, and Plaintiff's Response to the Motion, and having heard the argument of counsel, the court finds and rules as follows.

I. Undisputed Summary Judgment Facts

1.1 Defendant filed a Notice of Payment of Plaintiff's Individual Claim (the "Notice") on June 10, 2019.

1.2 The Notice states:

> 4. USAA GIC recognizes Weber's entitlement to reasonable attorney's fees and costs in connection with the Weber Claim.
>
> 5. This may be construed as a confession only with regard to Weber's individual claims or bills arising from the Weber Claim. It should not be construed as a confession by USAA GIC with regard to any other claims, suits, bills, charges, actions, attorney's fees, or costs involving the putative class alleged in the Amended Class Action Complaint.

1.3 Also on June 10, 2019, Defendant delivered to counsel for Plaintiff a check in the amount of three hundred dollars ($300.00).

1.4 The $300.00 payment was greater than Plaintiff's damages as alleged in the Amended Complaint and Plaintiff's answers to Defendant's Interrogatories.

II. Analysis and Order

2.1 The Notice filed by Defendant is not a pleading specifically recognized in the Florida Rules of Civil Procedure. Nevertheless, the payment of Plaintiff's claim in full, together with the express confession of judgment in the Notice constitutes a confession of judgment under Florida law. *See Ivey v. Allstate Ins. Co.*, 774 So. 2d 679 (Fla. 2000) [25 Fla. L. Weekly S1103a].

2.2 Plaintiff's claim has been paid in full.

2.3 Accordingly, Plaintiff no longer has standing to pursue either his individual or putative class claims for damages and declaratory and injunctive relief. *See Syna v. Shell Oil Co.*, 241 So. 2d 458 (Fla. 3d DCA 1970); *Ramon v. Aries Ins. Co.*, 769 So. 2d 1053 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1830a]; *Chinchilla v. Star Cas. Ins. Co.*, 833 So. 2d 804 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D2389a]; and *Ahearn v. Mayo Clinic*, 180 So. 3d 165 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D2502d].

2.4 Plaintiff argues that there is a distinction between a situation in which a defendant waives or forgives a claim, and the circumstances here, where the Defendant paid the claim, citing *Jackson v. So. Auto Fin. Co.*, 988 So. 2d 721 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D2023a]; *Kaner v. Robert R. Schiffman, D.C.*, 126 So. 3d 1134 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D1326a]; *Peraza v. Robles*, 983 So. 2d 1189 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D997a] and *Allstate Indemnity Co. v. De La Rosa*, 800 So. 2d 245 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D2193a]. The distinctions contained in the cases cited by Plaintiff are without a difference.

2.5 In addition, the cases Plaintiff cites are distinguishable. In *Jackson*, the defendant made a settlement offer, not a payment. In *Peraza*, although the defendant transmitted sufficient funds to pay the claim in full, the defendant also demanded that the plaintiff sign an unaltered release, thus rendering the defendant's proposal a settlement offer. In *Kaner* and *De La Rosa*, the defendant's payment did not cover the entire amount claimed to be due.

2.6 Plaintiff also argued that the court in *Jackson* held that "picking off" the class representative is impermissible. However, as noted, *Jackson* is distinguishable on its facts, and it has been superseded by *Ahearn*.

2.7 Although the declaratory and injunctive relief claims are not addressed by the Notice, payment of the Plaintiff's claim in full renders the declaratory relief claim moot, as well as the injunction claim that follows.

2.8 Even though "picking off" a class representative is not permitted under federal law, Florida law does not prohibit a defendant from making a payment to a class plaintiff prior to class certification. *Allstate Ins. Co. v. Chaple*, 774 So. 2d 742 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D2649a]. In this case, no class has been certified. In fact, Plaintiff's motion for class certification was not filed until September 17, 2019, when Plaintiff filed its response to Defendant's Motion, well after the June 10, 2019 Notice and payment.

2.9 Defendant's Notice and payment is a confession only with regard to Plaintiff's individual claims or bills arising from Plaintiff's claim. Defendant's Notice and payment is not a confession by USAA GIC with regard to any other claims, suits, bills, charges, actions, attorney's fees, or costs involving the putative class alleged in the Amended Class Action Complaint.

2.10 Plaintiff is entitled to reasonable attorney's fees and costs in connection with the Plaintiff's claim.

2.11 Defendant's Motion for Summary Judgment should be granted.

For these reasons, it is

ADJUDGED that:

1. Defendant's Motion for Summary Judgment is **GRANTED**.

2. Plaintiff is entitled to an award of reasonable attorney's fees and costs.

3. The court retains jurisdiction to determine the amount of Plaintiff's fees and costs.

AMENDED SUMMARY FINAL JUDGMENT[1]

THIS CAUSE having come before the court on the Order Granting Motion for Summary Judgment As to Plaintiff's Standing, entered on April 13, 2020, and the court finding it is appropriate to enter final judgment based on the Order, and being fully advised in the premises, it is

ADJUDGED as follows:

1. Defendant's payment in the amount of $300.00, previously delivered in the form of a check but returned, shall be made or issued again by Defendant to Plaintiff. This payment to Plaintiff satisfies his individual claims asserted in this matter.

2. After this payment, Defendant shall go hence without day as to Plaintiff's individual claims.

3. Pursuant to Defendant's Notice of Payment of Plaintiff's Individual Claim, Plaintiff is entitled to reasonable attorney's fees and costs.

4. As a result of the foregoing, Plaintiff's class action claims are dismissed without prejudice.

5. This court reserves jurisdiction to determine the amount of attorney's fees and costs due to Plaintiff.

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[1]The Summary Final Judgment entered June 8, 2020, is amended after examination of Defendant's Motion for Reconsideration of Summary Final Judgment.

* * *

Civil procedure—Summary judgment—Affidavit in support—Sufficiency

DIRECT GENERAL INSURANCE COMPANY, Plaintiff/Counter-Defendant, v. NYDREKA WILLIAMS, Defendant/Counter-Plaintiff. NYDREKA WILLIAMS, Plaintiff/Counter-Defendant, v. DIRECT GENERAL INSURANCE COMPANY, Defendant/Counter-Plaintiff. Circuit Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 20-CC-028749. March 16, 2022. Michael C. Bagge-Hernandez, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Defendant/Counter-Plaintiff Nydreka Williams.

ORDER GRANTING DEFENDANT WILLIAMS' MOTION TO STRIKE AFFIDAVIT OF ROSE CHRUSTIC AND GRANTING DEFENDANT'S MOTION TO SET TRIAL

THIS MATTER having come before the court on March 14, 2022 on Defendant Williams' Motion to Strike Affidavit of Rose Chrustic and Attached EUO Transcript and Defendant's Motion to Set Trial. The court having reviewed the file, considered the motions, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds,

1. Defendant Williams filed the deposition transcript of Rose Chrustic in support of its Motion to Strike Affidavit.

2. Florida Rule of Civil Procedure 1.140(f) allows a party in a civil matter to file a motion to strike four categories of material from pleadings.

3. *Clay County Land Trust #08-04-25-0078-014-27, Orange Park Trust Services, LLC As Trustee Only, v. JPMorgan Chase Bank, National Assoc*., 152 So. 3d 83, 85 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2433a]; Affidavit contained inadmissible hearsay in the absence of any showing that affiant was familiar with business practices of company or the accuracy of its records.

4. *Story v. Sunshine Foliage World, Inc*., 120 F. Supp. 2d 1027 (M.D. Fla. 2000). An affidavit submitted in connection with a summary judgment motion is subject to strike if it does not measure up to the standards of the Federal Rules of Civil Procedure.

5. As such, Defendant Williams' Motion to Strike Affidavit of Rose Chrustic is **HEREBY GRANTED**.

6. Defendant's Motion to Set Trial is **HEREBY GRANTED**. A separate Uniform Order Setting Trial shall be entered.

* * *

Criminal law—Forfeiture of property—Pertinent inquiry at time of adversarial preliminary hearing in forfeiture proceedings is whether there is probable cause to believe that violation of Florida Contraband Forfeiture Act occurred or is occurring, not whether there was probable cause for such belief at time of seizure—Where law enforcement presented no evidence at hearing to corroborate claim that substance discovered in truck was marijuana, rather than hemp as claimed by owner, owner successfully rebutted probable cause for seizure

IN RE FORFEITURE OF: 2014 RAM 1500 TRUCK VIN: 1CRR6FT6ES160498, SHANNON JARBAR CLAYTON, Claimant. Circuit Court, 14th Judicial Circuit in and for Bay County. Case No. 19-4593-CA. January 27, 2020. John L. Fishel, II, Judge. Counsel: Natalie McSwane, Panama City, for Panama City Police Department. Shannon Jarbar Clayton, Pro se, Panama City, Claimant.

ORDER FINDING NO PROBABLE CAUSE

THIS CAUSE, having come before the Court for an adversarial preliminary hearing on January 10, 2020, and the Court, having received testimony and evidence and having considered the arguments presented at the hearing, court file and records, the verified affidavits and other supporting documents, and being otherwise fully advised, finds as follows:

FACTUAL BACKGROUND

This is a civil action for forfeiture. On or about December 17, 2019, the Panama City Police Department (the "PCPD") seized the vehicle at issue owned by the Claimant. According to PCPD, the vehicle was used or attempted to be used as an instrumentality in the commission of a felony, or to aid or abet the commission of a felony, to wit: Sell, Manufacture, Possession with Intent to Sell a Controlled Substance in violation of section 893.13, Florida Statutes, and Possession of Paraphernalia in violation of section 893.147 Florida Statutes.

As provided by section 932.703(2)(a), Florida Statutes, the Claimant requested that the Court conduct an adversarial preliminary hearing. On January 10, 2020, this Court held a hearing for the purpose of determining whether there was probable cause to believe that the vehicle had been or was being used in violation of the Florida Contraband Forfeiture Act.

At the hearing, Corporal David Harris testified that on December 17, 2020, while traveling north on Jenks Avenue, he approached a white Dodge Truck and was immediately overwhelmed with the odor of marijuana. According to the officer, because he continued to smell the very strong odor of marijuana while following the truck, he decided to conduct an investigative traffic stop. The officer alleged that upon his contact with the driver, the Claimant in this case, he immediately determined that the alleged odor of marijuana was coming from the inside of the vehicle. When he informed the Claimant of the reason for the stop, as the officer alleged, the Claimant told him that he had a small amount of marijuana that he and his passenger were smoking. Therefore, the officer detained the Claimant and the passenger. After they were placed in the patrol vehicle, the officer conducted a warrantless search of the vehicle and allegedly discovered partially consumed marijuana blunt near the center cup holder. At the hearing, the officer also testified that he found a backpack in the rear seat of the truck that contained several bags of alleged prepackaged marijuana with approximate combined weight of over 300 grams, a digital scale, and $1,700.00 in cash. Subsequently, due to the discovery of the alleged marijuana and the large amount of currency, the officer notified the Street Crimes Unit.

Investigator Austin Brock testified that he took over the investigation upon his arrival at the scene. According to him, when he learned that the Claimant was the registered owner of the vehicle and that the vehicle was paid off, the vehicle was impounded, and the Claimant was given a Notice of Seizure. Investigator Brock explained that the decision to forfeit the vehicle was not his, and that it was the policy of his department to do so when the value of the controlled substance found exceeded the approximate amount of $5,000.00 and when there was no lien holder identified on the title to the vehicle. Yet, Investigator Brock admitted that the value of 300 grams of marijuana was unlikely to exceed said amount. During cross-examination, Investigator Brock denied that he used the threat of seizure or forfeiture to coerce the Claimant to enter into a confidential informant agreement, but he admitted that he had informed the Claimant that the police and prosecutors "liked people who were willing to cooperate."

In his defense, the Claimant testified that when Investigator Brock arrived at the scene, he tried coercing him to enter into a confidential informant agreement through the use of threat of forfeiting his truck. According to the Claimant, before he declined to make phone calls and to "set up people," there was no indication that the police were intending to forfeit his vehicle. Further, the Claimant stated that while he occasionally smokes marijuana, the substance found in the

backpack in the rear of the vehicle was hemp.

No evidence was provided during the adversarial hearing to controvert the Claimant's statement that the 300 grams of substance found in his vehicle were indeed hemp and not marijuana.

ANALYSIS

Under the Florida Contraband Forfeiture Act, real, or personal property "used in violation of any provision of the [Act,] or in, upon, or by means of which any violation of the [Act] has taken or is taking place," may be seized and ultimately forfeited through civil proceedings. § 932.703(1)(a), Fla. Stat. (2019); *see also City of Coral Springs v. Forfeiture of a 1997 Ford Ranger Pickup Truck VIN No. 1FTCR10A4VTA62475 FL Tag 3U16BDE,* 803 So. 2d 847, 849-50 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D108a]. To effectuate a forfeiture under the Act, the seizing agency must engage two stages: a seizure stage and a forfeiture stage. *See Gomez v. Vill. of Pinecrest,* 41 So. 3d 180, 184 (Fla. 2010) [35 Fla. L. Weekly S432a]. At the seizure stage, the trial court must determine "whether there is probable cause to believe that the property has been used in violation of the Act." *In re Forfeiture of: $221,898 in U.S. Currency,* 106 So. 3d 47, 49 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D258a]. The required showing is something "less than a prima facie case, but more than a mere suspicion." *In re Forfeiture of Seven Thousand Dollars U.S. Currency*, 942 So. 2d 1039, 1042 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D3069c] (citing *Dep't of Highway Safety & Motor Vehicles v. Jones*, 780 So. 2d 949, 951 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D603a]). If probable cause exists, the matter then proceeds to a subsequently scheduled forfeiture proceeding, during which "the court or jury determines whether the subject property shall be forfeited." *Velez v. Miami-Dade Cnty. Police Dep't,* 934 So. 2d 1162, 1164 (Fla. 2006) [31 Fla. L. Weekly S109a] (quoting § 932.701(2)(g), Fla. Stat. (2002)).

Because due process "requires that 'those claiming an interest in the property' be provided with notice and the opportunity to be heard at each stage of the proceeding," the current version of Act provides interested persons with the right to litigate the issue of probable cause at an adversarial preliminary hearing. *City of Fort Lauderdale v. Baruch*, 718 So. 2d 843, 847 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1937a]. Notably, "[t]he focus of the statute is on the evidence of probable cause that exists at the time of the adversarial preliminary hearing, not just what the police officers knew at the time the property was seized." *Sanchez v. City of West Palm Beach,* 149 So. 3d 92, 97 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1874a]. Thus, the language of section 932.703(2)(c), Florida Statutes, compels the conclusion that, unlike a Fourth Amendment challenge, the pertinent inquiry at the adversarial preliminary hearing is "whether there 'is' probable cause to believe that a violation of the Act occurred or is occurring, not whether there 'was' probable cause to believe that a violation of the Act occurred at the time of seizure." *Beary v. Bruce,* 804 So. 2d 579, 581 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D224a] (emphasis added); *see also City of Coral Springs v. Forfeiture of a 1997 Ford Ranger Pickup Truck VIN No. 1FTCR10A4VTA62475 FL Tag 3U1 6BDE,* 803 So. 2d 847, 850 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D108a] (stating that the question of importance is "whether the information *relied upon by the state* is adequate and sufficiently reliable to warrant the belief by a reasonable person that a violation has occurred") (quoting *Medious v. Dep't of Highway Safety & Motor Vehicles,* 534 So. 2d 729, 732 (Fla. 5th DCA 1988). When the State cannot establish probable cause of a statutory violation early in the proceedings, its seizure of the property ends without the delay that would accompany a forfeiture trial. *Real Property,* 588 So. 2d at 957.

It should be recognized that there is a long line of cases in Florida that hold that the smell of burning marijuana coming from a vehicle provides an officer with probable cause to detain the defendant and conduct a warrantless search. *See State v. T.P.,* 835 So. 2d 1277 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D385a]; *State v. Williams,* 967 So. 2d 941 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2188a]; *State v. Jennings,* 968 So. 2d 694 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2787a]); *see also State v. Betz,* 815 So. 2d 627, 633 (Fla. 2002) [27 Fla. L. Weekly S285b] ("As the odor of previously burnt marijuana certainly warranted a belief that an offense had been committed, this unquestionably provided the police officers on the scene probable cause to search the passenger compartment of the respondent's vehicle."). However, due to recent legislative changes, it has become questionable whether these cases continue to be controlling for the purpose of probable cause determination. Specifically, as of July 1, 2019, the definition of cannabis was amended and much of the search and seizure law that hinges on either an officer's or K-9's ability to smell seems to be called in significant doubt. *See* § 893.02(3), Fla. Stat. (2019). The current version of the statute provides that hemp is not a controlled substance, and section 581.217, Florida Statutes, defines "hemp" as "the plant Cannabis sativa L. and any part of that plant, including the seeds thereof, and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers thereof, whether growing or not, that has a total delta-9 tetrahydrocannabinol concentration that does not exceed 0.3 percent on a dry-weight basis."

Since it has been recognized that there is no practicable way to visually distinguish hemp from marijuana, the mere presence of the suspected substance or its odor might no longer suffice to believe that the substance is marijuana. Case law from other jurisdictions also strongly suggests that if the odor detected is that of a substance which may be put to innocent use, the fact that it might be illicitly employed may be inadequate to establish probable cause. *See, e.g., People v. Dickson,* 192 Cal. Rptr. 897, 901 (Cal. 2d Dist. 1983) ("[E]ther has many legitimate uses around homes, repair shops, and the like. Among other functions, it serves as a common solvent and is used to start engines. Accordingly, the odor of ether . . . is consistent with lawful as well as criminal activity.") *State v. 1983 Toyota Corolla,* 879 P. 2d 830, 833 (Okla. Ct. App. 1994) ("The smell of air freshener, perfume or cologne from the interior of an automobile driven by a female is not, per se, a rational or reasonable basis for suspicion of drug activity, nor does it establish probable cause, absent further correlating factors, to suspect drug activity."); *Com. v. Canning,* 28 N.E.3d 1156, 1158 (Mass. 2015) ("[I]f police seek a warrant to search a property for evidence of illegal marijuana possession or cultivation, they must offer information sufficient to provide probable cause to believe the individual is not properly registered under the act to possess or cultivate the suspected substance.")

It should be also noted that, because the exclusionary rule applies to forfeiture proceedings, any evidence obtained in violation of the Fourth Amendment must be excluded from the probable cause determination at an adversarial preliminary hearing. *See In re Forfeiture of 1999 Dodge Intrepid,* 934 So. 2d 669, 670 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2090a]; *see also Indialantic Police Dep't v. Zimmerman,* 677 So. 2d 1307, 1309 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D485a] ("[T]he validity of the stop and search are inextricably bound up with the probable cause determination required by the Act.").

However, under the current authoritative Florida case law, it could be concluded that Officer Harris had probable cause to conduct the initial stop. Yet, accepting the facts alleged by the officers to be true at the time of the initial stop, the Court is not persuaded that they remain true for all time. Indeed, pursuant to section 932.703(2)(c), Florida Statutes, the probable cause inquiry focuses on the evidence that exists at the time of the adversarial hearing. Accordingly, the Court is required to evaluate all the evidence capable of rebutting the

PCPD's claim of a statutory violation. *See Velez,* 934 So. 2d at 1166 ("[I]n using the term 'adversarial,' the statute contemplates that the preliminary hearing would involve opposing parties." (citing *Black's Law Dictionary* 58 (8th ed. 2004))). Therefore, there is a temporal element in the appraisal of probable cause determination, and its original grounds could be disproved by subsequent examination of the totality of the circumstances. In other words, in order to give full effect to the statutory scheme and to the requirements of due process, the Court is expected to consider the Claimant's testimony and specifically, his claim that the substance discovered in the backpack at the rear of the vehicle might not be marijuana.

At the adversarial preliminary hearing, the PCPD did not present any corroborative evidence to substantiate its allegation that the substance discovered in the vehicle was indeed marijuana. There was no evidence that the substance was tested at any time during or after the investigation. Nor was it established that the officers were able independently, by training or experience, to differentiate between hemp and marijuana. Notably, there is a handful of cases where individuals are mistakenly arrested for possession of controlled substances even after a field test was initially performed. *See Rushing v. City of Orlando et al.,* 27 Fla J.V.R.A. (Fla. 9th Cir. Ct. 2017) (Plaintiff spent ten hours in jail due to traffic stop arrest until subsequent testing determined that flakes of white material on the floorboard of his vehicle were not methamphetamine but sugar from a Krispy Kreme doughnut.)

Therefore, the Court finds that the Claimant successfully rebutted the probable cause showing at the time of the adversarial preliminary hearing.

A careful examination of the court file in the instant case also revealed that currently there is no deposit of a bond as required by section 932.704(4), Florida Statutes. The Court notes that the record indicates that the bond was instead deposited in Case No. 19-4589-CA in connection with the initial Application for Order Determining Existence of Probable Cause, filed by the PCPD.

Indeed, property rights are among the basic substantive rights expressly protected by the Florida Constitution. Art. I, § 2, Fla. Const.; *see Shriners Hosps. for Crippled Children v. Zrillic,* 563 So. 2d 64, 68 (Fla. 1990) (article I, section 2 protects all incidents of property ownership from infringement by the state unless regulations are reasonably necessary to secure the health, safety, good order, and general welfare of the public). Forfeiture is penal in nature and must be strictly construed in favor of those against whom the penalty is to be imposed. *See In Re: FORFEITURE OF $37.388.00*, 571 So. 2d 1377 (Fla. 1st DCA 1990).

Therefore, it is

ORDERED that the 2014 RAM 1500 TRUCK, VIN: 1CRR6FT6ES160498, shall be released and returned, to the Claimant within five (5) days of this Order. Furthermore, the Clerk of Court is hereby ordered to transfer the bond deposited in Case No. 19-4589-CA to Case No. 19-4593-CA.

* * *

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COUNTY COURTS

Criminal law—Driving under influence—Search and seizure—Detention—Community caretaking—Officer who observed defendant's running vehicle parked at closed business, with indicia that it had been in accident and puddle of urine next to it, had objectively reasonable basis for concern for defendant's well-being—Officer was motivated solely by intent to aid and protect defendant, and officer's actions of arousing unconscious driver and opening door to prevent driver from driving away fell within scope of the emergency—Motion to suppress is denied

STATE OF FLORIDA, v. ANDREW MARTIN, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2020 CT 1049. July 29, 2021. D. Melissa Distler, Judge. Counsel: Adriana Laforest, Office of the State Attorney, for State. Jessica Damoth, for Defendant.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

THIS MATTER came to be heard on the Defendant's Motion to Suppress Unlawfully Obtained Evidence. The Court, having heard testimony from Officer Evan Scherr, and having heard argument from both Counsel for the State and the Defendant, the Court makes the following findings of fact:

Officer Evan Scherr testified that he was on duty as a road patrol officer for Flagler Beach Police Department on December 18, 2020, actively patrolling and performing security checks on closed businesses in the early morning hours. Officer Scherr testified that at approximately 4:30am, he noticed a car parked in the parking lot of a restaurant, Martins. Officer Scherr testified that this was highly unusual; Martins is open for business from 11:30am to 9:00pm, and he testified that in his 2 years as a Flagler Beach Officer, he has never seen a vehicle in that parking lot at that time of night. He testified that the vehicle was running and parked at an angle within a parking spot. When he got closer to the vehicle, Officer Scherr testified that the front left tire was flat and that there was a gash in the vehicle, with the bumper secured with a bungee cord. Additionally, he noticed a puddle of liquid near the car, which he opined to be urine. Officer Scherr testified that he became concerned for the safety of the occupants, as it seemed as though the vehicle was possibly involved in an accident. He parked his patrol vehicle behind the parked car. As he approached the vehicle and could see inside the drivers' side window, he saw an unconscious male in the driver's seat, leaning all the way back with his arms crossed.

Officer Scherr, in an attempt to determine the welfare of the driver, knocked on the window as close as he could to the face of the driver. He testified that he knocked as loudly as he could in an attempt to arouse the driver, since the windows were up on the running vehicle. He then noticed an ID card hanging from the visor with a name of Andy on the card and verified that the driver was the same person in the photograph, so he began knocking loudly and calling out, "Andy." Eventually after several attempts, the driver slowly began to open his eyes and move. Officer Scherr continued to be concerned about how long it was taking to arouse the driver and how lethargic and unfocused he was when he did begin to awaken. When the driver slowly began to move, he started to reach towards the steering wheel. It was at this time that Officer Scherr was concerned that the driver may attempt to operate the vehicle, so he opened the driver's door. When he did so, Officer Scherr testified that he was overcome by a blast of hot air and a very strong odor of an alcoholic beverage.

Officer Scherr testified that it was still difficult to get the drivers' attention, who was still lethargic. When Officer Scherr asked the driver if he was okay, the driver just stared at him. He testified that the driver seemed confused and slightly aggressive. Officer Scherr then asked for identification, which he several requests before the driver started to shuffle around the cab of the vehicle to finally produce an Ohio identification card. The driver then handed Officer Scherr a debit card. When Officer Scherr questioned him and said it was a debit car, the driver replied, "yes it is" and just stared at the card confused. Officer Scherr also noted mumbled and slurred speech during his conversation with the driver at this time.

About this time, Officer Scherr asked the driver to perform field sobriety exercises, to which the driver agreed; because Flagler Beach Police did not have body cameras at that time, their protocol was to call for a Flagler County Deputy to record the exercises. Officer Scherr testified that he had started to put the pieces together with the odor of alcohol, poor situational awareness, length of time to arouse the driver, his continued lethargy, slow reactions and poor understanding, along with the mumbled and slurred speech; Officer Scherr began to think the driver may be impaired.

Officer Scherr further explained that sleeping in a vehicle and parking overnight constitute ordinance violations within the City of Flagler Beach. He further explained that it is common to see cars parked overnight in public parking lots but not at a closed private business. On cross-examination, Officer Scherr testified that he had asked the driver if he needed any medical attention, to which the driver responded that he did not, dispelling concerns for any need to call emergency medical services. There was testimony about the emergency lights of the vehicles. It was revealed after watching a brief portion of the AXON recordings of Deputy Denker that the two Flagler Beach Police vehicles did not have emergency lights on but the deputy did have his emergency lights on when he arrived to record field sobriety exercises. Officer Scherr maintained that his primary intent of approaching the vehicle was to determine wellbeing and conduct a welfare check of the driver.

It is this sequence of events on which the Defendant bases his Motion to Suppress.

The Court must first determine what level of police-citizen encounter this constituted. A consensual encounter involves minimal police contact, which allows the citizen to either voluntarily comply with a request or choose to ignore the officer's request. *Popple v. State,* 626 So.2d 185 (Fla. 1993). The second type of encounter is an investigatory stop, where "a police officer may reasonably detain a citizen temporarily if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime." *Id.* The third type, which is an arrest, requires probable cause and is not at issue in this case. In *Popple,* the Florida Supreme Court held that an officer's request that an occupant of a lawfully parked car step out of his vehicle was a "seizure" of the occupant requiring reasonable suspicion. *Gentles v. State,* 50 So.3d 1192, 1197 (Fla. 4th DCA 2011) [35 Fla. L. Weekly D2900a]. The Defendant argues that the sleeping in a parked car is not criminal activity and did not justify the seizure.

Once a seizure has occurred, the next issue to determine is whether the seizure was reasonable based upon some recognized exception of the Fourth Amendment. There are many cases potentially applicable to this factual scenario, and many of the cases involving a lawfully parked vehicle. *See State v. Jimoh,* 67 So.3d 240 (Fla. 2nd DCA 2010) [35 Fla. L. Weekly D2469a]; *Danielewicz v. State,* 730 So.2d 363 (Fla. 2nd DCA 1999) [24 Fla. L. Weekly D793a]; *Delorenzo v. State,* 921 So.2d 873 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D737a]; *Gentles v. State,* 50 So.3d 1192 (Fla. 4th DCA 2011) [35 Fla. L. Weekly D2900a]; *State v. Hanson,* 23 Fla. L. Weekly Supp. 351b (Fla. Volusia County Court 2015); *State v. Sooy,* 13 Fla. L. Weekly Supp. 997b (Fla. Volusia County Court 2006); *State v. Calonge,* 25

Fla. L. Weekly Supp. 747a (Fla. Polk County Court 2017). However, in this circumstance, there was more than a parked vehicle in a closed parking lot of a store or building. The vehicle had a flat tire, evidence of having been in an accident, and a suspicious puddle immediately adjacent to the vehicle. In addition, sleeping in a parked vehicle and parking overnight constitute violations of Flagler Beach ordinances.

A temporary detention can also be justified under the officer's exercise of his community caretaking function. *See Cady v. Dombrowski,* 413 U.S. 433 (1973). Under the community caretaking function, the officer has the authority to check a person's status and condition to determine whether the individual needs assistance. Even without probable cause, an officer may detain an individual pursuant to community caretaking under certain circumstances.

In *State v. Perez,* 12 Fla. L. Weekly Supp. 35a (Fla. Miami Circuit Court October 5, 2004), the Circuit Court in Miami-Dade County, sitting in its' appellate capacity, set forth a three part test in determining whether the emergency aid/community caretaker doctrine applied. The three parts as set forth in *Perez* are (1) Was there an objectively reasonable basis for a belief in the immediate need for police assistance for the protection of life or property?; (2) Were the officer's actions motivated by an intent to aid or protect, rather than solve a crime?; and (3) Do the police actions fall within the scope of the emergency?

Applying this test to the instant case, the totality of the circumstances show that there was an objectively reasonable basis for a belief in the immediate need for police assistance for the protection of life or property. Officer Scherr was patrolling the city of Flagler Beach in the early morning hours and observed a vehicle with a flat tire, evidence of having been in an accident, and a suspicious puddle immediately adjacent to the vehicle. The Court finds that the Officer had an objectively reasonable basis for concern of the Defendant's personal well-being under these circumstances, and the Court further finds that Officer Scherr was solely motivated by the intent to aid and protect the driver rather than solve a crime prior to noting the compounding indicators of impairment.

Lastly, the three-part inquiry requires the Court to determine whether the police actions fall within the scope of the emergency. *Perez,* 12 Fla. L. Weekly Supp. 35a. Officer Scherr made all best efforts to arouse the driver by knocking on the door and even calling him by name once determining that the ID belonged to the unconscious driver. Once those efforts were successful, the driver, still in a lethargic and confused state, reached towards the steering wheel. It was at that time that Officer Scherr opened the door to the vehicle to prevent the driver from attempting to move the vehicle.

The Court finds that the actions taken by Officer Scherr were reasonable, motivated by an intent to aid or protect rather than solve a crime, and within the scope of the emergency with which he was faced. Based upon the above findings of fact, it is therefore ORDERED AND ADJUDGED that the Defendant's Motion to Suppress is DENIED.

* * *

Insurance—Homeowners—Coverage—Water damage—Burden is on homeowners to prove that damage to home interior caused by rain entering home falls under exception to rain-damage exclusion applicable when rain enters property through opening in roof caused by covered peril—Conclusory affidavit of homeowners' expert did not provide any admissible evidence that storm event caused opening in roof and resulted in rain entering home—Summary judgment is entered in favor of insurer

STATE 2 STATE RESTORATION INC., Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-023487-CC-05, Section CC06. July 15, 2021. Luis Perez-Medina, Judge.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND CLOSING CASE

THIS CAUSE, having come before the Court for hearing on May 20, 2021, upon a Motion for Final Summary Judgment filed by Defendant, Citizens Property Insurance Corporation, and the Court, having heard argument of counsel and having considered all of the evidence filed by the parties in support or opposition to the Motion, and being otherwise fully advised in the premises, it is hereby

ORDERED and ADJUDGED:

Defendant's Motion for Final Summary Judgment is **GRANTED**.

The over-arching issue addressed by this Court is whether Plaintiff can prove the existence of a peril-created opening in a roof which allowed water to enter the property causing damage to the interior of the residence. Plaintiff contends that it is the Defendant's burden to prove the nonexistence of a peril created opening. This Court disagrees.

Undisputed Facts

The Court makes the following findings of facts:

1. The Insured, Sarah Garcia, was covered under a policy of insurance issued by the Defendant (the "Policy"), which was in full force and effect when the Insured's property suffered a loss on June 5, 2017.

2. According to the Insured, prior to June 2017 she had no leaks to the interior of her home. *Sara Garcia Aff.* ¶ 5.

3. After a rainstorm in early June, leaks stared appearing. *Sara Garcia Aff.* ¶ 6.

4. The claim was reposted to Citizens and on August 7, 2017, Stephen McMillan, Citizens field adjuster inspected the property and found no visible signs of damage to the roof as a result of a covered peril. *Stephen McMillan Aff.* ¶ 2.

5. Mr. McMillan took photographs of the roof. *Id.*

6. Defendant's Policy "insures against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property." *Citizens Homeowners 3—Special Form Policy, CIT HO-3 10 16, Section I, A, 1* at 12. The Policy, however, does not insure for a loss, caused by:

> Rain, snow, sleet, sand or dust to the interior of a building unless a covered peril first damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening.
>
> *Id.*

7. According to Plaintiff's Response in Opposition to Defendants Motion for Summary Judgment, Plaintiff billed Defendant $12,704.49 for performing "water restoration services to the Insured's property." Plaintiff is not seeking payment for damages to the roof or for mitigation to protect the roof from further damage. Plaintiff is only seeking payment for services to dry the interior of the property after a water loss caused by the rainstorm.

8. Plaintiff does not know if the roof was inspected. *Diego Carvajal Dep.* p. 20.

9. There is no documentation showing where an opening occurred on the roof allowing water to enter the property. *Id.* p. 35-37.

10. Grant Renne submitted an affidavit and report on behalf of Plaintiff. Mr. Renne did not inspect the property but rather reviewed the documents attached to Defendant's Motion. *Grant Renne Aff.,* ¶ 4. Mr. Renne concluded that the roof was not damaged by normal wear and tear because the Insured did not observe any interior damage to the ceiling until after the June 17, 2017 weather event. *Id.* ¶ 10. Mr. Renne found "several issues consistent with storm damage" such as "torn shingles, creased shingles, and apparent breaches in underlayment." *Id.* ¶ 7. As will be explained, the Court holds that

Grant Renne's finding are conclusory and will not be considered.

11. In its Amended Motion for Final Summary Judgment, Defendant argues that there is no coverage for Plaintiff's claim as a matter of law, "as it is unable to carry its burden to establish a peril-created opening in the Insured's roof which allowed water to enter and cause damage to the interior of the insured property."

New Summary Judgment Standard for Florida

On April 29, 2021, the Florida Supreme Court finalized its amendment to Florida Rule of Civil Procedure 1.510 by replacing the text of the existing rule with almost all the text of Federal Rules of Civil Procedure 56. *In re Amends. to Fla. Rule of Civ. Proc. 1.510,* No. SC20-1490, 2021 WL 1684095, at 1 [317 So. 3d 72] (Fla. Apr. 29, 2021) [46 Fla. L. Weekly S95a]. Accordingly, Florida Courts are now required to follow the federal summary judgment standard which refers to the principles announced in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986), "and more generally to case law interpreting Federal Rule of Civil Procedure 56." *In re Amends. to Fla. Rule of Civ. Proc. 1.510,* No. SC20-1490, 2021 WL 1684095, at 5 [317 So. 3d 72] (Fla. Apr. 29, 2021) [46 Fla. L. Weekly S95a]. The effective date of the amendment was May 1, 2021. *Id.* at 1.

According to the new Rule, "[a] party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fla. Rule of Civ. Proc. 1.510(a).* A party asserting that a fact cannot be or is genuinely disputed may support the assertion by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Fla. Rule of Civ. Proc. 1.510(a)(c)(1)(B).* "A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." *Fla. Rule of Civ. Proc. 1.510(a)(c)(2).* In addition, the court can consider other materials in the record even when they are not cited by the parties. *Fla. Rule of Civ. Proc. 1.510(a)(c)(3).* "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." *Fla. Rule of Civ. Proc. 1.510(a)(c)(4).*

When addressing a summary judgment motion under the Amended Rule, a court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Hickson Corp. v. N. Crossarm Co.,* 357 F.3d 1256, 1260 (11th Cir. 2004) [17 Fla. L. Weekly Fed. C195a] (quoting *Anderson,* 477 U.S. at 251-52). At "the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson,* 477 U.S at 249. A "scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry . . . asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict . . . ." *Id.* at 252. In evaluating a summary judgment motion, all "justifiable inferences" must be resolved in the nonmoving party's favor so long as there is a genuine dispute as to those facts. *Beard v. Banks,* 548 U.S. 521, 529 (2006) [19 Fla. L. Weekly Fed. S402a]; *see Scott v. Harris,* 550 U.S. 372, 380 (2007) [20 Fla. L. Weekly Fed. S225a]. "In the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true," the court remains free to grant summary judgment. *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 596 (1993).

A "party may not avoid summary judgment solely on the basis of an expert's opinion that fails to provide specific facts from the record to support its conclusory allegations." *Evers v. General Motors,* 770 F.2d 984, 986 (11th Cir. 1985); *see Weigel v. Target Stores,* 122 F.3d 461, 468 (7th Cir. 1997) (holding that the plaintiff failed to create a genuine issue for trial when her expert's affidavit provided "nothing more than a naked conclusion unsupported by any factual foundation"); *Vollmert v. Wisconsin Dep't of Transp.,* 197 F.3d 293, 298 (7th Cir. 1999) (holding that an expert opinion is insufficient "to preclude summary judgment where it offers nothing but naked conclusions."); *Hilburn v. Murata Elec. N. Am., Inc.,* 181 F.3d 1220, 1227-28 (11th Cir. 1999) (holding that a conclusory statement in an expert's affidavit "is insufficient to create a genuine issue of a material fact" when the "affidavit is devoid of any specific facts whatsoever which support the" expert's conclusion).

In "the context of a motion for summary judgment, an expert must back up his opinion with specific facts." *United States v. Various Slot Machs. on Guam,* 658 F.2d 697, 700 (9th Cir. 1981). When a purported expert presents " 'nothing but conclusions—no facts, no hint of an inferential process, no discussion of hypotheses considered and rejected,' such testimony will be insufficient to defeat a motion for summary judgment." *Hayes v. Douglas Dynamics, Inc.,* 8 F.3d 88, 92 (1st Cir. 1993) (quoting *Mid-State Fertilizer v. Exch. Nat'l. Bank,* 877 F.2d 1333, 1339 (7th Cir. 1989)). "For an expert report to create a genuine issue of fact, it must provide not merely the conclusions, but the basis for the conclusions." *Vollmert,* 197 F.3d 293, 299 (7th Cir. 1999). "[A] trial court may exclude expert testimony that is 'imprecise and unspecific,' or whose factual basis is not adequately explained." *Id.* (quoting *Cook ex rel. Est. of Tessier v. Sheriff of Monroe Cty., Fla.,* 402 F.3d 1092, 1111 (11th Cir. 2005) [18 Fla. L. Weekly Fed. C298a]). To be appropriate, a "fit" must exist between the offered opinion and the facts of the case. *McDowell v. Brown,* 392 F.3d 1283, 1299 (11th Cir. 2004) [18 Fla. L. Weekly Fed. C92a] (citing *Daubert,* 509 U.S. at 591). "For example, there is no fit where a large analytical leap must be made between the facts and the opinion." *Id.* (citing *Gen. Elec. Co. v. Joiner,* 522 U.S. 136 (1997)); *see McDowell,* 392 F.3d at 1298 (when deciding the trustworthiness of an expert's report, the "court[s] should meticulously focus on the expert's principles and methodology, and not on the conclusions that they generate.").

When determining if expert testimony or any report prepared by an expert may be admitted, the Court engages in a three-part inquiry, which includes whether: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. *See City of Tuscaloosa v. Harcros Chems., Inc.,* 158 F.3d 548, 562 (11th Cir. 1998) (citing *Daubert,* 509 U.S. at 589).

Analysis

The burdens of proof applicable to insurance coverage disputes are well-established under Florida Law. There are three burdens of proof applicable to a claimed loss under Florida law. Initially, the burden is on the insured to prove "that the insurance policy covers a claim against it." *E. Florida Hauling, Inc. v. Lexington Ins. Co.,* 913 So. 2d 673, 678 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2257a]. Once a loss within the terms of the policy is established, the burden shifts to the insurer to prove that the loss falls within an exclusionary provi-

sion. *Id.* Finally, "[i]f there is an exception to the exclusion, the burden once again is placed on the insured to demonstrate the exception to the exclusion." *Id.*; *see also Florida Windstorm Underwriting v. Gajwani,* 934 So. 2d 501, 506 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D1213a] ("the insured has the burden to prove an exception to an exclusion contained within an insurance policy").

Citizens' policy provides coverage for "direct loss to property described in Coverages A and B only if that loss is a physical loss to property." The policy excludes coverage for loss caused by "[r]ain, snow, sleet, sand or dust to the interior of a building." The Affidavit of Sara Garcia provides proof that the damage to the interior of the residence was caused by rain entering the property, which is excluded under the policy of insurance.

The policy provides an exception to that exclusion when "a covered peril first damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening." The existence of a peril-created opening is undoubtedly an exception to the exclusion that would otherwise exist for interior damage caused by rain. Plaintiff, thus has the burden of proving that rain entered the property through an opening in the roof which was created by a covered peril. The affidavit of Sara Garcia does not provide such proof since her claim that water entered her property after a rainstorm merely reinforces the exclusion under the policy.

Plaintiff tries to meet its burden of proof by introducing the affidavit and report of Grant Renne. While Mr. Renne qualifies as an engineer, his report and affidavit is conclusory. Mr. Renne's affidavit and report lacks sufficient facts and the scientific methodology to explain how the torn or creased shingles he observed in the pictures were actually damaged by the June 2017 storm. In his affidavit he states, "several issues consistent with storm damage are present to the subject roof". Issues consistent with storm damage does not mean that the June 2017 storm is the actual cause of those issues. In addition, Mr. Renne does not identify the shingles containing damage or creases. He does not explain how the torn or creased shingles were damaged, the percentage of the shingles torn or creased, and how the torn or creased shingles are responsible for allowing water into the home. Mr. Renne's claim that there was an apparent breach in the underlayment is also conclusory since something apparent does not mean it exits. In addition, Mr. Renne does not identify where the apparent torn underlayment is located, the cause of the apparent tear, or how the apparent torn underlayment allows water to enter the property. Finally, Mr. Renne, does not state with specificity, the wind conditions required to create the alleged damage seen in the pictures. This Court therefore finds that Defendant properly denied Plaintiffs' request for payment of water mitigation to dry the property from a non-covered loss and that no breach of contract occurred.

Mr. Renne's, conclusion that an opening in the roof was caused by a June 2017 storm event which resulted in rainwater entering the building and causing damage is conclusory and will not be considered by the Court. Thus, Plaintiff is unable to provide evidence of an exception to the exclusion found in the Policy.

It is therefore ORDERED and ADJUDGED that:

1. Defendant's Motion for Final Summary Judgment is GRANTED.

2. Plaintiff State 2 State Restoration, Inc. shall take nothing, and Defendant, Citizens Property Insurance Corporation, shall go hence without day.

3. This Court retains jurisdiction to award reasonable attorney fees and costs.

* * *

Insurance—Property—Windstorm loss—Water intrusion—Coverage—Cause of loss—Testimony of insured along with expert's report and affidavit in opposition to insurer's motion for summary judgment were sufficient to allow case to proceed to trial on issue of causation—Insurer's field adjuster was not qualified as an expert by insurer and, accordingly, his opinion that loss was caused by wear and tear was not considered by the court—While insurer presented evidence which could be used to test credibility of insured and insured's expert, it is not for the court to weigh evidence and determine truth—Insurer's motion for summary judgment denied

NILDA CHE, et al., Plaintiffs, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2017-008411-CC-05, Section CC06. July 17, 2021. Luis Perez-Medina, Judge.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE, having come before the Court for hearing on June 28, 2021, upon a Motion for Final Summary Judgment filed by Defendant, Citizens Property Insurance Corporation, and the Court, having heard argument of counsel and having considered all of the evidence filed by the parties in support or opposition to the Motion, and being otherwise fully advised in the premises, it is hereby

ORDERED and ADJUDGED:

Defendant's Motion for Final Summary Judgment is **DENIED**.

The over-arching issue addressed by this Court is whether Defendant presented sufficient evidence to grant its Motion for Summary Judgment. The Court finds that Plaintiffs provided sufficient conflicting evidence to send this case to a jury for a determination of causation.

Undisputed Facts

The Court makes the following findings of facts:

1. The Plaintiffs, Nilda Che and Enrique Che, were covered under a policy of insurance issued by the Defendant (the "Policy"). The Policy was in full force and effect when the Plaintiffs' property suffered a loss on February 22, 2017.

2. Plaintiffs are seeking to recover interior water damage to the living room and are not seeking alleged damages to the roof covering.

3. Plaintiffs submitted the affidavit and report of Anthony Johnson. Mr. Johnson is a certified meteorologist with 42 years of experience in determining and analyzing wind speed values and rainfall amounts. Mr. Johnson concluded that during the morning hours of January 23, 2017 and F1 tornado touched down near the area of the subject's property. A pattern of circulation directly affected the subject property at 3:49 a.m. According to Doppler radar, the maximum wind gust at the subject property during this time was 76 miles per hour. The January 23, 2017 wind event was accompanied by heavy rains. *Anthony Johnson Aff.*

4. Mr. Johnson also opined that on February 22, 2017, heavy rains occurred at the subject property. The total precipitation on February 22, 2017 was 1.64″ during a small period of time. The maximum wind gusts on February 22, 2017 was 28 to 30 miles per hour. *Anthony Johnson Aff.*

5. Based on Mr. Jonson's knowledge and experience, this Court finds that he is qualified to render an opinion on wind speed values and rainfall amounts. The Court finds that Mr. Johnson's methodology in reaching his conclusions is sufficiently reliable and his testimony will assist the trier of fact in determine rainfall amounts and wind speed data at the subject property near the time of the loss.

6. According to Enrique Che, he first saw a leak the living room on or around February 22, 2007. On that date Mr. Che was working in Ft. Lauderdale. When he arrived home, he noticed standing water in the living room floor and a crack in the ceiling. Neither the crack in ceiling nor the water on the floor where present when Mr. Che left for work. *Enrique Che Dep.*

7. The next day, Mr. Che got on the roof and inspected the roof. While Mr. Che did not notice any holes, he did see gouges on the roof which he described as broken shingles which were lifted up. He also saw shingles that were folded back. In total he saw four shingle which were lifted up and debonded. All these damaged shingles were located above the living room area. Mr. Che tried to repair the broken shingles with tar paper and tar but his efforts did not stop the leaking in the living room area. *Enrique Che Dep.*

8. Mr. Che reported the claim to Citizens and had a tarp placed over the damaged roof. According to Mr. Che, the tarp prevented Hurricane Irma from causing further damage to the roof. *Enrique Che Dep.*

9. According to Mr. Che, the roof was 18 years old on the date of loss. Except for a single repair to the roof four years earlier, there were no issues with the roof. *Enrique Che Dep.*

10. Alfredo Brizuela was submitted by plaintiff as an expert on engineering and causation of insurance losses. In rendering his opinion, Mr. Brizuela spoke to Mr. Che about his recollection of the events. He also examined 89 photos taken by Citizens on March 15, 2017, 18 photos taken by People Insurance Claim Center, he inspected the property on November 14, 2019, and conducted historical weather data for January and February of 2017. *Alberto Brizuela Dep.*

11. Mr. Brizuela opined that in his professional opinion "wind pressure and wind gusts produced by a heavy wind and rain event on or about January 22, 2017, created permanent openings at the exterior roof which allowed for rainwater entry" to the property, resulting in damages to the interior of the property which manifested on or about February 22, 2017. *Alfredo Brizuela Aff.*

12. Mr. Brizuela explained how 3 or more debonded shingles in one area, as seen by Mr. Che, can be used to prove wind damage. *Alberto Brizuela Dep.*

13. Mr. Brizuela observed water damage to the interior of the property that was caused by rain intrusion. Mr. Brizuela observed latent moisture in the internal walls and ceiling "consistent with damage to the building components due to fluctuating wind pressures and wind driven rain." Mr. Brizuela concluded that in his opinion to a reasonable degree of engineering certainty that the property was "damaged by heavy winds and rain event occurring on or about January 22, 2017. *Alfredo Brizuela Aff.*

14. Mr. Brizuela also opined that the cracked/chipped shingles at the subject property was not consistent with wear and tear or deterioration of components. *Al Brizuela Engineering, Inc report.*

15. Based on Mr. Brizuela's knowledge and experience, this Court finds that he is qualified to render an opinion an expert on engineering and causation of insurance losses. The Court finds that Mr. Brizuela's methodology in explaining how a roof may be damaged by a windstorm is sufficiently reliable and his testimony will assist the trier of fact in evaluating the testimony of Mr. Che's and Mr. Johnson to determine if the windstorm events on or about January 22, 2017 caused windstorm damage to the roof which was later observed by Mr. Che on February 22, 2017.

16. Field adjuster, David Fagnano inspected the property and roof on Defendant's behalf on March 15, 2017. Mr. Fagnano observed roof-related water damage to the ceiling in the interior of the property but denied the claim based on his observations that the roof had no signs of wind damage, the rood had no signs of impact damage, and there were no openings created by a peril. *David Fagnano Aff.*

17. When Mr. Fagnano inspected the property on March 15, 2017, he was unaware that Mr. Che had performed repairs on the roof and covered the "reportedly lifted shingles immediately above the subject leak with tar and roof paper." Accordingly, Mr. Fagnano had no way of confirming the existence of "a covered created opening underneath the tar and roof paper". *David Fagnano Aff.*

18. Defendant did not qualify Mr. Fagnano as an expert and his claim that the roof failed due to deterioration or wear and tear is conclusory. Accordingly, Mr. Fagnano was considered by this Court as a fact witness based on his observations during his inspection of the roof, rather than an expert on the issue of wear and tear.

19. Defendant's Policy "insures against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property." *Citizens Homeowners 3—Special Form Policy, CIT HO-3 10 16, Section I, A, 1* at 12. The Policy, however, does not insure for a loss, caused by:

> Rain, snow, sleet, sand or dust to the interior of a building unless a covered peril first damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening.

Id. at 14. The policy also excludes coverage for wear and tear. *Id.*

20. In its Amended Motion for Final Summary Judgment, Defendant argues that there is no coverage since Plaintiffs cannot meet their burden of establishing the existence of a covered peril-created opening in the roof of the property.

New Summary Judgment Standard for Florida

On April 29, 2021, the Florida Supreme Court finalized its amendment to Florida Rule of Civil Procedure 1.510 by replacing the text of the existing rule with almost all the text of Federal Rules of Civil Procedure 56. *In re Amends. to Fla. Rule of Civ. Proc. 1.510,* No. SC20-1490, 2021 WL 1684095, at 1 [317 So. 3d 72] (Fla. Apr. 29, 2021) [46 Fla. L. Weekly S95a]. Accordingly, Florida Courts are now required to follow the federal summary judgment standard which refers to the principles announced in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986), "and more generally to case law interpreting Federal Rule of Civil Procedure 56." *In re Amends. to Fla. Rule of Civ. Proc. 1.510,* No. SC20-1490, 2021 WL 1684095, at 5 [317 So. 3d 72] (Fla. Apr. 29, 2021) [46 Fla. L. Weekly S95a]. The effective date of the amendment was May 1, 2021. *Id.* at 1.

According to the new Rule, "[a] party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fla. Rule of Civ. Proc. 1.510(a).* A party asserting that a fact cannot be or is genuinely disputed may support the assertion by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Fla. Rule of Civ. Proc. 1.510(a)(c)(1)(B).* "A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." *Fla. Rule of Civ. Proc. 1.510(a)(c)(2).* In addition, the court can consider other materials in the record even when they are not cited by the parties. *Fla. Rule of Civ. Proc. 1.510(a)(c)(3).* "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." *Fla. Rule of Civ. Proc. 1.510(a)(c)(4).*

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whether there is a genuine issue for trial." *Anderson,* 477 U.S at 249. A "scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry . . . asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict . . . ." *Id.* at 252. In evaluating a summary judgment motion, all "justifiable inferences" must be resolved in the nonmoving party's favor so long as there is a genuine dispute as to those facts. *Beard v. Banks,* 548 U.S. 521, 529 (2006) [19 Fla. L. Weekly Fed. S402a]; *see Scott v. Harris,* 550 U.S. 372, 380 (2007) [20 Fla. L. Weekly Fed. S225a]. "In the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true," the court remains free to grant summary judgment. *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 596 (1993).

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Analysis

The burdens of proof applicable to insurance coverage disputes are well-established under Florida Law. There are three burdens of proof applicable to a claimed loss under Florida law. Initially, the burden is on the insured to prove "that the insurance policy covers a claim against it." *E. Florida Hauling, Inc. v. Lexington Ins. Co.,* 913 So. 2d 673, 678 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2257a]. Once a loss within the terms of the policy is established, the burden shifts to the insurer to prove that the loss falls within an exclusionary provision. *Id.* Finally, "[i]f there is an exception to the exclusion, the burden once again is placed on the insured to demonstrate the exception to the exclusion." *Id.*; *see also Florida Windstorm Underwriting v. Gajwani,* 934 So. 2d 501, 506 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D1213a] ("the insured has the burden to prove an exception to an exclusion contained within an insurance policy").

Citizens' policy provides coverage for "direct loss to property described in Coverages A and B only if that loss is a physical loss to property." The policy excludes coverage for loss caused by "[r]ain, snow, sleet, sand or dust to the interior of a building." The Deposition of Enrique Che provides proof that the damage to the interior of the residence was caused by rain entering the property, which is excluded under the policy of insurance.

The policy provides an exception to that exclusion when "a covered peril first damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening." The existence of a peril-created opening is undoubtedly an exception to the exclusion that would otherwise exist for interior damage caused by rain. The testimony of Mr. Che along with the affidavit of Mr. Johnson and Mr. Brizuela provides such proof. The existence of an F1 tornado on January 23, 2017, as well as the damage to the roof observed by Mr. Che and explained by Mr. Brizuela in his report provides sufficient evidence to allow this case to proceed to trial on the issue of causation. Mr. Fagnano claim that the loss was caused by wear and tear is not percussive since a roof may be old with repairs and still function to keep water out of the property. In addition, Mr. Fagnano was not qualified as an expert by Defendant so his opinion was not considered by this Court.

This Court is aware of several Orders it has rendered in favor of Citizens on this issue. All those Orders are distinguishable from this case. In *Yadira Borges v. Citizens Property Insurance Corporation,* 2018-0110210-CC-05 (September 4, 2020) this Court granted Citizen' Summary Judgment Motion because the qualifications of Plaintiff's expert witness was not discussed in his report, he did not accompany his report with an affidavit, the expert claimed that wind uplifted the shingles but did not discuss a weather event causing the uplift, and the damage claimed also matched the damage observed several months later during Hurricane Irma. In *State 2 State Restoration v. Citizens,* 2018-023487-CC-05 (July 15, 2021) [29 Fla. L. Weekly Supp. 806a] this Court granted Citizen' Summary Judgment Motion based on Plaintiff expert's conclusory affidavit as to causation.

While Defendant produced evidence which could be used to test the credibility of Mr. Che and Mr. Brizuela, this Court's function is not to weight the evidence and determine truth, but rather to decide if there is genuine issue for trial. *Anderson,* 477 U.S at 249. Accordingly, it is ORDERED and ADJUDGED that:

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

* * *

Insurance—Personal injury protection—Motion for leave to file untimely reply is denied in absence of showing of excusable neglect

MANUEL V. FEIJOO, M.D., P.A., a/a/o Paul Faure, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-005840-SP-25, Section CG02. February 13, 2022. Elijah A. Levitt, Judge. Counsel: George A. David, for Plaintiff. Ryan McCarthy and Raul L. Tano, Shutts & Bowen LLP, Miami, for Defendant.

ORDER ON MOTION FOR LEAVE TO FILE REPLY

This cause came before the Court on February 10, 2022, for hearing on Plaintiff's Motion for Leave to File Reply, and the Court, being advised in the premises, hereby denies the Motion. The Motion for Summary Judgment on deficient demand letter will be heard as scheduled on February 23, 2022. Plaintiff shall have until February 17, 2022, to file a response to the Motion for Summary Judgment.

The Court finds that Plaintiff did not establish excusable neglect for its failure to timely file a reply. This matter has been set for hearing on various motions on at least nine (9) prior occasions. On January 11, 2021, Defendant filed its Motion for Summary Judgment, which the Court ordered to be heard within seventy-five (75) days of November 29, 2021. The Court has at least twice expressed concern about Plaintiff's failure to comply with the Florida Rules of Civil Procedure and court orders. [DEs 86 and 94]. Plaintiff's counsel should have reviewed the file and discovered that Plaintiff had not filed a reply. Based on the case history, the Court finds that neglect exists for Plaintiff's failure to timely file a reply, but the neglect is inexcusable. Wherefore, Plaintiff's Motion for Leave to File Reply is denied.

* * *

Criminal law—Driving under influence—Search and seizure—Consensual encounter occurred when officer approached defendant's vehicle, which was parked at closed business in high crime area at night, to perform welfare check and requested that defendant roll down his window—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. DAVID W. JONES, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2021 CT 1639 NC. November 9, 2021. Maryann Olson Boehm, Judge.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE came before the Court upon Defendant's Motion to Suppress on September 21, 2021. Defendant requests the Court to suppress all evidence which was the product of the wrongful stop and detention of Defendant, including the results of all standardized field sobriety exercises, all statements made by Defendant during the unlawful detention, and results of all biochemical tests which were the product of the wrongful stop and detention of Defendant.

In this DUI case, the issue is whether the officer made an illegal search and seizure when the officer approached Defendant's vehicle and knocked on the window while Defendant was asleep in the driver's seat, causing Defendant to roll down his window. The Court having heard the testimony of witnesses and having heard argument of counsel, and being otherwise fully advised in the premises, hereby finds as follows:

1. On February 11, 2021, Deputy Stephanie Silva of the Sarasota Sheriff's Office was on patrol when she responded to a call to 911 about a suspicious vehicle in front of Cody's Pawn at 3:15 A.M. Deputy Silva stated that she was familiar with the area due to recent burglaries in that area. Upon arrival, she observed only one vehicle parked in the parking lot, a black car with a male person in the driver's seat. She testified that the male appeared to be passed out or asleep.

2. Deputy Silva approached on foot with her flashlight initially "to see if he was okay." She testified that he was still breathing and appeared "almost as if sleeping." She wanted to check his wellbeing since the "area is typical for overdoses." She testified that she could not walk away at this point as an officer and had to check on him.

3. The deputy knocked on the driver's window. Defendant rolled his window down and talked to her. Deputy Silva asked if he was okay. The Defendant replied that he was tired and taking a nap. She immediately observed indicators of impairment. She testified that he was groggy and slow with an odor of alcoholic beverage coming from his breath. He had bloodshot, watery eyes and slurred speech.

4. At this time, Deputy Silva called the DUI Traffic Unit because of the indicators of impairment. The Defendant was subsequently arrested for driving under the influence.

Legal Analysis

The Supreme Court identified three levels of citizen conduct with police: consensual encounter, investigatory stop, and an arrest requiring probable cause that a crime has been or is being committed.[1] An officer may address questions to anyone on the street, and unless the officer attempts to prevent the citizen from exercising his/her right to walk away, such questioning will usually constitute a consensual encounter rather than a stop. *Mays v. State,* 887 So.2d 402 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D2239c], citing *State v. Mitchell,* 638 So.2d 1015, 1016 (Fla. 2d DCA 1994). A welfare check is considered a consensual encounter and involves only minimal police contact. [2]

Regarding consensual encounters with law enforcement, The Florida Supreme Court has held,[3]

> Although there is no litmus-paper test for distinguishing a consensual encounter from a seizure, a significant identifying characteristic of a consensual encounter is that the officer cannot hinder or restrict the person's freedom to leave or freedom to refuse to answer inquiries, and the person may not be detained without a well-founded and articulable suspicion of criminal activity. This Court has consistently held that a person is seized if, under the circumstances, a reasonable person would not conclude that he or she is not free to end the encounter and depart.

Moreover, in *Golphin v. State*,[4] the Florida Supreme Court clarified, "Implicit in the reasonable person standard is the notion that if a reasonable person would not feel free to end the police encounter, but does not, and is not compelled by the police to remain and continue the interaction, then he or she has consented to the encounter." A citizen encounter becomes an investigatory stop, requiring reasonable suspicion, when an officer shows his or her authority in such a manner that a reasonable person would feel compelled to comply with the officer's requests and their freedom of movement is restrained .[5]

In the instant case, the deputy approached the Defendant on a welfare check. The Defendant's vehicle was parked late at night at a closed business in an area known for high crime. The Defendant was sleeping in his car in the parking lot. Based on the evidence presented at the hearing and considering the totality of the circumstances, it was reasonable for the deputy to check on the welfare of the Defendant. The deputies' conduct in asking Defendant to roll down his window did not violate Defendant's constitutional rights. *See Dermio v. State,* 112 So.3d 551 (Fla. 2nd DCA 2013) [38 Fla. L. Weekly D776a]. Defendant was free to leave during the encounter with law enforcement. He could have terminated the encounter but chose to roll down his window and respond to the officer's questions.

Therefore, it is

ORDERED AND ADJUDGED that the Motion to Suppress is **DENIED.**

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[1] *Popple v. State,* 626 So.2d 185, 186 (Fla. 1993).
[2] *Popple v. State,* 626 So.2d 185 (Fla. 1993).
[3] *Popple v. State,* 626 So.2d 185 (Fla. 1993).

[4]*Golphin v. State,* 945 So.2d 1174, 1182 (Fla. 2006) [31 Fla. L. Weekly S845a].

[5]*Parsons v. State,* 825 So.2d 406 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D998a], citing *Popple v. State,* 626 So.2d 185 (Fla. 1993).

* * *

Criminal law—Driving under influence—Blood test—Consent—Defendant's consent to blood test was freely and voluntarily given—Officer's statement that he would arrest defendant, who was awaiting treatment at hospital, that night and transport her to jail for breath test if she did not consent to blood test did not render consent coerced—Motion to suppress blood test results is denied where defendant's consent to blood test was freely and voluntarily given

STATE OF FLORIDA, Petitioner, v. JESSICA L. SUAREZ, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County, Criminal Division. Case No. 2021 CT 003262 SC. October 13, 2021. David L. Denkin, Judge. Counsel: Megan McGinn, Assistant State Attorney, for Petitioner. Tauna Bogle, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS BLOOD TEST RESULTS

THIS CAUSE came to be heard on Defendant's Motion to Suppress. The Court viewed Officer Fischer's police bodycam video and heard the testimony of Officer Fischer and Officer Klein.

The Defendant was involved in a car accident in North Port and sustained injuries. The Defendant was transported from the scene by North Port Fire Rescue to the Sarasota Memorial Hospital in North Port for treatment. Officer Klein conducted the accident crash investigation at the scene and then followed the Defendant to the hospital. The Defendant concedes that prior to being transported to the hospital, Officer Klein had probable cause to arrest the Defendant for DUI. While in the hospital ambulance bay waiting admission, Officer Fischer approached the Defendant who was lying on a gurney wearing a neck brace. Prior to determining how long the Defendant would be hospitalized, Officer Fisher asked the Defendant if she would consent to a blood test. The Defendant said yes but then followed it up with ". . .what are my options." Officer Fisher told her if she provided a blood test she would not be arrested tonight. If she refused, he would have "to go the other route" and take her to jail in Sarasota. He further explained that it didn't mean she would never be charged with anything, it just meant she would not be taken into custody that night.[1] The Defendant consented to providing a blood sample and Officer Klein, who was with Officer Fisher, provided the Defendant with a written *Consent To Take Blood For Alcohol/Drug Testing.* The Defendant signed the document and so did Officer Klein. A nurse from the hospital then took the Defendant's blood.

ANALYSIS

The State does not maintain that the Defendant's blood test results were legislatively authorized under implied consent. §316.1932(1)(c), Fla. Stat. (2020). Instead, the State argues that the Defendant voluntarily consented to a blood draw while at the hospital falling wholly outside the scope of the implied consent law. *State v. Meyers*, 261 So.3d 573 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2647b]; *Robertson v. State*, 604 So.2d 783, 790 (Fla. 1992). The implied consent law is not the exclusive manner by which a blood test may be obtained and admitted into evidence. *State v. Murray*, 51 So.3d 593, 596 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D88b]

The Defendant alleges that based upon the surrounding circumstances she was coerced into consenting to provide a blood test. The Defendant points to the following facts in evidence to support this position: (1) the Defendant had just been in a car accident and was sitting up on a gurney in the bay of the hospital waiting to be admitted when she was asked if she would provide a blood sample, (2) the officer who asked her had a prior "relationship" with her in that he was someone she knew from high school[2], (3) there were two officers with her when she was asked to voluntarily provide a blood sample, (4) the Defendant was advised that if she provided a blood sample she would not be arrested that night but if she refused she would be arrested, taken to jail and there offered a breath test,[3] (5) that if she provided a blood sample that night it did not mean that she would never be arrested. The Defendant argues that these facts show that her consent to the taking of a blood sample was coerced because the officer advised her that if she did not consent, he would arrest her. And a coerced consent requires suppression of the breath test results. *See Mcowen v. State*, 14 Fla. L. Weekly supp. 105b (Fla. 18th Jud. Cir. 2006).

In determining whether the Defendant voluntarily consented to a blood test, the court must make a factual determination based upon the totality of circumstances. *Montes-Valenton v. State*, 216 So.3d 475 (Fla. 2017) [42 Fla. L. Weekly S210a]. The key to admissibility is answering the question of whether the Defendant's consent was knowingly and voluntarily made and was not the result of acquiescence to lawful authority. *State v. Murray*, 51 So.3d 593 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D88b]; *Chu v. State*, 521 So.2d 330 (Fla. 4 DCA 1988).

In *State v. Meyers*, 261 So.3d 573 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2647b], Defendant was observed driving erratically, crashed on a median and then ran from the crash injuring himself. The Defendant was arrested for Reckless Driving and transported by EMS to a hospital for treatment. Without determining how long the Defendant would be hospitalized, the arresting officer immediately requested a blood test from the Defendant. Since the Defendant consented the officer did not inform the Defendant that implied consent law requires submission only to a breath or urine. The court noted that a Defendant can expressly and voluntarily consent to a blood test thus falling outside the scope of implied consent law. *State v. Meyers*, 261 So.3d 573 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2647b]. This Court finds that the evidence presented established by a preponderance of the evidence that the Defendant's consent was freely and voluntarily given. *See Washington v. State*, 653 So.2d 362 (Fla. 1994); *Montes-Valenton v. State*, 216 So.3d 475 (Fla. 2017) [42 Fla. L. Weekly S210a].

IT IS THEREFORE **ORDERED AND ADJUDGED** that Defendant's Motion to Suppress is **DENIED.**

[1]Officer Fischer and the Defendant knew each other from high school and this was discussed between the Defendant and Officer Fischer at this time.

[2]They were aware of each other when in high school, nothing more.

[3]The Defendant stated in her motion and argued that Officer Klein had probable cause to arrest the Defendant for DUI prior to her being transported to the hospital.

* * *

Insurance—Automobile—Windshield repair—Appraisal—Disinterested appraiser—Complaint seeking declaration as to whether insurer's appointed appraiser is "disinterested appraiser" as contemplated by policy satisfies all elements of declaratory action—Motions to dismiss, stay discovery, and strike attorney's fees claim are denied

FLORIDA MOBILE GLASS, a/a/o ALEXU KARTIGANER, Plaintiff, v. ALLSTATE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-067631, Division U. January 19, 2022. Frances M. Perrone, Judge. Counsel: Emilio Stillo, Kevin Richardson, and Andrew Davis-Henrichs, Stillo & Richardson, P.A., Davie, for Plaintiff. Mary C. Littlejohn, Law Offices of Robert J. Smith, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT (DECLARATORY ACTION) FILED MARCH 30, 2021 AND/OR ABATE AND DEMAND INTO APPRAISAL, MOTION FOR PROTECTIVE ORDER REGARDING DISCOVERY REQUESTS, AND MOTION TO DISMISS ANY CLAIM FOR ATTORNEY'S FEES

THIS CAUSE came before the Court for hearing on December 8, 2021 upon consideration of the Defendant's Motion to Dismiss Plaintiff's Amended Complaint (Declaratory Action) filed March 30,

2021 and/or Abate and Demand Into Appraisal, Motion for Protective Order Regarding Discovery Requests, and Motion to Dismiss Any Claim for Attorney's Fees, and the Court having reviewed the motion, the relevant legal authorities, and considering argument of counsel, the Court finds as follows:

On March 30, 2021 Plaintiff filed its Amended Complaint seeking Declaratory Relief disputing the appointment of Defendant's appraiser Auto Glass Inspection Service, Inc. (hereinafter referred to as "AGIS") relating to replacement of a windshield for the insured, Alexu Kartiganer, that occured on or about November 13, 2019. Plaintiff did not attach a copy of the insurance policy to the pleading but quoted certain policy language within it's pleading that requires the appointment of a "competent and disinterested appraiser." The pleading goes on to allege that AGIS is not a "disinterested" appraiser as contemplated by the policy and seeks judicial declaration of same.

Defendant seeks dismissal for the following reasons:[1]

1. Plaintiff failed to properly state a cause of action for declaratory relief in Count IV of its Amended Complaint wherein it alleged Defendant's chosen Appraiser, AGIS, is not disinterested.

In support of its Motion to Dismiss, Defendant has filed an insurance policy, appraisal letters, court Orders, case law, and the Declaration of Jim Larson (President and CEO of AGIS).

A motion to dismiss of a petition for declaratory judgment goes only to entitlement for such a judgment, not to the merits of the case. *Effort Enters of Fla. v. Lexington Insurance Company*, 666 So.2d 930 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D2442b].

After a review of *Higgins v. State Fire and Casualty Company*, 894 So.2d 5 (Fla. 2004) [29 Fla. L. Weekly S533a], and the cases that follow, the Florida Supreme Court has receded from the strict application of declaratory actions described in the premier case of *Columbia Casualty Co. v. Zimmerman*, 62 So.2d 338 (Fla. 1952). The Supreme Court's 2005 decision relied heavily on the 4th District Court of Appeals reasoning in *State Farm Fire & Casualty Co. v Higgins*, 788 So.2d 992 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D111a] when it concluded that "[w]e believe that declaratory judgments are and can increasingly be a valuable procedure for the resolution of insurance coverage disputes. . .". The Florida Supreme Court further concluded that "the Legislature clearly contemplated fact-finding in declaratory actions." This application of Chapter 86 has been consistently applied in recent cases. *See Security First Insurance Company v. Phillips*, 312 So.3d 502 (Fla. 5th DCA 2020) [45 Fla. L. Weekly D1426b] (finding a bona fide controversy existed between the parties as to whether the ground cover damage occurred before or after the inception of the insurance policy) and *Heritage Property and Casualty Insurance Company v. Romanach*, 224 So.3d 262 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1563a] (seeking a determination of whether the chosen umpire was competent and impartial as required by the insurance policy).

When analyzing Plaintiff's pleading, this Court must determine if all the elements of a declaratory action exist in order for Petitioners to proceed under Chapter 86. A declaratory action must have the following elements:

a. a bona fide, actual, present practical need for the declaration;

b. the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to the state of facts or present controversy as to the state of facts;

c. some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts;

d. there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law;

e. the antagonistic and adverse interest are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answers to questions propounded from curiosity.

City of Hollywood v. Lou Petrosino, 864 So.2d 1175 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D163a] (*citing City of Hollywood v. Fla. Power & Light Co*., 624 So.2d 285, 286-87 (Fla. 4th DCA 1993)(*citing May v. Holley*, 59 So.2d 636, 639 (Fla. 1952); *Robinson v. Town of Palm Beach Shores*, 388 So.2d 314 (Fla. 4th DCA 1980)).

When reviewing a Motion to Dismiss, the Court must view the complaint in the light most favorable to the plaintiff and must limit its consideration to the "four corners" of the complaint. *See Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla. 1st DCA 1993) (holding "[i]n determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side.").

This Court finds that Plaintiff's pleading sets forth an issue of fact:

Seeking a declaration dealing with a present, ascertained or ascertainable state of facts or present controversy as to the state of facts or present controversy as to the state of facts, ie: whether AGIS can serve as a disinterested appraiser.

Accordingly, it is therefore, **ORDER** and **ADJUDGED** that:

1. Defendant's Motion to Dismiss Count IV of the Plaintiff's Amended Complaint is hereby **DENIED**.

2. Defendant's Motion to Stay Discovery with regards to Count IV of Plaintiff's Complaint is hereby **DENIED**.

3. Defendant's Motion to Strike Attorney's Fees is hereby **DENIED**.

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[1]Plaintiff voluntarily dismissed without prejudice Counts I, II, and III of Plaintiff's Amended Complaint prior to hearing. Therefore, Count IV was the only count heard.

* * *

Insurance—Personal injury protection—Overdue claims—Summary judgment is entered in favor of medical provider where it is uncontested that insurer did not timely afford PIP coverage and did not timely extend investigative period

FLORES MEDICAL CENTER, INC., a/a/o Mijail Carvahal, Plaintiff, v. ASCENDANT COMMERCIAL INSURANCE INC., Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-036233. November 3, 2021. Jessica G. Costello, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Louis Thomas, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT AND FINAL DECLARATORY JUDGMENT

THIS MATTER having come before the court on November 2, 2021 on Plaintiff's Motion for Final Summary Judgment Timothy A. Patrick appeared for Plaintiff. Louis Thomas appeared for Defendant. The court having reviewed the file, considered the Motion, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds,

1. Plaintiff filed this Declaratory action based upon Defendant's failure to timely afford PIP coverage.

2. In support of its Motion, Plaintiff filed the deposition transcript of Defendant's Claims Corporate Representative, Christopher Garcia.

3. It is undisputed that Defendant did not timely afford PIP coverage and did not timely extend the investigative period under *F.S.* 627.736(4) and (i), respectively.

4. Defendant failed to file anything in opposition to Plaintiff's Motion for Final Summary Judgment.

5. Plaintiff's Motion for Final Summary Judgment was filed on August 23, 2021. As such, the Court applied the new summary judgment standard approved by the Florida Supreme Court on May 1, 2021.

6. The party seeking summary judgment will bear the initial burden of proof in informing the court of the basis for the motion and identifying evidence demonstrating that there is no genuine issue of material fact. *Kitchen v. Ebonite Rec. Ctrs., Inc.,* 856 So. 2d 1083, 1085 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D2401a], (*citing Fisel v. Wynns,* 667 So. 2d 761, 764 (Fla. 1996) [21 Fla. L. Weekly S59a]). The moving party is then entitled to judgment when the non-moving party fails to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. *Holl v. Talcott,* 191 So. 2d 40, 43 (Fla. 1966). "It is not sufficient in defense of a motion for summary judgment to rely on the paper issues created by the pleadings, but it is incumbent upon the party moved against to submit evidence to rebut the motion for summary judgment and affidavits in support thereof or the court will presume that he had gone as far as he could and a summary judgment could be properly entered." *Id.*, (*quoting Hardcastle v. Mobley,* 143 So. 2d 715, 717 (Fla. 3d DCA 1962)).

7. Plaintiff's Motion for Final Summary Judgment is **HEREBY GRANTED**.

8. A Final Declaratory Judgment is entered in favor of Plaintiff as Plaintiff is the prevailing party.

9. The Court reserves jurisdiction as to attorney's fees and costs.

* * *

Insurance—Discovery—Depositions—Non-parties—Protective order—Standing—Plaintiff has standing to seek protective order concerning deposition of non-party where plaintiff is asserting attorney-client privilege in the testimony sought

SASA ZIVULOVIC, Plaintiff, v. METROPOLITAN CASUALTY INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-041262, Division J. February 26, 2022. J. Logan Murphy, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Catherine V. Arpen, Dutton Law Group, Tampa, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR PROTECTIVE ORDER AND DENYING DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S MOTION FOR PROTECTIVE ORDER

BEFORE THE COURT are Plaintiff's Motion for Protective Order, filed February 8, 2022, and Defendant's Motion to Strike Plaintiff's Motion for Protective Order of Non-Party, filed February 11, 2022. On the parties' request, the Court convened a time-sensitive hearing on February 18, 2022, to address the motions.

Upon consideration of the parties' written motions and argument at the hearing, the Court finds Plaintiff has standing to pursue a protective order concerning the depositions at issue because he is asserting a personal privilege in the testimony sought. *See GEICO Cas. Co. v. MSP Recovery Claims*, 317 So. 3d 225, 227-28 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D479b]. But he has failed to demonstrate the requisite "good cause" to preclude the depositions. Fla. R. Civ. P. 1.280(c). Contrary to Defendant's position, however, the Court cannot find that Plaintiff has waived the attorney-client privilege in his communications with former counsel. Plaintiff retains the ability to assert objections based on the privilege, which the parties may bring to the Court for consideration in context of the examination.

IT IS therefore **ORDERED** as follows:

1. Plaintiff's Motion for Protective Order is **DENIED.**

2. The parties will reschedule the depositions, currently scheduled for March 7, 2022 at 2:00 p.m. and 2:15 p.m., by March 1, 2022,[1] and the depositions must occur by April 8, 2022.

3. Defendant's Motion to Strike Plaintiff's Motion for Protective Order of Non-Party, which the Court construes as a response to Plaintiff's motion for protective order, is **DENIED**.

[1]Because of a delay in receiving and entering a proposed order, the Court is providing the parties an extra day to comply with the order.

* * *

Contracts—Insurance—Breach by insurer—Dismissal—Lack of specific allegations

MANASOTA ACCIDENT & INJURY CENTER, LLC, a/a/o Stacie Matthews, Plaintiff, v. FIRST ACCEPTANCE INSURANCE COMPANY, INC., Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 21-CC-012393, Division I. February 6, 2022. Leslie K. Schultz-Kin, Judge. Counsel: Lisa Hassemann-Arana, Ft. Lauderdale, for Plaintiff. Steven T. Sock, Dutton Law Group, Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT, OR IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT AND FOR PROTECTIVE ORDER

THIS CAUSE having come before the Court upon Defendant's Motion to Dismiss or for More Definite Statement and Motion for Protective Order, and argument having been heard by this Court on January 24, 2022, having been fully advised in the premises, it is **ORDERED AND ADJUDGED** that:

1. Defendant's Motion to Dismiss is GRANTED without prejudice.

2. The Defendant put forth that the Complaint lacks specificity for the Defendant to know what Plaintiff is asserting at issue in order to frame a defense.

3. The Court agrees with *Abdo v. Abdo*, 263 So.3d 141 (Fla. 2nd DCA, December 21, 2018) [44 Fla. L. Weekly D58a], that the Complaint must make *specific* allegations to allege breach of contract or dismissal is warranted.

4. Plaintiff has ten days from this Order to file an Amended Complaint.

* * *

Torts—Conversion—Automobile dealership's removal of finance company's valid lien on trade-in vehicle through submission of forged lien satisfaction form to Department of Motor Vehicles and subsequent sale of vehicle to innocent purchaser constitutes conversion—Damages—Proper measure of damages for conversion is fair market value of vehicle, not merely remaining payment owed on vehicle—Exception to general rule of damages for common law conversion, holding that one who has special interest in converted property can only recover value of interest in property, is not applicable where dealership and finance company were never in privity of contract

NATIONWIDE FINANCIAL SERVICES, LLC, Plaintiff, v. HOLLYWOOD IMPORTS LIMITED, INC. D/B/A AUTONATION HONDA HOLLYWOOD, Defendant. HOLLYWOOD IMPORTS LIMITED, INC. D/B/A AUTONATION HONDA HOLLYWOOD, Third Party Plaintiff, v. JAVIER FERNANDO MURCIA, Third Party Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO 13-012404 (61). January 26, 2022. Corey Amanda Cawthon, Judge. Counsel: Ronald R. Torres, Torres Law Offices, Weston, for Plaintiff Nationwide Financial Services, LLC. Richard A. Ivers, Law Office of Richard A. Ivers, Coral Springs; and Nancy W. Gregoire, Birbaum, Lippman & Gregoire, PLLC, Fort Lauderdale, Co-Counsel for Defendant Hollywood Imports Limited, Inc.

ORDER ON PLAINTIFF'S MOTION FOR ENTRY OF FINAL JUDGMENT AND ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON DAMAGES

THIS CAUSE, having come before the Court on April 7, 2021 for hearing on Plaintiff's Motion for Entry of Final Judgment and on Defendant's Motion for Summary Judgment on Damages, the Court having reviewed the Motions and the relevant portions of the Court file; heard argument of counsel; reviewed relevant legal authorities; and being sufficiently advised in the premises, finds as follows:

BACKGROUND

1. Plaintiff, Nationwide Financial Services, Inc. ("Nationwide") filed its Complaint in this case on or about December 3, 2013, which pertains to an action for common law conversion of a 2012 Volkswagen automobile.

2. In its Complaint, Nationwide alleged that on or about April 20, 2012, Javier Fernando Murcia ("Murcia") purchased a 2012 Volkswagen automobile from Motor Cars of Stuart pursuant to a retail installment contract, which was thereafter assigned to Nationwide, and required nine monthly payments of $2,018.45 beginning in May 2012.

3. Further, Nationwide stated that on or about July 28, 2012, Murcia purchased a 2010 BMW 7 Series automobile from Motor Cars of Stuart pursuant to a retail installment contract, which was thereafter assigned to Nationwide.

4. Nationwide further alleged in its Complaint that, pursuant to a Cross Collateralization Agreement dated August 27, 2012 between Nationwide and Murcia, a default on either retail installment contract would be deemed a default on the other retail installment contract.

5. According to Nationwide, in April 2013, Murcia traded in his 2012 Volkswagen automobile to the Defendant, Hollywood Imports Limited, Inc. d/b/a Autonation Honda Hollywood ("Hollywood") presumably as part of a transaction with Hollywood to purchase a different automobile. Because Nationwide still maintained a perfected lien of the 2012 Volkswagen, Hollywood was obligated to satisfy Murcia's debt to Nationwide as part of the trade in and new sales transaction.

6. However, as alleged in Nationwide's Complaint, without Nationwide's knowledge or consent, Hollywood submitted a Lien Satisfaction document to the Florida Department of Motor Vehicles which contained the forged signature of the Nationwide's authorized representative.

7. Nationwide has alleged that, at the time when Hollywood came into possession of the forged Lien Satisfaction document, Murcia's debt to Nationwide had not been paid in full as Murcia had only made 8 of the 9 required monthly payments.

8. Nationwide's contention is that Hollywood willfully and deliberately forged Nationwide's signature in order to avoid payment of Murcia's debt to Nationwide, and thus converted the vehicle to its own use and ownership.

9. On or about July 12, 2016, Hollywood was granted leave by the Court to file its Third Party Complaint, which was subsequently filed on or about July 19, 2016.[1]

10. In its Third Party Complaint, Third Party Plaintiff, Hollywood, asserted an action for breach of contract, fraud, and indemnity against Third Party Defendant, Murcia. Therein, Hollywood alleged that, at the time Murcia brought the trade-in vehicle to Hollywood, Murcia made express written representations that there were no liens or encumbrances on the trade-in vehicle.

11. Specifically, Hollywood stated that Murcia executed a retail purchase agreement whereby he received an allowance of $17,000 for the trade in vehicle toward the purchase of a new vehicle, under the terms of which agreement Murcia represented that there were no liens or encumbrances on the trade in vehicle and that he had clear title thereto.

12. Hollywood also stated in its Third Party Complaint that Murcia also agreed that, if the actual amount owed on the trade in vehicle was greater than the amount he listed on the retail purchase agreement, then he would pay off the difference to Hollywood.

13. According to Hollywood, Murcia also executed a Title Payoff and Guarantee form, wherein he represented he would deliver title of the trade in vehicle free and clear of all liens and encumbrances.

14. Hollywood also stated in the Third Party Complaint that it was Murcia or his agent who submitted the purported forged lien satisfaction to Hollywood, though there is no dispute that, at some point Hollywood did acquire knowledge that Nationwide was a lienholder of the 2012 Volkswagen, an issue it never sought to verify or clarify with Nationwide.

15. The Court subsequently held a non jury trial in this action on August 8, 2017 and on August 25, 2017. At the conclusion of trial, the Court entered judgment in favor of the Defendant, Hollywood, as to the underlying action, and in favor of Third Party Defendant, Murcia, as to the Third Party Complaint.

16. Following an appeal of the Court's judgment, the appellate court reversed the trial court's final judgment and remanded the case for further proceedings.

17. The Plaintiff's Motion for Entry of Final Judgment and Defendant's Motion for Summary Judgment on Damages were filed and followed the appellate court's decision.

18. On or about August 27, 2021, counsel for Third Party Defendant, Murcia, filed a Suggestion of Death indicating that Murcia died in June 2021. Subsequently, on January 19, 2022, Defendant/Third Party Plaintiff, Hollywood's Motion for Substitution of Third Party Defendant was granted, and Ildko Gutradt, as the surviving spouse and/or personal representative of Murcia, was substituted as Third Party Defendant in this action.

ANALYSIS

A. CONVERSION

19. Florida law has long maintained that a lienholder with possession or right to possession may maintain an action for conversion of such property. *Fletcher v. Dees,* 101 Fla. 402 (Fla. 1931).

20. As such, a lienholder is considered to be an "owner" for the purposes of conversion if he has a present right of possession. *Bel-Bel Intern. Corp. v. Community Bank of Homestead,* 162 F.3d 1101, 1108 (11th Cir. 1998) citing *Dekle v. Calhoun,* 53 So. 14, 15 (Fla. 1910).

21. Nationwide contends that, when Murcia defaulted on his monthly payment obligations, Nationwide's right to possession of the vehicle was triggered in accordance of the terms of the contract between Murcia and Nationwide, and pursuant to Florida Statutes 679.609, which governs a secured party's right to take possession after default. This Court agrees.

22. Conversion is an intentional tort which does not require actual intent, as liability for conversion does not require proof of knowledge or intent to deprive one of his property. *Stearns v. Landmark First Nat. Bank of Fort Lauderdale,* 498 So.2d 1001, 1002 (Fla. 4th DCA 1986); *Eagle v. Benefield-Chappel, Inc.* . 476 So.2d 716, 718 (Fla. 4th DCA 1985).

23. The tort of conversion may be established despite evidence that the Defendant took or obtained property based upon the mistaken belief that the Defendant had a right to possession, since malice or specific wrongful intent is not an essential element of the action. *Seymour v. Adams,* 638 So.2d 1044, 1047 (Fla. 5th DCA 1994); *Ciamor Marcy, Inc. v. Monteiro Da Costa,* 508 So.2d 1282, 1284 (Fla. 3d DCA 1987); *City of Cars, Inc. v. Simms,* 526 So.2d 119, 120 (Fla. 5th DCA 1988) *review denied,* 534 So.2d 401 (Fla. 1988).

24. Further, a conversion consists of an act in derogation of the plaintiff's possessory rights, and any wrongful exercise or assumption of authority over another's goods depriving him of the possession, permanently, or for an indefinite time is a conversion. *Star Fruit Co. v. Eagle Lake Growers Inc.,* 33 So.2d 858, 860 (Fla. 1948).

25. In this case, at a minimum, even if unintentional or based upon a mistaken belief, Hollywood's removal of Nationwide's valid lien through submission of a Lien Satisfaction form directly to the DMV, thus involuntarily terminating Nationwide's rights as a lienholder to obtain possession of the vehicle, and later selling the vehicle to an

innocent purchaser, constitutes conversion based on the case law cited above.

B. DAMAGES

26. Though Hollywood has not expressly admitted that its acts constitute conversion in this matter, it appears that the main issue of contention between the parties at this time is the amount of damages that may be due to Nationwide as a result of Hollywood's resale of the 2012 Volkswagen that was traded to it by Murcia.

27. Nationwide contends that it is entitled to recover the fair market value of the subject vehicle (subject to the County Court's $15,000.00 jurisdictional limit as it existed at the time of the 2017 non jury trial) plus prejudgment interest.

28. Alternatively, Hollywood contends that Nationwide would only be entitled to recover the value of its interest in the subject vehicle, or the amount it is owed rather than the value of the vehicle itself. In this case, those damages would be Murcia's final payment of $2,018.45 on the subject vehicle plus interest from the date of default.

29. It is for the following reasons that the Court agrees with the Plaintiff's contention as to calculation of damages in this action.

30. Florida law is well settled that the measure of damages in an action for conversion is the fair market value of the property at the time of conversion plus legal interest to the date of the verdict. *Exxon Corp. v. Ward,* 438 So.2d 1059 (Fla. 4th DCA 1983); *Roger Holler Chevrolet Company v. Arvey,* 314 So.2d 633, 634 (Fla. 4th DCA 1975); *Cutler v. Pelletier,* 507 So.2d 676 (Fla. 4th DCA 1987); *Lilly v. Bronson,* 129 Fla. 675, 177 So. 218 (Fla. 1937); *Handley v. Home Insurance Company of New York,* 112 Fla. 225, 150 So. 902 (Fla. 1933); *Page v. Matthews,* 386 So.2d 815 (Fla. 5th DCA 1980); *Bertoglio v. American Sav. & Loan Ass'n of Florida,* 491 So.2d 1216 (Fla. 3d DCA 1986); *Foley v. Dick,* 436 So.2d 139 (Fla. 2d DCA 1983); *Bergen Brunswig Corp. v. State, Etc.,* 415 So.2d 765 (Fla. 1st DCA 1982).

31. In tort actions, the measure of damages seeks to restore the victim to the position he would be in had the wrong not been committed. *Ashland Oil, Inc. v. Pickard,* 269 So.2d 714, 723 (Fla. 3d DCA 1972).

32. In this case, had Hollywood's conversion of the 2012 Volkswagen not occurred, then Nationwide would have been able to repossess and sell the collateral following Murcia's payment default. Because Florida law requires that the disposition of repossessed property be conducted in a commercially reasonable manner, Nationwide would have been expected to recover the fair market value of the subject vehicle at auction, and not merely the $2,018.45 balance of Murcia' s contract debt. Moreover, as noted previously by Nationwide, it would not have enjoyed a financial windfall by recovering the fair market value at auction because, after satisfaction of Murcia's contractual obligations and reimbursement of collection expenses as set forth in Florida Statutes 679.615, the net surplus proceeds recovered from the auction sale would have been returned to Murcia. Thus, restoring Nationwide to the position it would have been in prior to Hollywood's conversion would require recovery of the fair market value of the subject vehicle.

33. Hollywood suggests that the Court should limit the amount of Plaintiff's damages by applying the only noted exception to the general rule of damages for common law conversion—that one who has a special interest in personal property can only recover in a conversion action the value of his interest in the property. *Page v. Matthews,* 386 So.2d 815 (Fla. 5th DCA 1980); *Mercury Motor Express, Inc. v. Crockett,* 422 So.2d 358 (Fla. 1st DCA 1982).

34. However, as outlined in Plaintiff, Nationwide's previously filed Memorandum of Law, Florida courts have only applied the special interest exception to conversion actions wherein the Defendant who converted the property and the Plaintiff who was the victim of the conversion were initially in privity of contract.

35. Based on the case law referenced by both Nationwide and Hollywood in various filings regarding this issue, the Court agrees with Plaintiff's position that the exception to the general rule of fair market value damages in common law conversion does not apply to this case because Hollywood was not a party to, and was therefore a "stranger" to, the contract between Nationwide and Murcia. Here, it is undisputed that Nationwide and Hollywood were never in privity of contract. Even Hollywood's own filings on the issue argue that Hollywood is not a "stranger" to Nationwide because Hollywood was in privity of contract with *Murcia.* There does not exist a contention, nor any information to support such a contention, that Hollywood was, at any point, in privity with Nationwide as it relates to this matter.

36. Because Nationwide and Hollywood were never in privity of contract, the special interest exception to fair market value damages does not apply to this case. As such, the Court is bound to apply the fair market value of the subject vehicle as the proper measure of damages for common law conversion.

37. At trial, the Plaintiff introduced the following evidence to establish the fair market value of Murcia's 2012 Volkswagen:

Hollywood's appraisal dated April 13, 2013; Appraisal Amount: $16,500.00

Retail Installment Contract dated April 30, 2013; Trade-in Allowance: $17,000.00

Testimony of Jeff Freedman: Valued between $19,000.00 and $21,000.00

Retail Installment Contract dated May 25, 2013; Sold to bona fide purchaser for $21,791.70

38. It is not disputed that Hollywood did not proffer any testimony or exhibits at trial to rebut the fair market value presented by Nationwide.

39. Consistent with the Florida Supreme Court's holding in *Wilson v. Bankers Inv. Co.,* 47 So.2d 779 (Fla. 1950), which presented substantially similar facts to the instant case and which this Court agrees is controlling authority in this case, when Hollywood improperly removed Nationwide's lien and procured a Florida Certificate of Title showing Murcia's 2012 Volkswagen to be free of debt, and thereafter placed the car in the hands of an innocent purchaser who relied upon that certificate, Hollywood became responsible to Nationwide for conversion of the security.

40. In this case, the final judgment should reflect the fair market value of the 2012 Volkswagen (subject to the County Court's $15,000.00 jurisdictional limit as it existed at the time of the 2017 non jury trial) as the proper measure of damages.

CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** that Plaintiff's Motion for Entry of Final Judgment in Favor of Plaintiff is hereby **GRANTED**. Defendant's Motion for Summary Judgment on Damages is hereby **DENIED**. Further, the Plaintiff, Nationwide Financial Services, LLC, is hereby directed to submit to this Court for entry a proposed, Final Judgment in favor of Plaintiff and against the Defendant, Hollywood Imports Limited, Inc. d/b/a Autonation Honda Hollywood, in the principal amount of $15,000.00 plus prejudgment interest at the legal rate from May 25, 2013 until the date of judgment with an affidavit in support of the prejudgment interest amount sought.

[1]For the sake of brevity, other procedural history, including the filing of Defendant's initial Answer and Affirmative Defenses, Plaintiff's filing of its Amended Complaint, etc. has been omitted where unnecessary for purposes of this Order.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Summary judgment—Supporting affidavit—Hearsay—Exceptions—Business records—Medical provider's affidavit in support of summary judgment is insufficient where the affidavit failed to satisfy four elements of hearsay exception for business records—Further, records attached to affidavit are not provider's own business records—Policy's notice of election of insurer's intent to use PIP schedule of maximum charges as payment limitation set ceiling on PIP charges, not floor for such charges—No merit to argument that policy is unlawful hybrid of reimbursement methodologies—Insurer was required to reimburse only 80% of reasonable charge that was billed at less than allowable amount under fee schedule and was not required to raise PIP charge to amount prescribed by schedule of maximum charges or to reimburse 100% of billed amount

OCEAN CHIROPRACTIC AND HEALTH CENTER, INC., a/a/o Rolston Athill, Plaintiff v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COWE20005813, Division 83. December 29, 2021. Order Denying Plaintiff's Motion for Rehearing, January 18, 2022. Ellen Feld, Judge. Counsel: John C. Daly Jr., Daly & Barber, P.A., for Plaintiff. Pablo M. Arrue, Hamilton Miller & Birthisel, LLP, for Defendant.

ORDER DENYING PLAINTIFF'S RENEWED MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come before the Court upon Plaintiff's Renewed Motion for Summary Judgment/Disposition As To Statutory Fee Schedule Amount, and after presentations of the parties, and this Court being otherwise advised in the premises, it is hereby Ordered and Adudged as follows:

On 9/21/21, Plaintiff filed its renewed motion for summary judgment attaching a typed affidavit with several pen-and-ink strike throughs and amendments. The affidavit failed to strictly comply with the requirements of F.S.§90.902 to permit the admission of the attached documents under the business records exception to hearsay. *Yisrael v. State,* 993 So. 2d 952 (Fla. 2008) [33 Fla. L. Weekly S577a] Holding: "if evidence is to be admitted under one of the exceptions to the hearsay rule, it must be offered in strict compliance with the requirements of the particular exception."

"To secure admissibility under the business records exception to hearsay, F.S.§90.803(6)(a), the proponent must show that (1) the record was made at or near the time of the event; (2) was made by or from information transmitted at or near the time by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record. *Yisrael* citing *Jackson v. State,* 738 So. 2d 382, 386 (Fla. 4th DCA 1989).

Plaintiff's affidavit failed to satisfy the four elements of the hearsay exception for business record. Moreover, Plaintiff's counsel represented that the records attached to the affidavit were received in discovery from defense counsel and not from Plaintiff's own business records. Therefore, the Court finds the attached documents to be unauthenticated by the affiant.

Plaintiff's evidence is insufficient to sustain summary judgment and is therefore denied.

In *MRI Associates of Tampa, Inc., v. State Farm Mutual Automobile Insurance Company.* No. SC19-1390, issued 12/9/21, the Supreme Court answered the following certified question in the negative.

"Does section 627.736(5)(a)Florida Statutes 2013 preclude an insurer that elects to limit PIP reimbursements based on the schedule of maximum charges from also using the separate statutory factors for determining the reasonableness of charge?"

Plaintiff's demand letter did not include an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due. Plaintiff's demand did not specify it was due $7.33 for CPT 98941 as it now apparently claims. In fact, Plaintiff's itemized statement stated a zero balance ($0.00) for each CPT 98941 charged. Plaintiff's demand did not specify Plaintiff sought the difference between State Farm's reimbursement of $60.00 and Plaintiff's belated, post suit claim to $67.33.

To prevail at summary judgment "The Plaintiff must either disprove affirmative defenses or establish their legal insufficiency." *Howdeshell v. First National Bank of Clearwater,* 369 So. 2d 432 (Fla. 2d DCA 1979). As Plaintiff did not comply with the demand letter condition precedent by specifying the exact amount claimed to be due for CPT 98941, Plaintiff did not overcome State Farm's affirmative defense of failure of demand letter condition precedent. See *David Rivera v. State Farm Mutual Automobile Insurance Company,* No. 3D21-27 (3d DCA 2021) [46 Fla. L. Weekly D447a].

Plaintiff's summary judgment statement of the issue, on page one of its renewed motion states:

> **The issue is whether the PIP Statute and policy requires an insurance company to pay either 80% of 200% of Medicare or the full amount submitted by a medical provider when the charge submitted is less than the allowable amounts, which is 200% of Medicare.**

In light of the Florida Supreme Court's recent answer to the certified question in *MRI Associates of Tampa, Inc., v. State Farm Mutual Automobile Insurance Company,* No. SC18-1390, issued 12/9/21, this court finds that State Farm was required to reimburse only 80% of a reasonable charge was not statutorily or contractually required to elevate Plaintiff's own PIP charge to the schedule of maximum charges rate nor reimburse Plaintiff 100% of the amount billed. State Farm was required to reimburse Plaintiff 80% of its reasonable $75.00 charge for CPT 98941, which it did when it reimbursed Plaintiff $60.00.

The relevant provisions of the PIP Statute related to an insurer's reimbursement of PIP charges are as follows: F.S.§627.736(1)(a); F.S.§627.736(5)(a); F.S.§627.736(5)(a)1; and F.S.§627.736(5)(a)5.

The first provision, F.S.§627.736(1)(a) limits a PIP insurer's liability to 80% of a reasonable PIP charge. It provides, in pertinent part:

> **627.736 Required personal injury protection benefits; exclusions; priority; claims.—**
>
> (1) REQUIRED BENEFITS.—An insurance policy complying with the security requirements of *s.627.733* must provide personal injury protection. . .as follows:
>
> (a) *Medical benefits*.—Eighty percent of all reasonable expenses. . .
>
> for medically necessary medical, surgical, X-ray, dental, and rehabilitative services. . .

The plain language of this provision reflects its mandatory nature which clearly limits an insurer's liability to the reimbursement of 80% of a reasonable PIP charge. An insurer is required to reimburse 80% of a reasonable PIP charge-no more and no less. Nowhere does the provision mandate payment of 100% of a reasonable PIP charge. Nowhere does the provision compel the insurer's involuntary assumption of the statutorily imposed, and contractually agreed upon 20% insured's co-pay requirement.

The second provision, F.S.§627.736(5)(a), provides the methodology for assessing and determining the reasonableness of a PIP charge. In this section, the legislature provides several factors to aid the trier of fact in the determination of reasonable PIP charges, it provides:

F.S.§627.736(5) CHARGES FOR TREATMENT OF INJURED PERSONS.

(a) A physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person for a bodily injury covered by personal injury protection insurance **may charge the insurer and injured party only a reasonable amount pursuant to this section** for the services and supplies rendered, and the insurer providing such coverage may pay for such charges directly to such person or institution lawfully rendering such treatment if the insured receiving such treatment or his or her guardian has countersigned the properly completed invoice, bill, or claim form approved by the office upon which such charges are to be paid for as having actually been rendered, to the best knowledge of the insured or his or her guardian. However, **such a charge may not exceed the amount the person or institution customarily charges for like services or supplies. In determining whether a charge for a particular service, treatment, or otherwise is reasonable, consideration may be given to evidence of usual and customary charges and payments accepted by the provider involved in the dispute, reimbursement levels in the community and various federal and state medical fee schedules applicable to motor vehicle and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.(Emphasis added)**

The third provision, F.S.§627.736(5)(a)1., provides the insurer with a permissive payment limitation option, elected by the insurer at its discretion, provided its policy gives proper notice of the election, it provides, in pertinent part:

1. The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:

f. For all other medical services, supplies, and care, 200 percent of the allowable amount under:

(I) The participating physicians fee schedule of Medicare Part B, except as provided in sub-sub-subparagraphs (II) and (III).

(II) Medicare Part B, in the case of services, supplies, and care provided by ambulatory surgical centers and clinical laboratories.

(III) The Durable Medical Equipment Prosthetics/Orthotics and Supplies fee schedule of Medicare Part B, in the case of durable medical equipment.

However, if such services, supplies, or care is not reimbursable under Medicare Part B, as provided in this sub-subparagraph, the insurer may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation, as determined under s. *440.13* and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided. Services, supplies, or care that is not reimbursable under Medicare or workers' compensation is not required to be reimbursed by the insurer.

This provision allows the insurer to limit PIP charges to the schedule of maximum charges calculated at 200% of the Medicare Part B Physicians Fee Schedule or 100% of the Florida Worker's compensation reimbursement rate.

The payment limitation can only be applied to charges which exceed the schedule of maximum charges rates, as it operates as a cap on unreasonable PIP charges. *MRI Associates of Tampa, Inc., v. State Farm Mutual Automobile Insurance Company,* No. SC18-1390, holding: "By its very nature, a limitation based on a schedule of maximum charges establishes a ceiling but not a floor."

The fourth provision of F.S.§627.736(5)(a)5., states in pertinent part:

If a provider submits a charge for an amount less than the amount allowed under subparagraph 1., the insurer may pay the amount of the charge submitted.

The amount allowed under **subparagraph 1**., is equal to 80% of the schedule of maximum charges rate, which for CPT 98941 was $67.33. Therefore, to trigger the permissive provisions in F.S.§627.736(5)(a)5., Plaintiff's charge for CPT 98941 would have had to have been less than $67.33. Plaintiff charged $75.00, therefore the permissive provisions of F.S.§627.736(5)(a)5 are not even triggered under the facts of the instant case.

Plaintiff's $75.00 charge for CPT 98941 is objectionably reasonable based on F.S.§627.736(5) criteria. F.S.§627.736(5)(a) provides that a provider may charge the insured and injured party only a reasonable charge. Plaintiff charged State Farm $75.00 for CPT 98941. This was Plaintiff's own charge submitted voluntarily for payment to State Farm, an amount customarily charged by Plaintiff for CPT 98941.

The Medicare Part B Physicians Fee Schedule allowed $42.08 for CPT 98941. The Medicare Part B Physicians Fee Schedule is a federal medical fee schedule applicable to automobile and other insurance coverages, and a reasonableness criterion provided in F.S.§627.736(5)(a).

The schedule of maximum charges rate for CPT 98941 was $84.16. As Plaintiff's charge was $75.00, it cannot be said its charge was presumptively unreasonable as it was below the payment limitation rate provided in F.S.§627.736(5)(a)1.

Taking the average of the Plaintiff's $75.00 charge, the $42.08 Medicare Part B rate, and the $84.16 schedule of maximum charges rate, yields $67.32, of which 80% equals $53.86. Therefore, applying the reasonableness methodology in F.S.§627.736(5)(a), to the facts, Plaintiff's $75.00 charge, was not presumptively unreasonable as to permit State Farm to impose the schedule of maximum charges payment limitation in F.S.§627.736(5)(a)1.

State Farm, relying on F.S.627.736(5)(a) criteria, considered Plaintiff's charge objectively reasonable, and was therefore required to reimburse 80% of the charge or $60.00, the amount State Farm actually reimbursed the Plaintiff.

The Court finds that because an insurer's liability is limited by F.S.§627.736(1)(a) to 80% of a reasonable PIP charge; because Plaintiff did not specify the exact amount claimed to be due for CPT 98941 in its demand letter; because Plaintiff's charge was presumptively reasonable; because neither F.S.§627.736 nor State Farm's policy require State Farm elevate a provider's charge to the schedule of maximum charges, or require reimbursement of 100% of a reasonable PIP charge; and finally, because the Florida Supreme Court ruled that the schedule of maximum charges operates as a payment limitation, not a floor, Plaintiff's renewed motion for summary judgment is therefore, **DENIED WITH PREJUDICE.**

ORDER DENYING PLAINTIFF'S MOTION FOR REHEARING AND FINAL JUDGMENT FOR DEENDANT

THIS CAUSE having come on to be heard on Plaintiff's Motion for Rehearing, the Court having been otherwise fully advised in the premises on January 18, 2022, it is hereby,

ORDERED AND ADJUDGED:

1. Plaintiff's Motion for Rehearing is **DENIED**.

2. **IT IS FURTHER, ORDERED AND ADJUDGED** that Final Judgment is hereby entered in favor of Defendant, State Farm Mutual Automobile Insurance Company, and against Plaintiff, Ocean Chiropractic And Health Center, Inc. a/a/o Rolston Athill. The Plaintiff, Ocean Chiropractic and Health Center, Inc. a/a/o Rolston Athill take nothing by this action and that Defendant, State Farm Mutual Automobile Insurance Company shall go hence without day.

* * *

Insurance—Personal injury protection—Motion to dismiss or for more definite statement is denied—Complaint is not required to allege legal reason medical provider disagrees with insurer's calculation of benefits—Complaint is not required to anticipate insurer's defenses or set forth provider's avoidances

POMPANO SPINE CENTER, LLC, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX21059467, Division 53. February 11, 2022. Robert W. Lee, Judge.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND MOTION FOR MORE DEFINITE STATEMENT, WITH NOTICE OF IMPENDING DEFAULT

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. 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.

Unlike other complaints that this Court has reviewed involving Allstate as a defendant, the Plaintiffs' allegations in this cases is not lacking in clarity. They have set forth the dates of treatment, how much the Plaintiff billed, how much Allstate paid, and a reasonable estimate of how much remains in dispute.

As is clear from a review of Allstate's Motion, 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 its charges are reasonable. If the plaintiff meets its burden, the burden then shifts to the insurer to demonstrate why its 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 and Motion for More Definite Statement are DENIED. Additionally, the Defendant is advised that the Court, on its own motion pursuant to Rule 1.500(b), shall enter a default against the Defendant without further notice or hearing unless within 10 days of the date of this Order, the Defendant shall FILE an ANSWER to the Complaint.

* * *

Civil procedure—Insurance—Default—Motion to vacate default is denied where insurer failed to establish excusable neglect, due diligence, and meritorious defense

PALMER CHIROPRACTIC, INC., Plaintiff, v. LM GENERAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. CONO20021691, Division 71. February 10, 2022. Louis Schiff, Judge. Counsel: Heather May Owens, Law Firm of Cindy Goldstein, P.A., Coral Springs, for Plaintiff. Aileen Graffe-McDonley, Law Office of Ignacio M. Sarmiento, London, KY, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO VACATE DEFAULT

THIS CAUSE having come to be heard on February 7, 2022, before this Court on Defendant's Motion to Vacate the Default, and the Court, after review of the motions, heard argument of counsel, it is hereby ORDERED AND ADJUDGED that:

Plaintiff filed this action for unpaid PIP benefits on or about November 13, 2020. Defendant was served with the complaint on or about November 17, 2020, and failed to file any responsive pleadings.

Plaintiff moved for default on February 10, 2021, which the Court granted on the same day.

On or about December 14, 2021, Defendant filed its Motion to Vacate and proposed Answer and Affirmative Defenses. This was filed 13 months after the Defendant was served.

Defendant's Motion to Vacate, was filed more than 10 months after entry of Default.

The Motion to Vacate is untimely and insufficient to establish due diligence.

Moreover, Defendant did not file the affidavit of its litigation adjuster, Nicole Genovaldi-Gerena, concurrently with its Motion to Vacate, but rather delayed filing the executed affidavit for nearly a month.

The Court finds the affidavit filed is self-serving and legally insufficient to establish due diligence.

Since Defendant has failed to establish all three prongs of excusable neglect, meritorious defense, and due diligence, Defendant's motion is denied.

Final Default Judgment is entered in favor of Plaintiff with the amount to be determined at a later date.

Mediation to be scheduled by the parties within 30 days to occur within 60 days, representatives of each party must be in attendance.

* * *

Civil procedure—Default—Vacation—Motion to vacate default that was not submitted under oath or with supporting affidavit is summarily denied—Statement that affidavit will be filed is insufficient

EXPERIENCE CHIROPRACTIC CENTER, LLC, Plaintiff, v. SECURITY NATIONAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX21049800, Division 53. February 17, 2022. Robert W. Lee, Judge.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO VACATE OR SET ASIDE DEFAULT

THIS CAUSE came before the Court for consideration of the Defendant's Motion to Dismiss or Motion to Set Aside Default, and the Court's having reviewed the Motion and the relevant legal authorities; having made a thorough review of the matters filed of record; and having been sufficiently advised in the premises, the Court finds as follows:

Before a motion to vacate a default can be considered on the merits, the moving party must submit the motion under oath or with support-

ing affidavit. *See Garcia v. State*, 306 So.3d 212, 215 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1402b]; *Dodrill v. Infe, Inc.,* 837 So.2d 1187, 1187 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D558d]; *Mieles v. Lugo*, 26 Fla. L. Weekly Supp. 865a (5th Cir. App. 2019); *Irkhin v. Simonelli*, 25 Fla. L. Weekly Supp. 996c, 997 (12th Cir. App. 2017); *Woodard v. Mid-Atlantic Finance Co.*, 2015 WL 12659998, *1 (Fla. 4th Cir. 2005). *See also Waterson v. Seat & Crawford*, 10 Fla. 326, 330 (1863) (defendant submitted affidavit demonstrating meritorious defense and unavoidable neglect); *Orchard Grove Ass'n, Inc. v. Gregory*, 26 Fla. L. Weekly Supp. 114a, 115 (17th Cir. Ct. 2018) (defendant submitted verified motion setting forth excusable neglect). Because the Defendant did not submit the motion under oath or with any supporting affidavit, the Motion is summarily DENIED without prejudice. Merely stating that an affidavit will be filed at some later point is insufficient.

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Civil procedure—Insurance—Discovery—Motion for protective order filed seven months after issuance of order setting pretrial deadlines and near to discovery cutoff date is denied

NORTH BROWARD RADIOLOGISTS, P.A., Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE21011180, Division 53. February 10, 2022. Robert W. Lee, Judge.

ORDER DENYING DEFENDANT'S MOTION FOR PROTECTIVE ORDER AND MOTION TO STAY ALL DISCOVERY

This cause came before the Court for consideration of the Defendant's Motion for Protective Order Regarding Deposition and Motion to Stay All Discovery Pending Hearing on Defendant's Motion for Summary Judgment on the 9810A Policy and Status Conference to Set Hearing on Policy. As the Court understands the progress of the case, this Court issued its Uniform Order Setting Pretrial Deadlines on July 16, 2021. Now, seven months later, and approaching the discovery cutoff and other pretrial deadlines, the Defendant asks the Court to exercise its discretion to issue a protective order and to stay discovery when the Defendant clearly could have resolved this issue months ago. The Court declines to reward the Defendant's dilatory conduct. Accordingly, it is hereby

ORDERED that the Defendant's Motion is DENIED in all respects.

* * *

Criminal law—Driving under influence—Search and seizure—Blood draw—Consent—Testimony by two deputies that defendant gave consent for blood draw supports denial of motion to suppress—Issue of whether signature on consent card matches exemplar of defendant's signature is superfluous where signature card is merely corroborative of consent given to deputies

STATE OF FLORIDA, v. LUCAS EDWARD GARCIA, Defendant. County Court, 19th Judicial Circuit in and for Martin County. Case No. 19002660CTAXMX. August 26, 2021. Kathleen H. Roberts, Judge.

ORDER DENYING
DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE having come before the Court on the Defendant's Motion to Suppress, and the court having heard testimony from the witnesses, argument of counsel and reviewed the caselaw provided, hereby denies the Motion to Suppress.

The defense stipulated for the purpose of the hearing that there was probable cause to conduct a DUI investigation and further asserted that in no way was the defense insinuating that the deputies involved in this case had "faked" the Defendant's signature on the form that acknowledged the Defendant's consent to a blood draw for the DUI investigation. Both the crash investigation deputy and the DUI deputy testified that their first encounter with the Defendant was at the hospital where he had been taken after a traffic crash. The DUI deputy met with the defendant bedside. At some point the Defendant's mother was present in the room with the Defendant. The Defendant's mother testified that while she was there, she repeatedly told the deputies that her son would not consent to a blood draw. She testified that while she was there, the Defendant indicated he did not consent to the blood draw, and she said he needed an attorney. The mother acknowledged that she was escorted from the hospital room to wait outside while the deputies continued their investigation with the Defendant, who is an adult.

Both deputies separately testified that the Defendant consented to the blood draw. Both deputies testified that the mother was not present in the room when he consented. One deputy believes that there was a nurse present in the room, the other could not recall whether there was or there was not a nurse in the room when verbal consent was given. Both deputies watched the Defendant sign the consent to blood draw form while he was laying in the hospital bed.

The defense presented a handwriting expert to challenge the signature on the consent form, and the handwriting expert opined that the signature on the card was not created by the same person who created the signatures in the exemplars. The expert testified that he was not aware at the time of the examination that the defendant was charged with DUI, and thus not aware that the defendant has been charged with a DUI with an enhanced blow, which might affect the signing of a document, which can be considered a "normal faculty."

Whether the signature matched the signatures produced is superfluous under the facts of this case. Both deputies testified that the defendant gave consent to the draw of his blood when requested by law enforcement, and the signature card is merely corroborative of that consent.

It is hereby ORDERED AND ADJUDGED that the Motion to Suppress is denied. The case remains set on the Monday August 30, 2021 jury trial docket and the State's Motion to Continue will be addressed then.

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