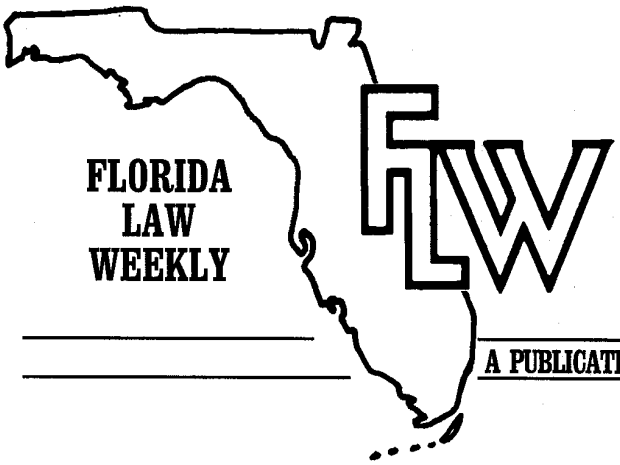
Volume 29, Number 2, June 30, 2021



SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 57-148

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

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

SUMMARIES

Summaries of selected opinions or orders published in this issue.

- **INSURANCE—COMMERCIAL PROPERTY—EXCESS POLICIES—HOTELS—CANCELLATIONS—COVID-19. In a declaratory action brought against an insurer under a second excess policy by a hotel group which claimed losses allegedly sustained as a result of the COVID-19 pandemic, the Circuit Court found that, under the Hotel Enhancement Endorsement provision relating to "cancellation of bookings," the sub-provision explicitly referencing "contagious and/or infectious disease" did not require that the losses be tied to cases of disease at an insured location. Furthermore, coverage for "cancellation of bookings" expressly applied notwithstanding the existence of potentially applicable exclusions, and thus was not subject to the "Fungus, Wet Rot, Dry Rot, Virus and Bacteria Exclusion." The collective liability of the primary and two excess insurers was not restricted by the primary insurer's policy-specific sub-limit for "cancellation of bookings" coverage. Language on the participation page of the shared property policy form, which stated that the collective liability of the insurers shall not exceed any appropriate sub-limit of liability, did not limit the liability of the second excess insurer where no appropriate sub-limit for cancellation of bookings coverage was set by or incorporated by reference into that policy. The complete exhaustion of the underlying limits of the primary and first excess policy was not required for the second excess policy's coverage to be triggered where that policy only required that the aggregate limit for the particular peril be reduced or exhausted.** *MDM BRICKELL HOTEL GROUP, LTD. v. HOMELAND INSURANCE COMPANY OF NEW YORK. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. April 1, 2021. Full Text at Circuit Courts-Original Section, page 97a.*

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

Bold denotes decision by circuit court in its appellate capacity.

* * *

TABLE OF CASES REPORTED

TABLE OF CASES REPORTED (continued)

* * *

TABLE OF STATUTES CONSTRUED

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

TABLE OF STATUTES CONSTRUED (continued)

* * *

TABLE OF CASES TREATED

Case Treated / In Opinion At

TABLE OF CASES TREATED (continued)

* * *

DISPOSITION ON APPELLATE REVIEW

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

Associates in Family Practice of Broward, LLC (Brown) v. Allstate Fire and Casualty Insurance Company. County Court Seventeenth Judicial Circuit, Broward County, Case Nos. COCE18-6840 and CACE19-21865. County Court Order at 25 Fla. L. Weekly Supp. 761a (December 2019). Affirmed at 46 Fla. L. Weekly D1487a

* * *

Volume 29, Number 2
June 30, 2021
Cite as 29 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Disability to operate motor vehicle—Licensee was afforded due process where deputy who cited licensee for improper backing made report of licensee's alleged disability to drive, licensee was notified of need to pass extended driving examination in order to retain license, and license was not suspended until after licensee failed examination—Where licensee was afforded hearing at which she was allowed to introduce evidence, confront witnesses, and challenge accuracy of test results, essential requirements of law were met—Order upholding suspension was supported by competent substantial evidence

JEWEL LYNN DOHAN, Petitioner, v. STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 5th Judicial Circuit (Appellate) in and for Sumter County. Case No. 2020-CA-677. April 6, 2021. Counsel: J. Clancey Bound, Bounds Law Group, for Petitioner. Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER ON PETITION FOR WRIT OF CERTIORARI

(MARY P. HATCHER, J.) **THIS COURT** having considered Petitioner's Petition for Writ of Certiorari pursuant to Fla. R. App. P. 9.100, filed on December 31, 2020; Respondent's Response to Petition for Writ of Certiorari, filed on March 18, 2021; Petitioner's Reply to Response to Petition for Writ of Certiorari pursuant to Fla. R. App. P. 9.100, filed on March 25, 2021; and having reviewed the record in this case, finds as follows:

A. Petitioner asserts the administrative findings based upon the results of the extended driving test resulting in the suspension of her driver's license was not supported by competent substantial evidence. In addition, Petitioner asserts the investigation leading to the issuance of the traffic citation and request for license review was unreasonable and negligently performed and therefore should not have led to a request for license renewal resulting in a lack of procedural due process.

B. Petitioner provided evidence that she was issued a traffic citation for improper backing that was subsequently dismissed due to lack of evidence. Petitioner asserts the investigation into the traffic citation improperly prompted a reexamination of her qualifications to be licensed.

C. The Circuit Court may review by certiorari an order by the Florida Department of Highway Safety and Motor Vehicles to determine 1) whether due process has been accorded, 2) whether the essential requirements of law have been observed, and 3) whether the administrative findings were supported by competent, substantial evidence. *See Vichich v. Department of Highway Safety and Motor Vehicles*, 799 So.2d 1069 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D2290a].

D. Section 322.126(2), Florida Statutes, provides as follows:

> Any physician, person, or agency having knowledge of any licensed driver's or applicant's mental or physical disability to drive or need to obtain or to wear a medical identification bracelet is authorized to report such knowledge to the Department of Highway Safety and Motor Vehicles. The report should be made in writing giving the full name, date of birth, address, and a description of the alleged disability of any person over 15 years of age having mental or physical disorders that could affect his or her driving ability.

E. Deputy Willis made such a report that was referred to the Medical Advisory Board (MAB) at the Department. The MAB proceeded with the review process and required Petitioner to pass an extended driving examination pursuant to Sections 322.221(1) and (2), Florida Statutes. It was only after Petitioner failed the driving examination that her driver's license was suspended for one year pursuant to and required by Fla. Admin. Code 15A-1.015(3). Petitioner was notified and made aware of the driving examination requirement and the consequences of failing that requirement. Consequently, Petitioner was accorded procedural due process.

F. Petitioner was afforded a Show Cause hearing pursuant to Fla. Admin. Code 15A-1.015(3) where she had the opportunity to introduce evidence, confront witnesses and challenge the accuracy of test results. Consequently, the essential requirements of law have been observed.

F. Petitioner's driving record was received into evidence without further authentication pursuant to Section 322.201, Florida Statutes. Petitioner's driving record indicated Petitioner's driver's license was suspended for one year for failure to pass a driving test. The Hearing Officer reviewed Petitioner's driving record which was entered into evidence without objection by Petitioner at the administrative hearing. Consequently, there was substantial competent evidence that the Hearing Officer correctly sustained the suspension of Petitioner's driver's license.

Based upon the foregoing, it is hereby

ORDERED AND ADJUDGED that the Petitioner's Petition for Writ of Certiorari is hereby DENIED.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearings—Licensee's request for formal review hearing was not complete where request was not accompanied by filing fee—Hearing scheduled within 30 days of submission of filing fee that made hearing request complete was timely—Hearing officer's finding that arrest preceded request that licensee submit to breath test was supported by competent substantial evidence in arrest affidavit—Petition for writ of certiorari is denied

MICHAEL FRANCIS FEELEY, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondents. Circuit Court, 5th Judicial Circuit (Appellate) in and for Lake County. Case No. 35-2020-CA-001530-A. March 16, 2021. Counsel: Benjamin M. Boylston, The Law Office of Ben Boylston, P.A., Tavares, for Petitioner. Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(BAXLEY, J.) THIS CAUSE came to be reviewed upon Petitioner MICHAEL FRANCIS FEELEY's Petition for Writ of Certiorari, filed September 24, 2020. The Court entered an Order to Show Cause on October 13, 2020. Respondent FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES filed its Response to Petition for Writ of Certiorari on January 11, 2021. Petitioner seeks review of the suspension of a driver's license entered by Respondent following a hearing held on August 26, 2020. Relief is sought from this Court on two grounds: 1) that the hearing scheduled on August 26, 2020 was late pursuant to Chapter 15A-6.013 of the FAC; and 2) The evidence in this case did not establish that Petitioner's arrest preceded the breath test request.

HOLDING

As it concerns Petitioner's initial argument, this Court finds against Petitioner's central argument centered largely on a focused interpretation of "a timely request for a formal review" as precluding the need for the $25 fee noted in § 322.21(9)(a) of the Florida Statutes. This Court notes that while § 322.21(9)(a) does not outright state that the requisite filing fee need be paid "before" the formal hearing is scheduled by the Respondent, neither does § 322.21(9)(a) state any timetable upon which such a fee may otherwise be deemed late upon which enforcement of that fee may be commenced. This Court notes

that the Respondent, in the event of a late filing fee, is conceivably empowered under §322.2615(9) to continue hearings originally scheduled within 30 days following receipt of the request by Petitioner or to cancel Petitioner's license altogether under §322.22(1) if the "correct fees" are not filed. However, neither §322.2615(9) nor §322.22(1) empower the agency to collect fees owed to the Highway Safety Operating Trust Fund which would be used in preparing for a formal hearing. This Court is thus inclined to find Respondent's argument contending that such fees are due when the full request for a formal hearing is made falls within the basic tenets of statutory construction. *See Green v. Dep't of Highway Safety & Motor Vehicles,* 905 So. 2d 922, 923 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D1301a]; *see also See State v. Atkinson,* 831 So. 2d 172 (Fla. 2002) [27 Fla. L. Weekly S888a].

Furthermore, although § 322.21(9)(a) does not state the timetable for submitting the $25 filing fee needed for the formal review, the Florida Statutes do require a filing fee to be filed with a request for an administrative hearing:

> (9) An applicant:
>
> (a) Requesting a review authorized in s. 322.222, s. 322.2615, s. 322.2616, s. 322.27, or s. s. 322.64 must pay a filing fee of $25 to be deposited into the Highway Safety Operating Trust Fund.
>
> § 322.21(9), Fla. Stat.

A principle of statutory construction holds that a specific statute governs over a general statute. *Fla. Virtual Sch., v. K12, Inc.*, 148 So. 3d, 102 (Fla. 2014) [39 Fla. L. Weekly S569a]. § 322.21(9)(a). When sections 322.2615 (9) and 322.21 (9), Fla. Stat. are read together, an application for an administrative review is not complete unless it is accompanied with the $25 filing fee. Therefore, since Petitioners request for an administrative hearing did not include the required filing fee when it was submitted on July 24, 2020, the request was not complete. The filing fee was submitted on July 27, 2020, which made the Petitioner's application complete, and the hearing officer scheduled the hearing within 30 days of the completed request on July 27, 2020.

As it concerns Petitioner's second argument, this Court finds against Petitioner's argument that competent, substantial evidence in this case did not establish that the Petitioner's arrest preceded the breath test request as required in § 316.1932(1)(a) of the Florida Statutes. This Court notes that on first tier certiorari review of a hearing officer's decision, the circuit court has to review whether the hearing officer's factual findings were supported by competent, substantial evidence. *See State, Dep't of Highway Safety & Motor Vehicles v. Wiggins,* 151 So. 3d 457, 462 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1894a]. The competent, substantial evidence standard requires the circuit court to defer to the hearing officer's findings of fact, *see id.* at 465, unless there is no competent evidence of any substance, in light of the record as a whole, that supports the findings. *See Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456 (1951). The hearing officer in the instant matter based a decision on the arrest affidavit that stated that the arresting Deputy first arrested the Defendant and then later requested the Defendant submit to a breath test. For this Court to call the arrest affidavit into question by comparing it to additional case documents would be to wrongly reweigh the evidence at this stage of review. There was competent substantial evidence to support the hearing officer's findings of facts and decision. Therefore, it is

ORDERED AND ADJUDGED as follows:

1. The Petition for Writ of Certiorari Jurisdiction filed by the Petitioner, MICHAEL FRANCIS FEELEY, is **DENIED**.

* * *

Traffic infractions—Sentencing—Trial court did not abuse its discretion in denying withhold of adjudication for traffic infractions admitted by defendant—Trial court has discretion to enter any lawful sentence upon entry of voluntary no contest plea—Further, denial of withhold of adjudication was not arbitrary, fanciful, or unreasonable where defendant had history of prior traffic violations, was speeding on highway in fully loaded dump truck, and failed to respond to stopping officer's lights and siren

JOSE MANUEL MAS CASTILLO, Appellant, v. PINELLAS COUNTY SHERIFF, Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pinellas County. Case No. 19-00024-APANO. UCN Case No. 522019AP000024000APC. December 18, 2020. Appeal on Judgment and Sentence Entered by the Pinellas County Court, Susan Bedinghaus, Judge. Counsel: Brooke Elvington, for Appellant. Shannon Lockheart, for Appellee.

ORDER AND OPINION

(MEYER, Judge.) We AFFIRM.

This case concerns the disposition of certain traffic infractions committed by Appellant/Defendant below, who holds a commercial driver's license (CDL). On March 21, 2019, Appellant/Defendant was driving a fully loaded commercial dump truck southbound on Highway US 19 in Pinellas County, Florida, when he was captured by radar traveling 70 mph in a 55-mph zone. Additionally, Appellant/Defendant failed to yield to a Pinellas County Sheriff vehicle as it approached with lights and siren on. Appellant/Defendant was given two citations, for speeding in violation of § 316.187, Fla. Stat., and for failing to yield to an emergency vehicle in violation of § 316.126(1)(a), Fla. Stat. Neither citation required a court appearance and carried civil penalties of $256.00 and $166.00 respectively. Appellant/Defendant's driving record reveals a prior citation for "cut across to avoid traffic ctl device." He also has two entries for failing to pay traffic fines.

On May 8, 2019, Appellant/Defendant's counsel, filed a notice of appearance for the speeding ticket, entered a plea of not guilty, and requested a hearing. The hearing was scheduled and subpoenas were issued to all parties, including the Pinellas County Sheriff's Deputy who issued the subject citations.

On May 22, 2019, a hearing was conducted on Appellant/Defendant's traffic infractions citations in the lower court. Appellant/Defendant, through counsel, requested the trial court hear both infractions at the same time, to which the trial court agreed. The trial court asked if there was going to be an adjudication, and went on to indicate that she would offer nothing more than a concurrent fine. During the hearing the Deputy advised the court that Appellant/Defendant was driving a fully loaded dump truck when he received both citations. After discussions with the court, Appellant/Defendant through counsel agreed to a no-contest plea to the court's offer but made a final request that the court consider withholding adjudication. The trial judge stated it was her opinion that applicable law prohibited her from withholding adjudication. Furthermore, the trial court indicated that it is not her practice to violate the law through the process referred to as "masking."[1] The hearing concluded with Appellant/Defendant entering a plea of no-contest in exchange for adjudications and a concurrent fine.

On June 03, 2019, Appellant/Defendant, through counsel, filed a timely motion for a new hearing pursuant to Fla. R. Traffic Court 6.540(a), arguing that the trial court misapplied the law by not providing a withhold of adjudication. Appellant/Defendant urged the court to reconsider and explained he would lose his employment if the withhold were not granted. The Court denied Appellant/Defendant's motion. On July 3, 2019, Appellant/Defendant filed a timely notice of appeal, which is now before this Court.

The trial court did not abuse its discretion in denying a withhold of adjudication for a traffic infraction admitted by the Appel-

lant/Defendant because the trial judge had discretion to impose any lawful sentence upon entry of a voluntary plea of no contest under the circumstances presented at the hearing discussed in a preceding section of this opinion. Not awarding a withhold in a case like the one at bar is both lawful and appropriate. Additionally, even if Appellant/Defendant is correct in the assertion that the trial judge was incorrect in her conclusion that awarding a withhold would violate "masking" laws, the decision may still be upheld.

A trial court's ruling on a discretionary power (here the granting or not granting of a withhold of adjudication) is, on its face, subject to an abuse of discretion standard of review. Under this standard, this Court would only overturn the lower court's plea bargain/sentence if it was found to be "arbitrary, fanciful, or unreasonable." *Banks v. State*, 46 So. 3d 989 (Fla. 2010) [35 Fla. L. Weekly S313a]. In this case alternate grounds appear on the record which supports the conclusion by the lower court not to offer the withhold of adjudication. The facts before the court were that the Appellant/Defendant, with a prior traffic violation history was speeding in a fully loaded commercial dump truck on U.S. Highway 19 and failed to respond to the hail of a police vehicle's lights and siren. These facts provided the court with a sound basis to not offer the withhold. Regardless of the court's opinion on "masking", not offering a withhold under these circumstances cannot said to have been arbitrary, fanciful or unreasonable. The Appellant/Defendant did not have to enter the plea and nothing in the record suggests that it was not made freely and voluntarily and with the assistance of competent legal counsel.

IT IS THEREFORE ORDERED that the judgment and sentence are AFFIRMED. (KEITH MEYER, PATRICE MOORE, and THANE B. COVERT, JJ.)

---

[1]In a nutshell in this case "masking" is the process of characterizing the outcome of a case in such a manner so as to potentially prevent regulatory authorities responsible for maintaining oversight of certain licenses from identifying driving violations and consequently suspending and/or revoking those licenses as required by law and to promote public safety.

* * *

Appeals—Timeliness—Appeal filed more than 30 days after rendition of order upholding red light camera citation is untimely—No merit to argument that circuit court administrative order extending time limits due to COVID-19 pandemic extended time for filing appeal because neither trial nor appellate courts are authorized to extend time for filing appeals—Even if appeal were timely, order should be affirmed where due process was accorded and transcript of hearing has not been filed

ALEJANDRO GABRIEL ARGERICH, Appellant, v. CITY OF MIAMI GARDENS, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-95 AP 01. March 31, 2021. On Appeal from an Order of Dawn Grace Jones, Special Master, City of Miami Gardens. Counsel: Alejandro Gabriel Argerich, Pro Se, Appellant. Michele Samaroo, Assistant City Attorney, City of Miami Gardens Office of the City Attorney, for Appellee.

OPINION

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

(PER CURIAM.) AFFIRMED.

Appellant appeals a Final Administrative Order ("Order") upholding a red light camera citation issued to him by the City of Miami Gardens ("City"). The record reflects that the Order in this appeal was rendered on February 18, 2020. The notice of appeal was not filed until 48 days later on April 7, 2020. As such, this court would lack subject matter jurisdiction over this appeal if untimely. *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 Order 20-04 ("AO 20-04") addressing extensions of time in connection with the COVID-19 pandemic. 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 (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 conclude that this appeal is untimely and should be dismissed. Even assuming *arguendo* that we had concluded otherwise, we find that the Order should be affirmed in any event.

STANDARD OF REVIEW

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

Procedural due process requires that the agency provide reasonable notice and a fair opportunity to be heard. *Housing Authority of the City of Tampa v. Robinson,* 464 So. 2d 158, 164 (Fla. 2d DCA 1985). A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. *Jennings v. Dade County,* 589 So. 2d 1337, 1340-41 (Fla. 4th DCA 1991). Here, Petitioner received procedural due process as the hearing he requested before a hearing officer was scheduled for February 18, 2020. Notwithstanding, Appellant failed to appear at the hearing, arguing that he did not receive notice of the hearing. The record reflects, however, that the January 27, 2020 Administrative Hearing Notification Letter attached to the City's answer brief was mailed to the same address for the Appellant as the Notice of Violation and the Hearing Officer's Order, which Appellant undisputedly did

receive.

Appellant also failed to provide a transcript of the Hearing. In appellate proceedings, the decision of a lower tribunal has the presumption of correctness and the burden is on the appellant to demonstrate error. *Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150, 1152 (Fla. 1979) ("The trial court should have been affirmed because the record brought forward by the appellant is inadequate to demonstrate reversible error").

As procedural due process was accorded and Appellant has failed to demonstrate reversible error, the Order is AFFIRMED. (TRAWICK, WALSH and SANTOVENIA, JJ., concur.)

* * *

Municipal corporations—Zoning—Appeals—Certiorari—City commission's passage of zoning ordinance that created overlay preservation zoning district, rezoning large area with multiple properties, was legislative action that is not subject to certiorari review—No merit to argument that rezoning action is quasi-judicial because city code provides for quasi-judicial hearing as part of historic designation process, and city commission's decision was contingent on finding that area met certain criteria—Although code provides for quasi-judicial hearings to be held by historic preservation board and requires that board consider certain criteria, code does not provide for quasi-judicial hearings before commission and is silent as to any facts that must be found or criteria that must be applied by commission when considering board's recommendation—Public reading of ordinance is not quasi-judicial proceeding—Petition for writ of certiorari is dismissed

YTECH-180 UNITS MIAMI BEACH INVESTMENT, LLC, Petitioner, v. CITY OF MIAMI BEACH, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 18-184 AP 01. April 13, 2021.

ORDER WITHDRAWING OPINION DATED AUGUST 31, 2020, GRANTING MOTION FOR REHEARING AND DISMISSING THIS CASE FOR LACK OF JURISDICTION

(PER CURIAM.) THIS MATTER having come before the Court on Respondent's Motion for Rehearing (the "Motion") and this Court having read the Motion and Response in Opposition, examined the case file and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED:

Respondent's Motion is GRANTED. This case is DISMISSED.

On August 31, 2020, a panel of this Court[1] issued its opinion granting a petition for writ of certiorari and quashing an ordinance enacted by the City of Miami Beach. On review of Respondent's Motion, this Court WITHDRAWS its prior opinion, GRANTS rehearing and DISMISSES this case for lack of jurisdiction.[2]

Respondent, City of Miami Beach (the "City" or "City Commission") contends this Court should rehear and reconsider its 2020 Opinion because this Court overlooked the "want of jurisdiction it creat[ed]." Specifically, Respondent contends this panel, as then-previously constituted, found the City's "process provided by the Code for the adoption of Historic Designation status is legislative in character," but, nevertheless, proceeded to make a determination on the merits. This Court agrees with Respondent that, if the process was "legislative in character," this Court would lack certiorari jurisdiction and could not reach the merits of Petitioner's brief.

Florida courts have long held that a city's legislative actions are subject to attack in circuit court through the filing of an original action seeking declaratory or injunctive relief, while a city's quasi-judicial actions are subject to certiorari review. *See e.g. Minnaugh v. County Com'n of Broward County,* 752 So. 2d 1263, 1265 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D659a] (legislative actions are "not subject to the certiorari review process but reviewable by a de novo action seeking declaratory or injunctive relief in circuit court"); *see also Board of County Com'rs of Brevard County v. Snyder,* 627 So. 2d 469, 474 (Fla. 1993).

In this case, the board action at issue is the City Commission's passage of a zoning ordinance that created an overlay, historic preservation zoning district over an area referred to as the Tatum Waterway in Miami Beach, Florida.

The Florida Supreme Court has, for decades, expressly stated "[z]oning is a legislative function which reposes ultimately in the governing authority of a municipality." *Gulf & Eastern Development Corp. v. City of Fort Lauderdale,* 354 So. 2d 57, 59 (Fla. 1978); *Snyder,* 627 So. 2d at 474 ("Enactments of original zoning ordinances have always been considered legislative.").

Florida's District Courts of Appeal have similarly, and routinely, held that "creating zoning districts and rezoning land are legislative actions, and. . . trial courts are not permitted to sit as 'super zoning boards' and overturn a board's legislative efforts." *Hirt v. Polk County Bd. of County Com'rs,* 578 So. 2d 415, 417 (Fla. 2d DCA 1991); *see also Harris v. Goff,* 151 So. 2d 642, 645 (Fla. 1st DCA 1963) ("It has been uniformly held in this state that the function of a board or commission in the enactment of zoning ordinances is a purely legislative function."); *Machado v. Musgrove,* 519 So.2d 629, 632 (Fla. 3d DCA 1987) ("It is well settled that a zoning action is an exercise of legislative power to which a reviewing court applies the deferential fairly debatable test"); *Pasco County v. J. Dico, Inc.,* 343 So. 2d 83, 84 (Fla. 2d DCA 1977) ("The adoption of a zoning ordinance and zoning maps is a legislative act.").

Florida courts have, however, wrestled with when, if ever, the passage of a zoning ordinance may constitute quasi-judicial action. In *Hirt,* for example, the Second District Court of Appeal explained that "[w]hether a board's zoning decision is considered legislative or quasi-judicial. . . turn[s] on whether the local governmental body is enacting an ordinance, in which case *it **is*** acting legislatively, or enforcing it, in which case *it **may*** be acting quasi-judicially." 578 So. 2d at 417 (emphasis added). It is only when "appellate courts have been called upon to classify governmental bodies' *application* of zoning ordinances, [that] their decisions have sometimes blur[red] the distinction between legislative and quasi-judicial actions." *Id.*

Two years following the Second District's *Hirt* opinion, the Florida Supreme Court clarified that although "[e]nactments of original zoning ordinances have always been considered legislative," the passage of a zoning ordinance that affects a limited number of persons, or property owners, *could be* functionally viewed as quasi-judicial action. *Snyder,* 627 So. 2d at 474. Specifically, the Florida Supreme Court adopted the lower court's analysis and held,

> Rezoning actions **which have an impact on a limited number of persons or property owners**, on identifiable parties and interests, **and** where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, **and** where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of. . quasi-judicial action.

Id. (emphasis added). The Court's opinion in *Snyder* is applicable to all rezoning actions that do *not* concern the passage of, or amendment to, a comprehensive land use plan. *See Martin County v. Yusem,* 690 So. 2d 1288 (1997) (committing to its analysis in *Snyder,* except for cases that concern amendments to a comprehensive land use plan and finding that all actions concerning a comprehensive land use plan are legislative by nature, even when the amendment under consideration concerns a single property or owner).

Admittedly, the case law on this issue could be clearer. Often, it seems as if the concepts of a "comprehensive land use plan" and other zoning ordinances are being used interchangeably. Additionally, it is

not always clear whether courts intend to use the word "comprehensive" in "comprehensive plan" as an adjective, or as one part of a compound noun. The Third District Court of Appeal has acknowledged the difference between a comprehensive land use plan and zoning action. *See Machado,* 519 So. 2d at 631-32. Specifically, the Third District Court of Appeal has explained,

> A local comprehensive land use plan is a statutorily mandated legislative plan to control and direct the use and development of property within a county or municipality. . . .The plan is likened to a constitution for all future development within the governmental boundary. **Zoning**, on the other hand, is the means by which the comprehensive plan is implemented, and **involves the exercise of discretionary powers** within limits imposed by the plan.

Id. Notwithstanding this distinction, the Third District Court of Appeal, like every other Florida court, has clearly, and correctly, reiterated what Florida courts have always known that—"[i]t is well-settled that *a zoning action* is an exercise of legislative power. . . ." *Id.* (emphasis added).

The law in Florida, therefore, currently provides that a city's enactment of, or amendment to, a comprehensive land use plan is legislative in nature—irrespective of how many people the action affects. *See generally Yusem*; *see also Snyder.* If, rather than enact, or amend a comprehensive land use act, the city enacts a zoning ordinance with broad application to a large number of owners, then that act is *also* legislative in nature. *See Snyder,* 627 So. 2d at 474 ("it is evident that comprehensive rezonings affecting a large portion of the public are legislative in nature"); *Board of County Com'rs of Sarasota County v. Karp,* 662 So. 2d 718, 720 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D2268a] ("Further, although the corridor plan directly affected a finite number of parcels, the number was fairly substantial."); *J. Dico, Inc.,* 343 So. 2d at 84 ("The adoption of a zoning ordinance and zoning maps is a legislative act"); *Gulf & Eastern Dev. Corp.,* 354 So. 2d at 59 ("zoning is a legislative function which reposes ultimately in the governing authority of a municipality"); *Hirt,* 578 So. 2d at 417 ("[w]hether a board's zoning decision is considered legislative or quasi-judicial. . . turn[s] on whether the local governmental body is enacting an ordinance, in which case *it* ***is*** acting legislatively.").

However, if the passage of a zoning ordinance does not concern a comprehensive land use plan and affects only a limited number of persons, that action *may* be quasi-judicial. *See Snyder,* 627 So. 2d at 474 ("Rezoning actions which have an impact on a limited number of persons or property owners. . . and where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of. . . quasi-judicial action"); *see also Hirt,* 578 So. 2d at 417 (it is when courts must classify "governmental bodies' application of zoning ordinances, [that] their decisions have sometimes blur[red] the distinction between legislative and quasi-judicial actions."); *Section 28 Partnership, LTD v. Martin County,* 642 So. 2d 609, 612 (Fla. 4th DCA 1994) ("a zoning decision is reviewable by certiorari, as the review of a quasi-judicial act rather than legislative act **if**: (a) **it affects a limited number of property owners**; (b) the outcome is contingent on facts presented at a hearing; **and** (c) it is viewed as the application, rather than the setting, of policy.") (emphasis added).

In this case, the record demonstrates the City Commission enacted a zoning ordinance that created an overlay zoning district, rezoning a large area with multiple properties as historic. Petitioner, in fact, has, in a letter that is part of the record below, stated that the zoning ordinance at issue could affect 8,000-10,000 residents.[3] This fact alone demonstrates the City's action was legislative in nature. *See Snyder,* 627 So. 2d at 474 ("it is evident that comprehensive rezonings affecting a large portion of the public are legislative in nature."); *Karp,* 662 So. 2d 718, 720 (Fla. 4th DCA 1995) ("Further, although the corridor plan directly affected a finite number of parcels, the number was fairly substantial."); *J. Dico, Inc.,* 343 So. 2d at 84 ("The adoption of a zoning ordinance and zoning maps is a legislative act.").

Even if this Court were inclined to conclude that the zoning ordinance at issue, which covers a large area and affects thousands of residents, was somehow "limited," this Court would still not find the City's zoning action to be of a quasi-judicial nature for at least two reasons.

First, the Commission's decision to create an overlay historic district over the Tatum Waterway was not "contingent on a fact or facts arrived at from distinct alternatives presented at a hearing." *Snyder,* 627 So. 2d at 474. Second, the Commission's decision to designate the Tatum Waterway as historic cannot "be functionally viewed as policy *application*." *Id.* This is not a case where the City Commission must decide whether an applicant for a variance or permit should be afforded relief. In this case, the City Commission, as Petitioner concedes, chose to create a historic zoning overlay district over the Tatum Waterway as part of what it called its "Master Plan" for the City. In formulating the Master Plan, the City sought the input of experts and residents. Policy decisions and compromises were made. The designation of the Tatum Waterway as historic was one such policy decision and constituted an exercise of the City's long-recognized legislative power to enact zoning ordinances and create zoning maps. *See Machado,* 519 So. 2d at 631-32 ("Zoning. . . involves the exercise of discretionary powers.").

Petitioner, nevertheless, contends this Court should treat the City Commission's passage of the zoning ordinance as if it were a quasi-judicial act. Petitioner argues, primarily, that (1) the City Code provides for quasi-judicial hearings as part of the historic designation process; and (2) the City Commission's decision was contingent on a finding that the proposed designated area met certain historic preservation and "sea level rise" criteria. Petitioner is incorrect.

First, the City Code does *not* require the City Commission to hold a quasi-judicial hearing. While Petitioner is correct that the City Code provides for quasi-judicial hearings on proposed historic designations, the quasi-judicial proceedings are conducted by the historic preservation board. *See* Miami Beach, Fla., Code § 118-591(f) ("A quasi-judicial public hearing on a proposed historic preservation designation shall be conducted *by the historic preservation board. . .* ")(emphasis added).

Second, while the City does require the historic preservation board to consider certain factors and/or apply some criteria, the City Code is silent as to any facts that must be found, or criteria that must be applied, by the City Commission when determining whether it wishes to accept, or reject, the board's recommendation. *See* Miami Beach, FL., Code § 118.592. Instead, the City Code merely states the City Commission must simply vote by a five-sevenths vote to designate a property as historic. *See* Miami Beach, FL., Code § 118.593(c); *see also e.g. Gulf & Eastern,* 354 So. 2d at 60 (finding proceedings before a zoning board "result in input which is material and substantial" but noting "a record in the strict sense is not made at the zoning board hearing by which the City Commission is bound"); *Machado,* 519 So. 2d at 631-32 ("Zoning. . . involves the exercise of discretionary powers.").[4]

This Court is equally unpersuaded by Petitioner's other arguments, including its characterization of the two public readings before the City Commission as quasi-judicial proceedings. *See Karp,* 662 So. 2d at 720 ("Respondent's argument that the 'character of the hearing' referred to in *Snyder* refers primarily to the due process aspects of the hearing is not well taken."). It is not uncommon for ordinances to be read and for residents to be heard before a commission votes on the passage of a new law. Indeed, nearly fifty years ago, the Florida

Supreme Court stated,

> Every meeting of any board, commission, agency or authority of a municipality should be a marketplace of ideas, so that the governmental agency may have sufficient input from the citizens who are going to be affected by the subsequent action of the municipality. . . Government, more so now than ever before, should be responsive to the wishes of the public. These wishes could never be known in nonpublic meetings, and the governmental agencies would be deprived of the benefit of suggestions and ideas which may be advanced by the knowledgeable public. Also, such open meetings instill confidence in government. The taxpayer deserves an opportunity to express his views and have them considered in the decision-making process.

Town of Palm Beach v. Gradison, 296 So. 2d 473, 475 (Fla. 1974); *see also* Miami Beach, FL. § 2-14(a) (affording its residents "timely opportunities for input and procedural fairness in hearings for any proposed policy, ordinance, project or other matter that impacts residents' quality of life."). The public reading of an ordinance does not, therefore, standing alone, turn a legislative act into a quasi-judicial proceeding.

Similarly, the fact that the proceeding before the historic preservation board was quasi-judicial in nature does not convert the City Commission's inherent *legislative* authority to rezone large portions of the city into a quasi-judicial act. On the contrary, there are good reasons to allow for quasi-judicial proceedings before a historic preservation board. *See Gulf & Eastern,* 354 So. 2d 57. For example, in *Gulf & Eastern,* the Florida Supreme Court reiterated what has become abundantly clear—"[z]oning is a legislative function which reposes ultimately in the governing authority of a municipality." *Id.* at 59. Still, the Court noted that it has become common for some, or all, of the zoning process to be delegated to an independent board. *Id.* at 59. These delegations allow a board or agency to recommend a more restrictive use of property and "effectively [endow] the [board or agency] with the power to alter the use of a particular parcel of land on an interim basis" "until the recommendation has been acted on by the [c]ity [c]ommission." *Id.* The Florida Supreme Court did not then, and has not since, held that the passage of a zoning ordinance necessarily constitutes a quasi-judicial act when it follows a quasi-judicial proceeding before a zoning, planning, or historic preservation board.[5] Instead, Florida courts have continued to maintain that the passage of a zoning ordinance is a legislative act, *unless* the action taken affects a limited number of persons. *See Snyder,* 627 So. at 474 ("it is evident that comprehensive rezonings affecting a large portion of the public are legislative in nature").

In summary, the City Commission's passage of the zoning ordinance at issue affected a large number of persons and property, was not contingent on the finding of any fact, and constituted policy formulation as opposed to policy application. The City Commission's action therefore was legislative in nature. This Court lacks certiorari jurisdiction over the legislative actions of the City Commission.

Accordingly, this Court withdraws its Opinion dated August 31, 2020, withdraws its Order Denying Respondent's Motion to Dismiss, and DISMISSES the Petition for Certiorari for lack of jurisdiction. (TRAWICK, WALSH and R. ARECES, JJ., CONCUR.)

[1]Judge Ramiro Areces did not participate in the oral argument. Judge Areces replaces Judge Alexander Bokor who was appointed to the Third District Court of Appeal sometime after this Court issued its opinion.

[2]Respondent's Motion for Clarification is moot.

[3]Specifically, in a letter addressed to the Mayor and City Commission, dated May 14, 2018, Petitioner estimated that historic designation could result in displacement of "8,000-10,000 possibly uninformed residents in the Historic Designation subject area."

[4]Petitioner also contends that the City has defined "quasi-judicial" in such a way as to convert its otherwise legislative rezoning actions into quasi-judicial actions. This Court disagrees. The definition upon which Petitioner relies effectively tracks *Snyder* and does nothing to change the analysis here. *See* Miami Beach, FL., Code § 2-511.

[5]The cases upon which Petitioner relies concern zoning actions of limited scope, "spot-zoning," and/or are otherwise distinguishable and inapposite.

* * *

Municipal corporations—Development orders—Settlement agreement—Challenge to city's adoption of resolution ratifying settlement agreement allegedly allowing development with height and floor area ratio in excess of city code requirements—City commission did not depart from essential requirements of law in ratifying agreement that allowed height consistent with height requirements of site-specific regulations, although height allowed exceeded city code regulations—City departed from essential requirements of law by approving settlement that deviated from city code FAR requirements without evidence of unfair, disproportionate, or inordinate burden imposed on developer—Further, approval of settlement agreement allowing variance from FAR requirements constituted impermissible spot zoning—No merit to argument that developer established inordinate burden under Bert J. Harris Act—Resolution quashed

ALLIANCE STARLIGHT III, LLC., Petitioner, v. CITY OF CORAL GABLES, FLORIDA, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000118-AP-01. L.T. Case No. Coral Gables Resolution No. 2019-95. March 23, 2021. On Petition for Writ of Certiorari from Coral Gables City Commission adoption of City Commission Resolution No. 2019-95 and Dispute Resolution Agreement. Counsel: Richard Sarafan, Alfredo Gonzalez, Martin J. Keane, Joseph B. Isenberg, and Michael Bild, Genovese, Joblove & Battista, P.A., for Petitioner. Frances Guasch De La Guardia and Anna Marie Gamez, Holland & Knight LLP; and Miriam Soler Ramos, City Attorney, Coral Gables, for Respondent.

OPINION

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

(WALSH, J.) Petitioner, Alliance Starlight II, LLC ("Alliance Starlight") seeks to quash Coral Gables City Resolution No. 2019-95 ratifying a Dispute Resolution Agreement ("Settlement Agreement") Biltmore Development, LLC ("Biltmore") the right to construct a development on property located in the same neighborhood as Petitioner Alliance Starlight.

Background

The Coral Gables City Commission ratified a Settlement Agreement between Biltmore and one of its neighbors, the David William. The Settlement Agreement would allow Biltmore to construct its project notwithstanding Coral Gables' zoning height and Floor Area Ratio ("FAR") limits. The Petitioner argues that the Settlement Agreement should be quashed because it permits Biltmore to violate several provisions of the Coral Gables zoning code and would allow for impermissible spot zoning.

Biltmore's Valencia Property, Petitioner Alliance Starlight's property, and another neighbor, the David William Property, are all zoned "Multi-Family Special Area" ("MFSA"), and all are "high density." Petitioner's property is located at 717, 729, 737, and 741 Valencia Avenue, Coral Gables. Biltmore owns a neighboring property located at 701-11 Valencia Avenue, Coral Gables, ("Valencia Property"). In 2018, Biltmore submitted its application to build an 11-story, 124-foot-high residential condominium.

A section of the Coral Gables zoning code restricts MFSA properties to a maximum height of 70 feet on lots smaller than 20,000 square feet.[1] However, the Biltmore project and Alliance Starlight sit in an area governed by site specific regulations—regulations which only apply to the blocks and lots where all the subject properties sit. The site specific regulations allow building to a maximum height of 150 feet, without mention of lot size. The zoning code limits maximum floor area ratio ("FAR") for these properties to 2.0. There is no provision in the site specific regulations restricting FAR.

The Biltmore Plan, David William Litigation, Settlement Process and Quasi-Judicial Hearing

Both the David William and Petitioner Alliance Starlight objected to Biltmore's proposed development on the ground that it exceeded the height restrictions in the general zoning code.

In 2007 and 2013, well before Biltmore submitted its application, City Attorney Craig Leen issued a series of written zoning opinions interpreting the City's zoning laws on height. His legal opinions concluded that "site specific" zoning regulations (which apply to specific lot and block numbers) governed over more general regulations, and therefore, the permissible height for development in this area was 150 ft, not 70 feet,[2] as limited by the more general zoning code.[3] In a later 2018 opinion letter, the subsequent City Attorney, Miriam Ramos, mirrored Mr. Leen's legal conclusions. These legal opinions do not address the zoning code's limitation of floor area ratio ("FAR").

In reliance upon these prior City Attorney legal opinions, City Attorney Craig Leen stopped the Board of Architects from hearing the David William's objections.[4] The David William property attempted to appeal the Board of Architects' approval of the Biltmore development to the City of Coral Gables' Clerk. Mr. Leen rejected the appeal as untimely, again because he believed that his 2007 and 2013 legal opinions long ago resolved any ambiguity in the City's zoning ordinances.

The David William filed a Petition for Mandamus, Declaratory or Injunctive Relief in the Circuit Court of the Eleventh Judicial Circuit, challenging dismissal of its appeal to the City of Coral Gables' Clerk, the Board of Architects' design approval, the prior City Attorney legal opinions as well as the authority of the City Attorney to issue binding legal opinions interpreting the zoning code.

To resolve the outstanding litigation between the City, the Biltmore, plaintiff Jorge M. Guarch, Jr.,[5] and the David William, the parties entered into a Settlement Agreement. However, the Petitioner, Alliance Starlight, was not a party to the settlement. Under the Agreement, the David William agreed to withdraw its lawsuit, and the Biltmore agreed to reduce the size of its project from 124 to 75 feet in exchange for the City granting its project an increase of FAR from 2.0 to 2.7. The City Commission held two public hearings and ratified the Settlement Agreement. While Alliance Starlight submitted written objections to the Settlement Agreement before the hearing, it did not attend the public hearings.

At the hearings, counsel for the David William advocated in favor of approving the Settlement Agreement. But neither the David William nor the Biltmore submitted evidence nor testimony that the Biltmore developer was "unfairly, disproportionately or inordinately burdened" by a final order denying its development rights. Vice Mayor Lago objected to the Settlement Agreement, raising several concerns:

> I think we're putting ourselves in a position where we're being strong armed by an entity, which is basically getting an additional 35% FAR. Again, what are they going to do with that FAR? So what they're going to do, they're going to take that and flip the property.
>
> * * *
>
> I just don't like the fact that anybody comes here and says, look, there's an ambiguity in the code and, you, know, unless we come to some sort of settlement agreement and you give me an additional 35 percent FAR, I'm going to, you know — . . . . potentially litigate this issue.

Alliance Starlight timely filed this petition for writ of certiorari.

Analysis

On certiorari review, a circuit court determines: (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. *Haines City Community Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]; *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982).

Procedural Due Process

Petitioner argues that the City Commission did not afford it sufficient notice and opportunity for hearing and therefore violated its due process rights. "A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard." *Jennings v. Dade County,* 589 So. 2d 1337, 1340-41 (Fla. 3d DCA 1991). The Petitioner admitted in correspondence to the City Assistant Manager before the hearing that it reviewed the proposed Settlement Agreement and made specific objections to deviations from the zoning code. The fact that the Petitioner chose not to attend the hearings does not establish any due process violation. We therefore find that Petitioner's argument that it was deprived of due process is without merit.

Departure from the Essential Requirements of Law

Petitioner next argues that the Resolution departs from the essential requirements of law because it fails to abide by the City of Coral Gables Zoning Code. A court "departs from the essential requirements of the law if it applies the wrong law or legal standard." *Westerbeke Corp. v. Atherton,* 224 So. 3d 816, 821 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D1741c]. "Clearly established law can be derived not only from case law dealing with the same issue of law, but also from 'an interpretation or application of a statute, a procedural rule, or a constitution provision.' " *State Dep't of Highway Safety & Motor Vehicles v. Edenfield,* 58 So. 3d 904, 906 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D523a] (quoting *Allstate Ins. Co. v. Kaklamanos,* 843 So. 2d 885, 890 (Fla. 2003) [28 Fla. L. Weekly S287a]).

Departure from the Essential Requirements of the Law—Coral Gables Height Restrictions

Petitioner argues that the City departed from the essential requirements of law in permitting its neighbor to construct a development over 70 feet in height, because the zoning code only permits buildings higher than 70 feet where the lot size exceeds 20,000 square feet. Coral Gables Zoning Code Section 4-104.D.8.a limits the "maximum permitted height" for buildings located within the Multi-Family High Density district "[p]ursuant to the Comprehensive Plan Map designation and/ or Site Specific Zoning Regulations." But subsection 4-104.D.8.f limits maximum height of buildings in the "multi-family high density" district to 70 feet if the parcel has a land area of less than 20,000 square feet, and up to 150 feet in height if the lot exceeds 20,000 square feet. §§ 4-104.D.8.f.iii; 4-104.D.8.h, Coral Gables Zoning Code (emphasis added).

The site specific portion of the Coral Gables Comprehensive Plan regulates specifications for the lots and block where the Biltmore Project, David William and Alliance Starlight sit. In contrast to the general zoning code height limitations, the site specific provisions limit height as follows: "No apartment buildings and/ or structure shall be erected or altered . . . to exceed thirteen (13) stories or onehundred-fifty (150) feet in height, whichever is less." § A-12.B.2.e, Site Specific Zoning Regulations. There is no mention of lot size restriction. The "Future Land Use Element" goals and objectives for Coral Gables similarly provide that properties which are multi-family high density may build up to 150 feet in height.

Thus, the site specific regulations permit building up to 150 feet in height, without regard for lot size, while the more general zoning code limits maximum height to 70 feet for buildings with a lot size of less than 20,000 square feet.

In 2007, 2013, and 2018, the City Attorney for Coral Gables issued

written opinions interpreting the code to permit buildings up to 150 feet in this specific district irrespective of lot size. The City argues that these opinions were final appealable decisions on zoning matters and that because the Petitioner had the right to but did not appeal these legal opinions issued in 2007, 2013 and 2018, the Petitioner's current petition is untimely.[6] The City relies upon Section 2-702 of the Coral Gables City Code, which states:

> The City Attorney serves as the final authority with regard to legal issues involving interpretation and implementation of these regulations. **An action to review any decision of the City Attorney may be taken by any person or persons, jointly or separately, aggrieved by such decision by filing with the Circuit Court in the manner and within the time prescribed by the Florida Rules of Appellate Procedure**.

The Petitioner counters that this Court may not defer to an agency's interpretation of its own code without violating the newly-adopted Article V, Section 21 of the Florida Constitution.[7] We need not decide whether written legal opinions by the Coral Gables City Attorney constitute final, binding, appealable decisions. Nor need we determine whether Article V, Section 21 of the Florida Constitution bars this court from deferring to the opinions of a municipal city attorney,[8] because we independently determine that under the code, Biltmore is permitted to build its Valencia Property to a height of 150 feet, irrespective of lot size.

City ordinances are interpreted in the same manner as state statutes. *Surf Works, L.L.C. v. City of Jacksonville Beach,* 230 So. 3d 925, 930 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D2398a]. Once the plain meaning of applicable provisions is determined, if provisions conflict and therefore cannot be harmonized *in pari materia,* then the specific provision will govern over the general. *Id., citing Cone v. State, Dep't of Health,* 886 So. 2d 1007, 1010, 1012 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D2413a] (citation omitted).

Moreover, the City codified the principle that the site specific regulations prevail over general zoning regulations. Section 4-101.D of the City of Coral Gables Zoning Code (performance standards) addresses how the City resolves a conflict between the general provisions of the zoning code and site specific regulations:

> The following performance standards shall govern the general development of structures in this District. **Where there are specific standards for properties that are specifically set forth in the Site Specific Zoning Regulations, the regulations in the Site Specific Regulations shall apply**.

(emphasis added)

Thus, we need not defer to the legal opinions of the City Attorney as Coral Gables urges. Instead, we independently conclude that site specific regulations govern over general zoning ordinances, and therefore, Biltmore was permitted to build up to 150 feet without regard for lot size.

As the City Commission's adoption of the Settlement Agreement did not deviate from the height requirements of the site specific zoning provisions, there was no departure from the essential requirements of law in ratifying the part of the settlement agreement permitting the Biltmore project to be built to a height of 75 feet.

Departure from the Essential Requirements of Law—Settlement Agreement and Increased Floor Area Ratio

Under the Settlement Agreement, the David William agreed to dismiss its litigation, the Biltmore agreed to reduce the height of its project from 124 to 75 feet and in exchange, the City allowed Biltmore an increase of floor area ratio from 2.0 to 2.7. The only code provision that limits floor area ratio for MFSA high density properties is Coral Gables zoning code section 4-104.D.6: "**Floor area ratio. Maximum floor area ratio (FAR) shall not exceed 2.0."** (emphasis added)

Division 17 of the City's zoning code addresses settlements. Article 3, Division 17, Section 3-1701, Coral Gables Zoning Code, Purpose and Applicability states:

> The process [settlement] may also be initiated by the City to settle litigation in order to avoid unfairly, disproportionately, or inordinately burdening a party to that litigation, such as to mitigate the burden where a party to a settlement agrees in the settlement to bear a disproportionate burden of a government use that benefits the public.

Section 3-1703 Guidelines. B. states:

> The decision to grant relief pursuant to this Division rests in the sound discretion of the City Commission in the exercise of its inherent sovereign powers to settle legitimate disputes. The policy of the City is to fashion a proposal for resolving the dispute based on a considered balance of the following factors:
>
> 1. The degree of burden suffered by the applicant or property owner.
>
> 2. The nature and significance of the public interest that is served by the application of the regulation to the property.
>
> 3. The likelihood of litigation, and its likely cost, the City's potential exposure, the uncertainly of outcome, the timetable for resolving the issues, and whether there is a perceived need for a judicial determination of the issues raised by the application.

Thus, if a property owner demonstrates that it suffered an unfair, disproportionate, or inordinate burden, the city is vested with discretion to approve a settlement which deviates from the code. In the proceedings below, short of conclusory allegations in the Settlement Agreement itself,[9] neither the City nor the Biltmore brought forth any evidence—no testimony, exhibits or other evidence—establishing such a burden. Moreover, the City Commission made no factual findings that Biltmore suffered a burden. Instead, the City Attorney expressed the need for additional FAR, and the Planning and Zoning Director described additional FAR as part of the settlement. Vice-Mayor Vincent Lago complained, ". . . we are being taken for a ride for additional FAR. . ." (Alliance Appx. 000119).

The City Commission departed from the essential requirements of law in two respects. First, it adopted a Resolution that is inconsistent with its zoning code limiting FAR to 2.0. Second, the City Commission adopted a Resolution in violation of Sections 3-1703 through 3-1705 which require that to approve a settlement, there be evidence of an unfair, disproportionate, or inordinate burden imposed on the property owner.[10]

Spot Zoning

Additionally, Petitioner argues that in permitting an unjustified increase in FAR applicable to only one property, the resolution approving the Settlement Agreement resulted in spot zoning. "Spot zoning is the name given to the piecemeal rezoning of small parcels of land to a greater density, leading to disharmony with the surrounding area." *S. W. Ranches Homeowners Ass'n, Inc. v. Broward County,* 502 So. 2d 931 (Fla. 4th DCA 1987). The name generally applies to a city rezoning only one or a few lots.[11] *Bird-Kendall Homeowners Ass'n v. Metro Dade County,* 695 So. 2d 908, 909 at n. 2 (Fla 3d DCA 1997) [22 Fla. L. Weekly D1536a]. A spot zoning challenge examines "(1) the size of the spot; (2) the compatibility with the surrounding area; (3) the benefit to the owner; and, (4) the detriment to the immediate neighborhood." *Id., citing Parking Facilities, Inc. v. City of Miami Beach,* 88 So.2d 141 (Fla.1956) and *Dade County v. Inversiones Rafamar S.A.,* 360 So.2d 1130 (Fla. 3d DCA 1978).

Approval of the settlement permitting an increase of FAR allowed for disparate treatment of the single Valencia Property for the sole benefit of the owner of the Biltmore. The Resolution permitted an impermissible variance from FAR requirements required by the Comprehensive Plan and Zoning Code yet denied the same FAR increase to properties similarly zoned like the Petitioner's property.

See Debes v. City of Key West, 690 So. 2d 700, 701 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D827a] (disapproving municipal rezoning of single property from medium-density residential to commercial general to permit construction of a shopping center because singling out one property for disparate treatment is impermissible spot zoning). The City Commission's approval of the Settlement Agreement here constitutes spot zoning because it singles out the Biltmore Property for disparate treatment, and we therefore find a departure from the essential requirements of law.

Lack of Competent, Substantial Evidence

As set forth above, the City violated its own zoning code in approving a settlement agreement without requiring proof or making findings that the developer suffered an inordinate or unfair burden. Likewise, the resolution passed without any competent, substantial evidence to support it. Because there was no competent, substantial evidence to support the resolution approving the settlement agreement, we must quash it. *See De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957) (competent substantial evidence is "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred"); *Smith v. Dep't of Health and Rehabilitative Servs.,* 555 So. 2d 1254, 1255 (Fla. 3d DCA 1989).

Bert J. Harris Act

The Respondent argues that the developer established its inordinate burden under the Bert J. Harris Act. Section 70.001, *et seq.,* Florida Statutes ("Bert J. Harris, Jr., Private Property Rights Protection Act") provides:

> When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government, as provided in this section.

The term "inordinate burden" is defined as follows:

> (e) The terms "inordinate burden" and "inordinately burdened":
> 1. Mean that an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.

Specific procedures which must be followed to establish an issue under the Bert J. Harris Act were never properly addressed nor raised. *See* § 70.001(4), Fla. Stat. (2019). At the March 12, 2019 hearing, the Deputy City Attorney explained that the Settlement Agreement resolved the David William litigation, and "any potential Bert Harris claim that the developer might make against the City for not having the highest and best use of their property." (Alliance Appx. 000111). But neither the developer nor the City Attorney proffered or put forth any evidence which would support a finding of inordinate burden under the definition of that term under the Act. Accordingly, this Court finds no merit in the Respondent's argument that the mere mention of an alleged Bert J. Harris problem satisfied the property owner's burden to enable the City to ratify the settlement.

We reject without further comment the arguments of Respondent that the Petition for Certiorari is barred because it is untimely or based upon the doctrine of unclean hands.

Conclusion

We grant the Petition for Writ of Certiorari and quash the resolution approving a Settlement Agreement allowing an increase of FAR in violation of the city zoning code as a departure from the essential requirements of law, absent competent substantial evidence to support it, and because the resolution constitutes impermissible spot zoning. (TRAWICK, J., concurs.)

(SANTOVENIA, J., concurring in part and dissenting in part.) The Petition seeks a writ of certiorari directed to the City of Coral Gables ("City") to quash City Resolution 2019-95 ("Resolution") and set aside in its entirety the Settlement Agreement ratified thereby. To the extent the majority opinion concludes that the Petition should be granted and quashes the Resolution approving the settlement as to the FAR of 2.7, I concur with the majority's conclusion. I respectfully dissent in part with the majority's opinion ratifying the part of the Settlement Agreement permitting the Biltmore project to be built to a height of 75 feet and concluding that Biltmore was permitted to build up to 150 feet without regard for lot size.

The majority correctly concludes that "the City violated its own zoning code in approving a settlement agreement without requiring proof or making findings that the developer suffered an inordinate or unfair burden. Likewise, the resolution passed without any competent, substantial evidence to support it. Because there was no competent, substantial evidence to support the resolution approving the settlement agreement[12], we must quash it". That conclusion applies equally to all of the terms of the Settlement Agreement: the agreed-upon project height limit of 75 feet and the FAR of 2.7. Accordingly, the same conclusion—that the Petition be granted and the Resolution be quashed—should be reached as to the Settlement Agreement in its entirety.

Furthermore, there is no more substantial competent evidence in the record to support the approval of the 75-foot height for development of the Valencia Property than is lacking to support the FAR of 2.7. The record supports only that these negotiated terms were agreed to in the Settlement Agreement by Biltmore in order to resolve the lawsuit filed by its neighbor, the David William. (Alliance Appx. 000112, lines 4-11).

The majority, after stating that "we need not defer to the legal opinions of the City Attorney as Coral Gables urges" goes on to state that "we independently conclude that site specific regulations govern over general zoning ordinances, and therefore, Biltmore was permitted to build up to 150 feet **without regard for lot size.**"[13] (emphasis added). However, the City has not at any time specifically concluded that the height cap of 150 feet contained in Section A-12.B.2.e, Site Specific Zoning Regulations applies without regard for lot size nor is that conclusion included anywhere in the Settlement Agreement or in the Resolution.

Notably, the former City Attorney's April 11, 2017 Legal Opinion Regarding 701 Valencia Avenue (CAO 2017-13), which appears to be the only formal legal opinion which addresses the Valencia Property specifically[14], concludes only that the "site specific governs and the **maximum** height is 150 feet." (Alliance Appx. 000068) (emphasis added). That legal opinion nowhere concludes that the height cap in § A-12.B.2.e, Site Specific Zoning Regulations applies to the Valencia Property regardless of minimum lot size requirements in the City Zoning Code.

Similarly, the whereas clauses in both Resolution 2019-84 (Alliance Appx. 000157) and the Settlement Agreement (Alliance Appx. 000161) cite to the former City Attorney's April 11, 2017 Legal Opinion Regarding 701 Valencia Avenue (CAO 2017-13), and also only state that the maximum height is 150 feet without making any reference to or reaching any conclusion whatsoever regarding the lot size provisions of the City Zoning Code.

The site specific provision in § A-12.B.2.e, Site Specific Zoning

Regulations, by its plain meaning, governs only the issue of the height cap[15]. Alliance Starlight argues in its Petition that the lot size provisions of the City Zoning Code apply and can be harmonized with the height cap. Notably, the City's Response to the Petition does not attempt to refute or take a contrary position to Petitioner's argument regarding lot size, but instead fails to respond to Petitioner's argument altogether. Whether that height cap provision conflicts with, or alternatively can be harmonized with, requirements contained in the performance standards of the City Zoning Code addressing the separate issue of minimum parcel dimensions (Alliance Appx. 000009) is an issue that has not been squarely addressed by the City either in its legal opinions or in this appeal.

The majority concludes that "Biltmore was permitted to build up to 150 feet **without regard for lot size**". The issue of whether Biltmore could, as a matter of law, develop the Valencia Property to 150 feet **regardless of lot size** was not decided below and is thus not properly before us in this appeal, nor does this court sitting in its appellate capacity have jurisdiction to issue advisory opinions. See generally *Northwoods Sports Medicine and Physical Rehabilitation, Inc. v. State Farm Mutual Automobile Insurance Company,* 137 So. 3d 1049 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a]. We should refrain from doing so.

For the foregoing reasons, I respectfully dissent and would grant the Petition, quashing the Resolution in its entirety.

---

[1]The lot containing Biltmore's project does not exceed 20,000 square feet.

[2]Section A-12.B.2.e, Site Specific Zoning Regulations. Section 4-104D.6 of the general Zoning Code limits the FAR to 2.0

[3]Respondent points out that these legal opinions were no surprise to Alliance Starlight. The same lawyer who now represents Alliance Starlight specifically solicited the opinion from Craig Leen on behalf of another client. Thus, Respondent argues that there was ample opportunity to appeal this legal interpretation in 2013 or 2014, and now, it is too late.

[4]Coral Gables argues that when its City Attorney issues an opinion on a zoning matter, that opinion bears the force and weight of a final municipal decision interpreting the zoning code. Coral Gables relies upon Section 2-702 of the Coral Gables City Code, which states:

> The City Attorney serves as the final authority with regard to legal issues involving interpretation and implementation of these regulations. An action to review any decision of the City Attorney may be taken by any person or persons, jointly or separately, aggrieved by such decision by filing with the Circuit Court in the manner and within the time prescribed by the Florida Rules of Appellate Procedure.

[5]Plaintiff Jorge M. Guarch, Jr. was a party in the underlying litigation.

[6]Respondent points out that these legal opinions would be no surprise to Alliance Starlight. Counsel for Alliance Starlight on behalf of another client emailed Craig Leen specifically soliciting the opinion that a developer could build to 150 feet in this district. Thus, Respondent argues that there was ample opportunity to appeal this legal interpretation in 2013 or 2014, and now, it is too late.

[7]

> Judicial interpretation of statutes and rules.—In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo.

Art. 5, § 21, Fla. Const.

[8]Although by its plain language, Florida's new "Anti-Chevron" doctrine would appear to apply only to interpretation of a "state statute or rule." A municipal zoning ordinance is a local ordinance, not a state statute or rule.

[9]" . . . **Owner alleges that reducing the project's height would disproportionately and inordinately burden the owner's property rights** in violation of Division 17 of the City of Coral Gables Zoning Code and the Bert J. Harris Act as codified in Section 70.001 of the Florida Statutes." (emphasis supplied). Also, "WHEREAS, pursuant to Section 3-1703(B) of the City of Coral Gables Zoning Code, all relief granted pursuant to Division 17 is conditioned upon the execution of a release of all claims that may arise from or relate to the application of the land development regulations that **allegedly created the unfair, disproportionate or inordinate burden**." (emphasis supplied). (Alliance Appx. 000096).

[10]Section 3-1703.A. provides:

> If the City Commission finds that an applicant has demonstrated that it has suffered an unfair, disproportionate or inordinate burden as a result of the application of these regulations to its property, the City Commission may grant appropriate relief. Likewise, if the City demonstrates that a settlement would avoid, mitigate, or remedy an unfair, disproportionate, or inordinate burden to a property owner, the City Commission may grant appropriate relief.

[11]The "classic" definition of spot zoning is "the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area for the benefit of the owner of such property and to the detriment of other owners." Plannersweb.com 2013/11 (citing Anderson's American Law of Zoning, 4th Edition §5.12 (1995)).

[12]The need for that proof and findings of inordinate burden on the Biltmore supporting the settlement is highlighted where the Bert J. Harris suit was only potential, and the action that had been taken on the Biltmore's development application by the City thus far—the approval of the application by the City's Board of Architects—was actually favorable to the Biltmore.

[13]The majority similarly concludes that "the site-specific regulations allow building to a maximum height of 150 feet, **without regard for lot size.**" (emphasis added).

[14]The City's Response to the Petition also references a December 18, 2014 zoning verification letter and a 2015 letter written by the former City Attorney regarding the Valencia Property, but does not address how or whether these letters have the force of legal opinions, are published or publicly disseminated, or equate to a zoning decision by the City's decision making body.

[15]That site specific provision provides: "No apartment buildings and/ or structure shall be erected or altered . . . to exceed thirteen (13) stories or one-hundred-fifty (150) feet in height, whichever is less." § A-12.B.2.e, Site Specific Zoning Regulations.

* * *

Municipal corporations—Zoning—Certiorari challenge to city commission's rejection of appeal of city historic preservation board's decision not to designate house belonging to petitioner's neighbor as historic—Due process—Ex parte communications—Competent substantial evidence overcame any presumption of prejudice arising from mayor's ex parte communication to preservation board where memorandum from mayor was read to board and each member of board stated that, notwithstanding having received it, member could be fair and impartial—City attorney did not violate due process by advising petitioner to avoid ex parte communication with city commissioners before her appeal where advice was consistent with case law, and petitioner was able to communicate her opinions to commissioners in testimony and through several emails sent to members of preservation board and community that were entered into record before commission—Hearing—Remote hearing—Petitioner failed to preserve issue of alleged error in conducting appeal hearing by Zoom where she did not object to hearing format until second of two commission hearings—Further, use of Zoom to conduct quasi-judicial municipal hearing does not violate due process—Board and commission did not depart from essential requirements of law where they adhered to zoning code standards for designation of historical landmarks—Decision of board is supported of competent substantial evidence that home did not meet criteria for historic designation—Claim that mayor violated Sunshine Law by sending ex parte communication to commissioners despite having recused himself from appeal of preservation board's decision is waived where argument was raised for first time in reply brief

MARIA V. CERDA, Appellant, v. CITY OF CORAL GABLES, Florida Municipal Corporation, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-130-AP-01. L.T. Case No. 20-1325. April 16, 2021. On Appeal from a decision by the Coral Gables City Commission on May 26, 2020. Counsel: David J. Winkler, David J. Winkler, P.A., for Appellant. Miriam Soler Ramos, City Attorney, Gustavo J. Ceballos, Assistant City Attorney, and John C. Lukacs, Sr., John C. Lukacs, P.A., for Appellee. Raoul G. Cantero, White & Case LLP, for Amicus Curiae/Intervenor, Lourdes Valls.

OPINION

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

(WALSH, J.) Three years ago, Lourdes Valls purchased a one-story ranch-style house for her daughter in the City of Coral Gables ("The City").[1]

The homeowner submitted plans to the City to demolish the house and build a new house in the Mediterranean revival style which permeates her Coral Gables neighborhood. As is required by the Coral Gables code, if a homeowner submits plans to demolish a property, the homeowner must apply for a determination of historic significance with the Historic Preservation Board. The homeowner accordingly filed her application for a determination of historic significance.

At the quasi-judicial hearing before the Historical Preservation Board, both the preservation officer on behalf of the Historical Resources and Cultural Arts Department (HRCAD) and Ms. Valls presented PowerPoint presentations, both of which were accepted in evidence without any objections. The preservation officer testified and presented evidence that the Valls residence was a ranch-style home built in 1936 by renowned architect Russell Pancoast. The house was described as an example of an early Traditional Custom Ranch House, incorporating Art Deco and Art Moderne influences. HCAD recommended preservation based upon three of the criteria set forth in section 3-1103, of the Coral Gables Zoning Code:

- Exemplifies the historical, cultural, political, economic or social trends of the Community
- Portrays the environment in an era of history characterized by one (1) or more distinctive architectural style;
- Embodies those distinguishing characteristics of an architectural style, or period, or method of construction.

Ms. Valls presented her own PowerPoint, again, without objection, containing architectural drawings, photographs of her house and other homes in the neighborhood, renderings, advertisements, and drawings of floorplans.

In addition, Ms. Valls' own architect, Ramon Pacheco, testified in favor of not designating the home historic. Mr. Pacheco is a graduate of the University of Florida and a prior employee of Pancoast's firm. He opined that he believed that Russell Pancoast was forced to compromise on the design of this house because he made choices which did not make sense—for example, the odd manner in which the home was oriented on the property. Mr. Pacheco concluded that the home was "not a Russell Pancoast." Moreover, he testified that the home was significantly transformed since it was built and was not the original house or near its original condition. The historic preservation officer acknowledged that the most significant alterations made to the home were the change to the windows, alteration from the original garage carriage doors to a single-wide garage door, and the replacement of the cement walkway with brick pavers.

As is depicted in the color photograph of the Valls' home introduced at the hearing, Ms. Valls argued that the house appears to be a white ranch-style home, typical in appearance to the ranch-style homes built all over Florida, but not especially represented in the City of Coral Gables. Some alterations to the home had been made in the past. Most of the homes designated historic in Coral Gables were of the Mediterranean revival style, as reflected in the photographs introduced at the hearing.

Following the hearing, the Historical Preservation Board declined to designate the home historic. Following a second hearing, the Board voted not to designate the home historic.

The Petitioner, Maria V. Cerda, has lived next door to the property for 33 years.[2] Ms. Cerda appealed the Board's decision not to designate her neighbor's property historic to the City Commission. Following two meetings of the City Commission which resulted in tie votes (Mayor Valdés-Fauli recused himself), the appeal was denied. Ms. Cerda has filed a petition for writ of certiorari asking that we quash the City Commission's decision to reject her appeal and the decision of the Historical Preservation Board not to designate the home historic.

In addition to arguments presented in the Petition, the Petitioner raises a new argument in her Reply Brief, that the City Commission violated the Sunshine Law because the City Mayor sent a memo to members of the City Commission before the appeal.

Analysis

We have jurisdiction to issue writs of certiorari from quasi-judicial decisions of municipal boards. Art. V, § 5(b), Fla. Const; *Haines City Community Development v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a], *citing De Groot v. Sheffield*, 95 So. 2d 912 (Fla. 1957). We apply a three-part standard of review: (1) whether procedural due process was afforded; (2) whether the essential requirements of law have been observed; and (3) whether the findings and judgment are supported by competent substantial evidence. *Heggs*, 658 So. 2d at 530 (Fla. 1995); *Board of County Comm'rs of Brevard County v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993); *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

Due Process

The Petitioner argues that the City violated her due process rights in three ways. First, she argues that a memorandum sent by the Mayor to members of the Historic Preservation Board caused improper influence over the members of the board. Second, she complained that she was given improper advice by the City Attorney to refrain from *ex parte* communications with the City Commissioners prior to the appeal. Third, she argues that her due process rights were violated because her appeal was heard virtually on the Zoom platform, rather than in-person. (Pet. at pp. 22-25).[3]

The Petitioner first argues that her due process rights were abridged because the Mayor sent an *ex parte* communication to the members of the Historic Preservation Board. "A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard." *Jennings v. Dade Cty.*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). With respect to a claim that *ex parte* communications were made to the tribunal, the Court explained:

> Ex parte communications are inherently improper and are anathema to quasi-judicial proceedings. Quasi-judicial officers should avoid all such contacts where they are identifiable. However, we recognize the reality that commissioners are elected officials in which capacity they may unavoidably be the recipients of unsolicited ex parte communications regarding quasi-judicial matters they are to decide. The occurrence of such a communication in a quasi-judicial proceeding does not mandate automatic reversal. . . . Upon the aggrieved party's proof that an ex parte contact occurred, its effect is presumed to be prejudicial unless the defendant proves the contrary by competent evidence. § 90.304.

Id. at 1341. Here, while there was an *ex parte* communication by the Mayor to the Board, the record contains evidence to refute any presumption of prejudice. The Mayor's *ex parte* communications

expressed the City's pride in its commitment to historical preservation, detailed the process for historical preservation, including changes to the process, and advocated against preservation overkill. The memorandum was read in its entirety to the Board and each member stated that notwithstanding having received it, they could each be fair and impartial. We find that competent evidence overcame any presumption of prejudice, and there was no due process violation.

Second, the Petitioner argues that she was deprived of due process when the City Attorney told her she could not reach out personally to the members of the City Commission before her appeal. In response to Ms. Cerda's objection that she was prohibited from contacting City Commissioners, the City Attorney explained the following to the members of the Commission at the hearing on the appeal:

> In his letter, he claims that the Jennings case, which is the case that addresses ex-parte communications, does not stand for the proposition that ex-parte communications should be avoided. However, Jennings itself states that ex-parte communications are inherently improper and that quasi-judicial officers should avoid all contact where they are identifiable. The word "avoid" is actually used in the case. In either event, the concept is that those communications should be avoided when they do occur and the case acknowledges—the board acknowledges in that case that, you know, elected officials are contacted by their—by the people they represent. That is part of human nature. It's part of the process, and that is why the disclosure—the ability to disclose, to dispel that particular potential for bias is there. That's exactly what was told to Ms. Cerda. The advice that I gave Ms. Cerda, which is the appellant, was to try to avoid ex-parte communications with the Commission. That is the advice that I give everyone, and I'm sure that the five—the four of you can attest to the fact that I consistently remind the Commission that ex-parte communications should be avoided, and if they are had, that they should be disclosed.

(Resp. App. at p. 89).

The City Attorney did not violate *Jennings* by advising Ms. Cerda to refrain from making *ex parte* communications. Moreover, Ms. Cerda was able to communicate her opinions to the City Commission. In addition to her record testimony to the Historic Preservation Board in support of preserving the Valls' house, her detailed email to the Board setting forth her opinions was included in the record. (Pet. App. at p. 456). Another email sent from Ms. Cerda to members of the community in support of preserving her neighbor's home detailing all of her arguments was also submitted and read into the record before the City Commission. (Pet. App. at pp. 618-619, 622-624). We find no violation of due process resulting from the City Attorney advising the Petitioner to avoid *ex parte* communications.

Finally, the Petitioner argues that while the property owner, Ms. Valls, executed an agreement to a virtual Zoom hearing on the appeal, Ms. Cerda was not given such a choice. Instead, she was merely instructed that a Zoom hearing was necessary. Ms. Cerda complains about the use of Zoom for her appeal to the City Commission.

We first reject this claim because it is unpreserved. The Petitioner failed to object or bring this issue to the attention of the parties below prior to the May 12, 2020 City Commission hearing. The preservation doctrine is intended "to put the [lower tribunal] on notice of a possible error, to afford an opportunity to correct the error early in the proceedings, and to prevent a litigant from not challenging an error so that he or she may later use it for tactical advantage." *Clear Channel Commc'ns., Inc. v. City of N. Bay Village*, 911 So. 2d 188, 190 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2170b] (citations omitted). Ms. Cerda did not object until the second Commission hearing and therefore cannot now argue that the virtual nature of the hearing violated her due process.

While the Petitioner did submit a letter voicing her objection to virtual proceedings prior to the second May 26, 2020 Commission hearing, we reject her due process claim on the merits. As the City Attorney explained at the May 26 hearing, section 3-607(b) of the City of Coral Gables Code requires that once an appeal is complete and submitted, it "shall" be heard at the next commission meeting. The City (like the rest of the world) was subject to municipal and statewide lockdown but could not by its own ordinances delay the appeal until the lockdown was lifted. The City briefly delayed setting the appeal from April 21 to May 12 to allow the City Attorney to promulgate rules for virtual hearings. (Resp. App. at p. 90). But as the City Attorney explained, proceedings could not be delayed any further or the City would have violated its own code.

Moreover, there was no option available to conduct the appeal in a live forum. These proceedings took place during a worldwide pandemic in which local government meetings could not take place live. How courts handled judicial proceedings during the pandemic is a helpful corollary to interpret due process rights during quasi-judicial proceedings. From the onset of the pandemic and concomitant shutdown in March 2020, the Supreme Court of Florida issued multiple Administrative Orders allowing and encouraging the use of virtual technology in all court matters with some exceptions, including jury trials.[4] Testing the due process boundaries in the use of virtual technology, the Third District Court of Appeal held that use of a virtual platform to conduct a violation of probation hearing did not violate a defendant's right to due process and confrontation of witnesses. *See Clarington v. State*, 3D20-1461, 2020 WL 7050095 (Fla. 3d Dist. App. Dec. 2, 2020) [45 Fla. L. Weekly D2671a], *cert. denied*, 3D20-1461, 2021 WL 115633 (Fla. 3d DCA Jan. 13, 2021) [46 Fla. L. Weekly D157a]. If conducting a virtual criminal hearing at which incarceration may be ordered does not violate due process, using Zoom to conduct a quasi-judicial municipal hearing does not violate the due process rights of an aggrieved neighbor. We find the Petitioner's due process rights were not violated.

Departure from the Essential Requirements of Law

The Petitioner argues that the Historical Preservation Board departed from the essential requirements of law because "there is no substantial competent evidence whatsoever to support the decision of the Historic Preservation Board that *not a single one* of the conditions for historic designation in Coral Gables Zoning Code Sec. 3-1103" were met. Petitioner also argues that the City Commission departed from the essential requirements of law

> in failing to overturn the decision of the Historic Preservation Board because there is clear and convincing evidence that at least one of the criteria for historic designation under Coral Gables Zoning Code Sec. 3-1103 were met.

Petitioner's argument is a mish-mash of an inapplicable evidentiary standard, a reformulated argument that the decision below lacks competent substantial evidence, and a misstatement of this Court's standard of review. Our role is not, as the Petitioner claims, to determine if the homeowner or the City adequately *refuted* the "clear and convincing"[5] evidence offered by the staff analysis. Rather, to determine whether there was a departure from the essential requirements of law, we must determine whether the lower tribunal failed to follow or apply the correct law—in this context, the relevant portions of the municipal code. *See Heggs*, 658 So. 2d at 530.

Here, the Historical Preservation Board and the City Commission adhered to the standards in Article 3—Developmental Review, section 3-1103, of the Coral Gables Zoning Code, which established the criteria for designation of historical landmarks. The Historical Resources and Cultural Arts Department (HRCAD) recommended historical designation based solely upon these three criteria found within Section 3-1103 of the Coral Gables Zoning Code:

> • Exemplifies the historical, cultural, political, economic or social trends of the Community

• Portrays the environment in an era of history characterized by one (1) or more distinctive architectural style;

• Embodies those distinguishing characteristics of an architectural style, or period, or method of construction.

The Historical Preservation Board conducted a public hearing at which it heard and took evidence relating to the enumerated criteria and ultimately declined to designate the home historic. The correct law was followed—the Petitioner merely disagrees with the result. We, therefore, find no departure from the essential requirements of law.

Competent Substantial Evidence

Next, the Petitioner argues that there was a lack of competent, substantial evidence to support the decisions below. Competent substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Duval Utility Co. v. Florida Public Service Commission*, 380 So. 2d 1028, 1031 (Fla. 1980). This Court may not reweigh the evidence nor substitute its judgment for that of the lower tribunal. *Heggs*, 658 So. 2d at 530. The Florida Supreme Court held that "[a]s long as the record contains competent substantial evidence **to support the agency's decision**, the decision is presumed lawful and the court's job is ended." *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a] (emphasis added).

In reviewing the record for evidence supporting the decision below, we find that there was competent substantial evidence presented that the home did not meet the three enumerated criteria. The homeowner's architect Ramon Pacheco testified that that house was not an exceptional example of a ranch-style home. Mr. Pacheco was a graduate of the University of Florida and an employee of Pancoast's firm, and thus was well-aware of the relative quality of other Pancoast projects. Mr. Pacheco testified that he believed Mr. Pancoast was forced to compromise on the design of the house. He characterized the house as "not a Russell Pancoast." He also testified that it had been transformed and was not the original house.

In addition, Ms. Valls presented materials to the Board, including photographs, drawings, advertisements from the time of construction, and other materials demonstrating that the Valls home does not satisfy the three enumerated criteria. While much was made at the hearings that the home was designed by famous architect Russel Pancoast, HRCAD did not recommend historical designation based on the criterion that the home was "an outstanding work of a prominent designer or builder." *See* § 3-1103, Div. 11, Coral Gables Zoning Code. The HRCAD acted within its discretion in determining that there was insufficient evidence to cite this criterion in its recommendation for historic designation.

The testimony of Ms. Valls' architect, Mr. Pacheco, in conjunction with the drawings, renderings and photographs introduced by Ms. Valls, support the Board's decision not to designate the home historic. Accordingly, we find that the decision was supported by competent, substantial evidence.

Respondent's Motion to Strike Untimely Raised Challenge to Violation of the Sunshine Law

In her Reply Brief, the Petitioner raises a new argument—that despite recusing himself from considering the appeal, Mayor Valdés-Fauli violated Florida's Sunshine Law by engaging in *ex parte* communications with the City Commissioners.[6] Because this argument was not presented in her Petition, Respondents have moved to strike this new argument as waived for appeal.

If an argument on appeal is not presented in the initial brief, it is waived for appellate review. An issue may not be raised for the first time in a reply brief. *See Ashear v. Sklarey,* 247 So. 3d 574 at n.3 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D181a], *citing Parker-Cyrus v. Justice Admin. Comm'n*, 160 So. 3d 926, 928 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D582a] (issue not raised in an initial brief is deemed abandoned and may not be raised for the first time in a reply). Allowing review of issues raised in a reply would violate due process, "because it would deprive the [opponent] of the opportunity to respond to the new argument raised by Petitioner in the reply." *Parker-Cyrus*, 160 So. 3d at 928. The court explained, " '[w]ithout strict adherence to this rule, the appellees are left unable to respond in writing to new issues presented by the appellants.' " *Id.* (quoting *Snyder v. Volkswagen of Am., Inc.*, 574 So. 2d 1161, 1161-62 (Fla. 4th DCA 1991)); *Gen. Mortg. Assocs., Inc. v. Campolo Realty & Mortg. Corp.*, 678 So. 2d 431 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1725a].

Even an allegation made for the first time in a reply that serious fundamental error occurred is deemed waived for appeal. *See Calabrese v. State*, 5D19-2858, 2021 WL 68319 at *3 (Fla. 5th DCA Jan. 8, 2021) [46 Fla. L. Weekly D130c] (finding Sixth Amendment fundamental error waived where issue not presented to the court until the reply); *Hoskins v. State*, 75 So. 3d 250, 257 (Fla. 2011) [36 Fla. L. Weekly S634a] (rejecting ineffective assistance of counsel claim raised for the first time in a reply brief); *Ferguson v. State*, 200 So. 3d 106, 111 (Fla. 5th DCA 2015) [41 Fla. L. Weekly D62a] ("However, Ferguson did not preserve any claim of fundamental error because the issue was only presented in his reply brief"), *citing Wheeler v. State*, 87 So. 3d 5, 6 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D194a] ("determining that appellate court was not required to undertake fundamental error analysis where defendant did not raise claim of fundamental error in initial appellate brief"). This rule is akin to barring new issues from being addressed by motion for rehearing. *See Lowry v. State*, 963 So. 2d 321, 328 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D1978a] ("However, unfamiliarity with fundamental error doctrine and Florida Rule of Appellate Procedure 9.330(a) is not a sufficient basis for a motion for rehearing"), *citing Lawyers Title Ins. Corp. v. Reitzes*, 631 So. 2d 1100, 1100-01 (Fla. 4th DCA 1993); *Rosier v. State*, 276 So. 3d 403 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D1686a] (in rejecting an argument not briefed raised for the first time in a rehearing the majority noted "fundamental principles of appellate review and judicial restraint apply even when the defendant has been convicted of a capital crime and sentenced to death") (citations omitted).

We find that these arguments are waived and therefore grant Respondent's motion to strike new arguments presented in the Reply Brief because they are barred for appellate review.

Motion to Strike is granted; the petition for writ of certiorari is denied. (TRAWICK and DE LA O, JJ., CONCUR.)

---

[1]A color photograph of the Valls house, reproduced here, was presented as part of Ms. Valls' evidence, and is reproduced on the first page of the Brief and on page 6 of the appendix filed for Intervenor Lourdes Valls.

[2]At no time prior to the historical determination proceedings in this case did Ms. Cerda ever seek a historical significance determination of her neighbor's property. Nor has she ever sought such a determination of her own property.

[3]Ms. Cerda makes an additional argument in her Reply Brief which, for reasons stated herein, we strike.

[4]The most recent Administrative Order, AO 20-23 is the tenth amendment to the Supreme Court of Florida's original order suspending speedy trial, suspending rules prohibiting use of virtual technology and encouraging the use of technology in most matters. *See* https://www.floridasupremecourt.org/content/download/724015/file/AOSC20-23-Amendment-10.pdf.

[5]This is not the burden of proof at the municipal level. *See Fla. Power & Light Co. v. City of Dania,* 761 So. 2d 1089, 1092 (Fla. 2000) [25 Fla. L. Weekly S461a], *citing Irvine v. Duval County Planning Commission*, 495 So. 2d 167 (Fla. 1986).

[6]Ms. Cerda did not raise this issue in her Petition. In her Petition, Ms. Cerda complains that she was prevented from making *ex parte* communications herself: "The motivations of the City Attorney's office to prevent Ms. Cerda (sic) free speech rights

can only be guessed at, but the fact that the advice was not given in good faith is evidenced by mayor Raúl Valdés-Fauli sending yet another ex parte "memo" urging the members of the City Commission to affirm the decision of the Historic Preservation Board." (Pet. at p. 24). The Petitioner thus did not argue in her Petition that the Mayor's communication with the Commission violated her due process rights. Rather, she complains that she was prevented from making her own *ex parte* communications.

* * *

Municipal corporations—Petition for certiorari review of mayor's veto of city commission's reversal of city's historical and environment preservation board's decision to deny county's application for certificate of appropriateness and approval of demolition and renovation of historic playhouse—Because mayor's veto is quasi-judicial decision, ex parte communications between mayor and interested members of public about pending veto are presumed to be prejudicial and violated county's due process rights—Mayor did not depart from essential requirements of law by relying on historical designation of playhouse and evidence that demolition of all but building's facade would result in playhouse being removed from historic register as basis for veto—Mayor's decision is sustained despite argument that he erroneously based veto on county's failure to include demolition permit in application where veto relies on other valid bases—Veto is supported by competent substantial evidence in preservation officer's report and concern that demolition would result in removal from historic register—Veto is quashed based on deprivation of due process rights

MIAMI-DADE COUNTY, Petitioner, v. CITY OF MIAMI, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-167-AP-01. April 7, 2021. On Petition for Writ of Certiorari from City of Miami mayoral veto of City Commission Resolution R-19-0169. Counsel: Abigail Price-Williams, Miami-Dade County Attorney and James Edwin Kirtley, Jr., Assistant County Attorney, for Petitioner. Victoria Méndez, City Attorney, John A. Greco, Deputy City Attorney, and Kerri L. McNulty, Senior Appellate Counsel, for Respondent.

(Before TRAWICK, WALSH and ZAYAS, JJ.)

OPINION ON REMAND

[Prior report at 28 Fla. L. Weekly Supp. 458a]

(WALSH, J.) On July 22, 2020, this Court issued an opinion dismissing Miami-Dade County's Petition for Writ of Certiorari challenging City of Miami ("City") Mayor Francis Suarez's veto of a resolution approving demolition and renovation of the City's historic Coconut Grove Playhouse. We opined that a mayoral veto is not a quasi-judicial act and therefore, we lacked jurisdiction to address this petition for writ of certiorari. On a second-tier petition for writ of certiorari, the Third District Court of Appeal quashed our opinion and remanded this case with directions to reinstate the petition and for consideration of the merits. The court held:

> We conclude that the Mayor's veto is inextricably intertwined with the quasi-judicial proceedings, as his action was in response to a quasi-judicial proceeding. Thus, it was reviewable by the circuit court's appellate division, and the circuit court had jurisdiction to address the merits of the County's petition.

Miami-Dade County v. City of Miami, 2020 WL 7636006 at *7 (Fla. 3d DCA Dec. 23, 2020) [46 Fla. L. Weekly D19a].

Accordingly, upon consideration of the mandate, we set aside the opinion and order of this court issued on July 22, 2020 and reinstate Miami-Dade County's Petition for Writ of Certiorari for consideration on the merits.

The Mayor of the City of Miami, Francis Suarez, vetoed a City of Miami Commission resolution quashing a decision by the Historical and Environmental Preservation Board ("HEPB"). Miami-Dade County (the "County") filed a petition for writ of certiorari to quash the Mayor's veto and reinstate the Commission's resolution approving demolition and renovation of the historic Coconut Grove Playhouse.

Historical Background of the Coconut Grove Playhouse

The City of Miami owns the historic Coconut Grove Playhouse ["Playhouse"], located on Main Highway in Coconut Grove. Miami-Dade County and Florida International University currently hold a lease on the Playhouse and seek to renovate the property. The current renovation plan, approved by the City Commission but vetoed by the Mayor, would demolish the theater, build new elements and a new, smaller theater, and retain only the historic façade and a few interior elements.

The Playhouse was designed in 1926 by the architectural firm of Kiehnel and Elliott and renovated and redesigned in 1955 by renowned architect Robert Browning Parker. (Resp. App. 19-36)[1] In 2005, the City of Miami initiated a process to designate the Playhouse as historic. The City of Miami Preservation Officer prepared a report to the HEPB in support of historic designation. In recommending historic designation of the Playhouse, the report relied upon three factors set forth in the City of Miami Code:[2]

> 3. Exemplifies the historical, cultural, political, economical, or social trends of the community.
>
> The Coconut Grove Playhouse exemplifies the historical, cultural economical, and social trends of Coconut Grove during the twentieth century, particularly the Boom and Bust cycles that characterize the history of Miami. The theater was built as the Coconut Grove Theater during the heyday of the 1920's real estate boom. Designed in a flamboyant "Spanish Baroque" style, the theater reflects the optimism and disposable wealth of Miami's citizens and the fascination with Mediterranean architectural precedents. Reborn in 1955 as the Miami's first live, legitimate theater, the Coconut Grove Playhouse evolved into one of the most important regional theaters in the country.
>
> 5. Embodies those distinguishing characteristics of an architectural style, or period, or method of construction.
>
> The design of the Coconut Grove Playhouse embodies the Mediterranean Revival style, and featured a highly decorative entrance, enriched window surrounds, and decorative detail associated with the design. Despite a few alterations, the Playhouse still retains enough integrity to convey its original Mediterranean Revival style and still exhibits its major character-defining elements.
>
> 6. Is an outstanding work of a prominent designer or builder.
>
> The Coconut Grove Playhouse is associated with two of South Florida's most prominent architects. Richard Kiehnel, who designed the original building, is considered one of South Florida's most outstanding architects. Kiehnel completed much of his work during the real estate boom of the 1920s, but also went on to make contributions into the 1930s and 1940s. As editor of the publication *Florida Architecture and the Allied Arts,* Kiehnel also influenced generations of new architects. Alfred Browning Parker is considered an outstanding living architect whose work is more aptly described as "Modernist." Parker remodeled the interior of the theater, dramatically changing its style from a highly decorative Mediterranean revival tour de force to a building that reflected the "clean," unornamented, geometrically defined architecture of the era to which he belonged.

(Resp. App. at p. 24); *See* Section 23-4 of the City of Miami Code of Ordinances.

Thus, Miami's decision to grant Historical Designation was based upon multiple factors, including the historical significance of the Playhouse, the architectural design of its original architect, Richard Kiehnel, and architect Alfred Browning Parker's subsequent 1950s "modernist" restyling of the theater. The 2005 Report also specifically defined "contributing structures" to include the **entire theater**, not merely the façade:

> **Contributing structures within the site include the Coconut Grove Playhouse itself**. Only the south and east facades possess architectural significance. There are no contributing landscape features. (emphasis added)

Id. at p. 26. Under the 2005 historical designation, while only the south and east facades possess *architectural* significance, the entire theater was designated based on "historical, cultural, political, economical, or social trends" as well as "distinguishing characteristics of an architectural style, or period."

The parties agree that the 2005 Historic Designation and its incorporated report of the preservation officer control whether any plan of demolition or renovation proposed by Miami-Dade County may be granted a certificate of appropriateness.

2017 First Certificate of Appropriateness

In 2017, Miami-Dade County applied for its first special certificate of appropriateness to the HEPB to develop the Playhouse. *See* § 23-6.2(b)(4), City of Miami Code. The application set forth, in broad strokes, a "Masterplan Concept" for the Playhouse. It proposed to restore *only* the "entire front historic building to the original 1927 Kiehnel & Elliott design," and survey the remaining interior elements. The 2017 "Masterplan Concept" therefore proposed to retain only the front façade, demolish the theater, and build a new theater on the original footprint.

The 2017 staff analysis concluded that demolition of the theater was permissible because the 2005 historic designation report described only the "original Kiehnel structure containing the South and East facades" as requiring preservation. In so doing, the staff misapprehended that while only the South and East facades possessed *architectural* significance, the entire theater possessed *historical* significance. (Resp. App. at pp. 23-26). In reliance upon this faulty staff analysis, the HEPB approved this 2017 Certificate of Appropriateness.[3]

Listing on the National Register of Historic Places

In 2018, after the Certificate of Appropriateness was granted, the City of Miami applied for and obtained a listing for the Playhouse in the National Register of Historic Places. In describing the historical significance of the interior, the report in support of the listing stated:

> While the levels of architectural integrity vary depending on the portion of the building examined, the Playhouse still retains a high degree of associative integrity with the events that occurred at that location. The theater's auditorium retains a high level of integrity from the period of significance associated with George Engles and Zev Buffman and the productions they coordinated and sponsored.
> * * *
> The Coconut Grove Playhouse retains to a high degree its integrity of feeling. The building clearly conveys a sense of early twentieth-century glamor, which Kiehnel and Elliott built and Parker maintained. While the interior has been altered and degraded, it still maintains its historic feeling as well.
>
> Overall Integrity
>
> The building retains sufficient integrity of location, setting, design, materials, workmanship, association and feeling for listing on the National Register of Historic Places.

These findings mirror the conclusions in the 2005 City of Miami Historic Designation.

Second Certificate of Appropriateness—Current Demolition and Development Plan

In 2018, after approval by the planning and zoning board, the County applied again to the HEPB for a special certificate of appropriateness to develop the Playhouse. The County's new plan proposed to preserve only the front structure of the Playhouse, demolish the existing theater, build a new 300-seat theater and additional structures, attempt to preserve certain interior elements and redesign new elements to echo the style of the original 1927 theater. After a hearing, the HEPB denied this application.[4]

On appeal, the City of Miami Commission reversed the denial and granted the Certificate of Appropriateness in a 3-2 vote in Resolution R-19-0169—Coconut Grove Playhouse Appeal.

Mayoral Veto and *Ex Parte* Communications

In the 10-day period between the City Commission passing resolution R-19-0169 and the mayoral veto, the City Mayor received and responded to *ex parte* email communications from members of the public. Most notably, on the day before the veto, Richard Heisenbottle, an interested witness before the HEPB hearing and City Commission hearings, emailed the Mayor with the following:

> Good morning Francis,
> Hope all is well.
> As the deadline is fast approaching, I took the liberty of drafting the attached Veto Message and suggested Compromise because I want you to know there is a profoundly strong intellectual and legal basis for you to exercise your Veto power and do what so many of us have asked you to do, Help Save the Coconut Grove Playhouse.
> Feel free to use any of this as you wish.
>
> Rich

This message was flagged, and the Mayor forwarded it to his counsel. The attachment to Mr. Heisenbottle's email is not contained in the Petitioner's Appendix and therefore not in the record. It is unknown whether Mr. Heisenbottle's proposed veto language found its way into the Mayor's veto message.

On May 9, Martin Blaya wrote the Mayor:

> . . . . I, along with many, as evidenced by the turnout at yesterday's meeting, agree that we must preserve the few remaining historic structures in our City and that the County plan does not achieve that goal. . . . As pointed out by many yesterday, the original vote of the residents was to restore the entire exterior of the Playhouse, not just the front façade, and all of the historical designations include the entire exterior, not just the façade. The County has intentionally misrepresented the history of the vote, historic designations and its remodeling plan . . . .

The Mayor responded to this email requesting Mr. Blaya's cell phone and flagged and forwarded the message to staff.

On May 9, Joe Cardona emailed the Mayor,

> . . . [I]if there was ever a great time for a Mayoral veto—tis now (Coconut Grove Playhouse) . . . Giminez and his folks (Dennis Kerbel) came into the city and ran roughshod—making all kinds of unfounded accusations about the Historical Preservation Board, twisting reality and spewing half-truths . . . .

The Mayor requested Mr. Cardona's phone number and forwarded the email to staff.

In a May 13th email to the Mayor, Carmen Pelaez, who testified at the public hearing on the appeal to the City Commission, wrote:

> I'm an award winning playwright and actor and have performed my play RUM & COKE to sold out audiences at the Playhouse plus I got an off broadway run out of it. I am the EMBODIMENT of a stakeholder.
> * * *
> . . . I want to make sure you have the financial and legal coverage you need to take on this fight. I would love to come in and give you my specific points which I believe would be useful to you to substantiate a veto . . . .

In response, the chief of staff and the Mayor arranged for a group meeting with Ms. Pelaez and historic preservation experts.

On April 10, 2019 (before the City Commission appeal), Barry White wrote to all commissioners offering "an objective and in depth

review of the issues involved." On the same day, the Mayor responded and asked if Mr. White would be interested in a discussion with his staff and policy people. On May 13 (after the commission vote and before the Veto), the Mayor directed his staff to note and schedule the meeting.

On May 17, 2019, the City of Miami Mayor vetoed the Commission's resolution. In his veto, the Mayor stated:

> We must uphold historic preservation requirements in our community, and the Coconut Grove Playhouse should be no exception. The Playhouse is "a signature building reflecting the heyday of Coconut Grove." *See* City of Miami Preservation Officer 2005 Report. The HEP Board recognized this fundamental truth and I seek to reinstate that decision.

Although initially opining that the appeal was premature, the Mayor reached the merits of the appeal:

> To the extent that the merits of the appeal could have been reached, my veto that seeks to affirm the HEP Board's decision is supported by competent and substantial evidence. Based on the record before the HEP Board and Commission, the County's proposal would jeopardize the National Register of Historic Places ("National Register") designation for the Coconut Grove Playhouse because the proposal is not consistent with the guidance provided by the Secretary of Interior's Standards for the Treatment of Historic Properties. . . . National Register provides significant benefits for designated properties, including but not limited to federal tax incentives, grant eligibility, and the prestige of the recognition.

The Mayor mentioned the possibility of delisting the Playhouse from the National Register, a "troublesome" outcome for the residents. The Mayor further stated, "[t]he County's current plan that cannibalizes the historic structure will not meet my approval." Finally, the Mayor concluded that the County's application is "fatally flawed because no request for demolition is included in the application of request" and the County would likely be unsuccessful in obtaining such a permit.

The County sought an override of this veto pursuant to Section 4(g)(5) of the City Charter which failed by a Commission vote of 3-2. The County then filed this petition seeking to quash the veto and restore the City Commission resolution.

Jurisdiction

We have jurisdiction to hear this petition for certiorari seeking to quash a mayoral veto:

> We conclude that the Mayor's veto is inextricably intertwined with the quasi-judicial proceedings, as his action was in response to a quasi-judicial proceeding. Thus, it was reviewable by the circuit court's appellate division, and the circuit court had jurisdiction to address the merits of the County's petition.

Miami-Dade County v. City of Miami, 2020 WL 7636006 at *7 (Fla. 3d DCA Dec. 23, 2020) [46 Fla. L. Weekly D19a]. *See also* Art. V, § 5(b), Fla. Const; *Haines City Community Development v. Heggs,* 658 So.2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a], *citing De Groot v. Sheffield,* 95 So. 2d 912 (Fla.1957).

We apply a three-part standard of review to a petition for writ of certiorari challenging a final quasi-judicial order: (1) whether procedural due process was afforded; (2) whether the essential requirements of law have been observed; and (3) whether the findings and judgment are supported by competent substantial evidence. *Heggs,* 658 So. 2d at 530 (Fla. 1995); *Board of County Comm'rs of Brevard County v. Snyder,* 627 So. 2d 469, 476 (Fla. 1993); *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982).

Due Process Violation

During the 10-day period between the vote of the City Commission to override the decision of the HEBP Board and the May 17, 2019 Veto, the Mayor received and responded to several *ex parte* communications.[5] The most notable was the email from Richard Heisenbottle[6] offering proposed language to be used in the Veto Message.

In its opinion quashing our decision dismissing the petition, the Third District concluded, "we find that the veto of a quasi-judicial decision is still part of a quasi-judicial proceeding." *Id.* at *7. As a quasi-judicial decision, this mayoral veto is subject to the due process requirements set forth in *Jennings v. Dade County,* 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). In *Jennings,* the Court explained:

> Ex parte communications are inherently improper and are anathema to quasi-judicial proceedings. Quasi-judicial officers should avoid all such contacts where they are identifiable. However, we recognize the reality that commissioners are elected officials in which capacity they may unavoidably be the recipients of unsolicited ex parte communications regarding quasi-judicial matters they are to decide. The occurrence of such a communication in a quasi-judicial proceeding does not mandate automatic reversal. . . . Upon the aggrieved party's proof that an ex parte contact occurred, its effect is presumed to be prejudicial unless the defendant proves the contrary by competent evidence. § 90.304.

The *ex parte* communications between the Mayor and interested members of the public about his pending veto are presumed to be prejudicial. No evidence was introduced which would allay any prejudice to the County. Nor could there be any such evidence in the record because no public hearing was convened to disclose the communications.

Engaging in *ex parte* communications is presumed to be prejudicial. Even if the County did not enjoy a presumption in its favor, these communications were particularly troubling, as they directly addressed the justification for and substance of the mayor's veto message. We therefore conclude that the County's due process rights were violated, and for this reason, we must quash the veto.

Departure from the Essential Requirements of Law

The County argues that the veto departed from the essential requirements of law (1) by erroneously concluding that the appeal was not ripe, (2) by relying upon criteria from the National Register, rather than the City's governing documents, and (3) by incorrectly concluding that no demolition request by the County constituted a flaw in the County's application. We find that the Mayor's veto did not depart from the essential requirements of law.

The County argues that the Mayor relied upon the incorrect law—the criteria in the National Register—rather than the binding HEPB Report from 2005. This argument is factually incorrect in two respects. First, the Mayor specifically relied upon the correct legal criteria, the 2005 HEPB Designation, which incorporated the report of the Preservation Officer:

> The Playhouse is "a signature building reflecting the heyday of Coconut Grove." *See* City of Miami Preservation Officer 2005 Report. The HEP Board recognized this fundamental truth and I seek to reinstate that decision.

Second, the Mayor did not rely upon the criteria in the National Register as the legal basis to veto the resolution. Instead, with respect to the National Register, the Mayor stated in his Veto,

> [M]y veto that seeks to affirm the HEP Board's decision is supported by competent and substantial evidence. Based on the record before the HEP Board and Commission, the County's proposal would jeopardize the National Register of Historic Places ("National Register") designation for the Coconut Grove Playhouse because the proposal is not consistent with the guidance provided by the Secretary of Interior's Standards for the Treatment of Historic Properties. *See* March 1, 2019 letter from Mr. Aldridge, Deputy State Historic Preservation Officer. National Register provides significant benefits for designated properties, including but not limited to federal tax incentives, grant eligibility, and the prestige of the recognition.

Examining the text of the Veto Message, it is clear that the Mayor did not veto the resolution relying upon the *legal criteria* set by the National Register, but rather, justified his veto, in part, based upon his concern that the demolition of the theater would jeopardize the property's listing on the National Register, a loss for the City and its residents. As for reference to the criteria provided by the Secretary of Interior's Standards for the Treatment of Historic Properties, these standards are specifically incorporated into City Ordinance 23-6.2(h)(1), and the Mayor was well within his rights to cite them.

Further, the Mayor's concerns that the Playhouse would be removed from the National Register were not fanciful. The Deputy Preservation Officer for the State of Florida opined in a March 1, 2019 letter to the HEPB that demolition may well affect the Playhouse's listing. (Resp. App. at pp. 1-4) In relying upon evidence that the Playhouse may be delisted, the Mayor did not rely upon the incorrect law and therefore no departure from the essential requirements of law occurred.

The County next argues that in concluding that the appeal was not ripe, the Mayor departed from the essential requirements of law. We reject this argument as well, because the Mayor reached the merits of the veto of the ordinance. *See, e.g., D.R. Horton, Inc. - Jacksonville v. Peyton,* 959 So. 2d 390 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1496c] (upholding mayoral veto based upon tipsy coachman doctrine).

Finally, the County argues that the Mayor incorrectly bases his veto on the failure of the County to include a petition for demolition in its application. The County argues that because the earlier 2017 certificate of appropriateness approving a "Masterplan Concept" reserved authority of the HEPB to issue demolition permits, there was no need for the County to seek demolition permits now, and the Mayor's citing this reason rendered his veto invalid. Because the Mayor also relies upon other valid reasons for his veto, his decision is sustained under the tipsy coachman doctrine, *See D.R. Horton,* 959 So. 2d at 397.

Further, the 2017 Certificate of Appropriateness did not authorize demolition of the entire Playhouse, but provided that further permitting would be necessary. The Mayor simply reasoned that it was unlikely that the County would obtain permits for demolition, because, under the current ordinance, "no demolition permit will be issued until the plan comes back to the HEBP and is approved." Resolution R-17-023. We find no departure from the essential requirements of law.

Competent, Substantial Evidence

We are next required to determine " 'whether the administrative findings and judgment are supported by competent substantial evidence.' " *Fla. Power & Light Co. v. City of Dania,* 761 So. 2d 1089 (Fla. 2000) [25 Fla. L. Weekly S461a] (quoting *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982)). Our role is "to review the entire record for any competent, substantial evidence" supporting the determination, not to weigh and determine the competing evidence provided by the objecting party. *See Miami-Dade County v. Publix Supermarkets, Inc.,* 305 So. 3d 668, 672 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1089a].

In support of his decision to veto, the Mayor cited the City of Miami Preservation Officer's 2005 Report. Both parties agree that historical designation of the Playhouse is premised upon the findings and conclusions contained in this 2005 report. In the body of the Veto Message, the Mayor stated:

> We must uphold historic preservation requirements in our community, and the Coconut Grove Playhouse should be no exception. The Playhouse is "a signature building reflect8ing the heyday of Coconut Grove." *See* City of Miami Preservation Officer 2005 Report. The HEP Board recognized this fundamental truth and I seek to reinstate that decision.

The 2005 report of Preservation Officer was incorporated into Resolution No. HEPB-2005-60, designating the "Coconut Grove Playhouse . . . as a historic site." The 2005 report basis its conclusions upon both historical and architectural criteria. (Resp. App. at p. 24). In particular, the Report found, "[d]espite a few alterations, the Playhouse still retains enough integrity to convey its major character-defining elements." *Id.* The Report further notes the contributions of **both** its prominent architects, Richard Kiehnel, who originally designed the Playhouse, and Alfred Browning Parker, who renovated it in the 1950s with a "modernist" flair. Demolition of the Playhouse would eliminate all contributions made by Browning Parker. This 2005 Report indisputably constitutes competent, substantial evidence supporting the mayoral veto.[7]

In addition, the Mayor based his veto upon a concern that demolition of the theater could jeopardize the Playhouse's listing on the National Register. The Mayor explained that the City enjoys multiple benefits resulting from the listing on the National Register, including federal tax incentives, grant eligibility, and prestige. The County's proposal would demolish the theater, retaining only the front façade and some interior architectural elements, placing the Playhouse at risk of losing its prestigious listing. The County responds that there is no assurance that the property would in fact be delisted. The County's appendix contains voluminous records related to the Sears Roebuck Tower (now part of the Adrienne Arsht Center for the Performing Arts), which endured significant demolition yet still maintains its listing. But in a March 1, 2019 letter to the HEBP, Deputy State Preservation Officer Jason Aldridge opined:

> [yes], demolition may affect the Playhouse's National Register designation. If the proposed plans are implemented the property will no longer possess the historic character and integrity that allowed the property to be listed in the National Register. Therefore, the Playhouse could be removed from the National Register.

(Resp. App. at p. 2)

Again, our role in evaluating the record for competent, substantial evidence is not to weigh competing evidence or quibble with the likelihood of the property's delisting. Rather, we are tasked with determining if there was competent evidence *supporting* the decision. We conclude that the mayoral veto is supported by competent, substantial evidence.

Accordingly, because we find that the County's due process rights were infringed, we quash the Mayor's veto and reinstate City Commission Resolution R-19-169—Coconut Playhouse Appeal. (TRAWICK AND ZAYAS, JJ., concur.)

(TRAWICK, J. specially concurring.) I write separately because I do not believe that this court has jurisdiction to entertain this petition. In my humble opinion, this court correctly dismissed this action. With all due respect to our colleagues on the Third District Court of Appeal, all of whom I hold in the highest regard, I disagree with their decision in *Playhouse II.* The decision of this court was thoughtfully analyzed and well-reasoned. That opinion was dispatched with a sweeping pronouncement that the mayoral veto exercised here was inextricably intertwined with the quasi-judicial functioning of the Miami City Commission. It is quite telling that the *Playhouse II* opinion cited no authority for such a far-reaching conclusion. Indeed, I believe that precedent compels a contrary result. As the *Playhouse II* decision noted,

> Moreover, in categorizing a governmental function, the focus should be on the nature of the proceedings. It is the character of a hearing which determines whether or not county or municipal action is legislative or quasi-judicial.

Playhouse II, 2020 WL 7636006 (Fla. 3d DCA Dec. 23, 2021) [46 Fla. L. Weekly D19a], *citing Board of County Commissioners of Brevard County,* 627 So.2d 469, 474 (Fla. 1993). *Playhouse II* then cited *West Flagler Amusement Company v. State Racing Commission,* 165 So. 64, 65 (Fla. 1935) and quoted the following language:

> . . . [q]uasi-legislative and quasi-executive orders, after they have already been entered, may have a quasi-judicial attribute if capable of being arrived at and provided by law to be declared by the administrative agency **only after express statutory notice, hearing and consideration of evidence to be adduced as a basis for the making thereof**. *Emphasis added.*

While *Playhouse II* agrees that the Miami City Code does not provide for notice and a hearing as part of the Mayoral veto process, the court disagreed that "the focus on these hallmarks alone turns the Mayor's veto into an executive or quasi-legislative action. Then, without any reason provided as to why the lack of these "hallmarks" is not controlling here,[8] *Playhouse II* reaches its penultimate conclusion—that the Mayor's veto is "inextricably intertwined" with the quasi-judicial proceedings before the City Commission and thus a continuation of those proceedings. Again, there is no authority—code provision, case or legal treatise—cited for this conclusion. This lack of authority supports my belief that the decision of a legislative entity and a mayor are separate actions with separate procedural requirements. They are not inextricably intertwined. While this court did not categorize the Mayor's veto as an executive action, but simply concluded that his veto was not quasi-judicial in nature, I would go so far as to ask whether there can there be any function more within the realm of executive prerogative than the exercise of a veto of an action from a legislative body.[9] *Playhouse II* turns a Mayor's veto into something it clearly is not—an appendage of the quasi-judicial functioning of the City Commission, blurring the distinction between roles of the City's Executive and its Legislative body.[10]

I also note that *Playhouse II* chides this court for finding that there was no avenue for review of the Mayor's veto when in fact there is—a Commission override. Yet Playhouse II says that our decision resulted in a miscarriage of justice because it rendered the Mayor's veto unreviewable. First, as *Playhouse II* correctly reminded this court, the Mayor's veto is subject to the review of the Commission through the veto override process. As to judicial review, I share the concerns of *Playhouse II* that a party who has an adverse decision as a result of a veto may be denied an opportunity to challenge that decision in a court of law. The law is quite clear—an executive or quasi-executive decision is not reviewable. *Fisher Island Holdings, LLC v. Miami-Dade County Commission on Ethics and Public Trust,* 748 So. 2d 381, 382 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D199a]. No court—not this one nor my esteemed colleagues on the Third District Court of Appeal—can create jurisdiction where none exists to assuage concerns about a lack of judicial review.

While we must abide by the dictates of the *Playhouse II* decision, for the reasons stated herein I believe that this court correctly dismissed the underlying petition for lack of jurisdiction.

---

[1]Both the City and the County have filed appendices. The Appendix to the County's Petition will be referred to by "Pet. App." And the Appendix to the City's Response will be referred to as Resp. App." The 2005 Report of the City of Miami Preservation Officer to the Historic and Environmental Preservation Board, the document which governs historical protection of the Playhouse, is included in the City's Appendix to the Response. (Resp. App. 19-36)

[2]§§ 23-3, 23-4(c), City of Miami Code of Ordinances. Pursuant to Section 23-4, City of Miami Code of Ordinances, designation of a site as historic requires consideration of factors set by the United States Secretary of the Interior.

[3]On a petition for writ of certiorari brought by city residents challenging this 2017 certificate of appropriateness, a panel of this Court held: (1) that residents had no standing to appeal and (2) the City of Miami violated due process by expanding the requirements of the certificate of approval because, in the prior panel's view, the interior of the theater was not designated as a historical structure. *Miami-Dade County v. City of Miami,* 26 Fla. L. Weekly Supp. 800b (Fla. 11th Cir. Ct. Dec. 3, 2018) ("*Playhouse I*"). Thus, in its opinion, a panel of this court relied upon the 2017 staff analysis which misconstrued the scope of the 2005 historical designation.

[4]The County argues that it was denied due process at the HEPB proceeding because of *ex parte* communications involving the chair of the HEPB, in addition to other due process challenges. Because our decision quashes the veto and reinstates the City Commission decision on the appeal from the HEPB, we decline to address these claims.

[5]The *ex parte* email communications with the Mayor are contained in the Petitioner's Appendix at Volume 4, Exhibit Q.

[6]Since the 2017 certificate of appropriateness for the County's conceptual master plan, Architect Richard Heisenbottle has advocated publicly to reopen the issue of preserving the Playhouse. He also engaged in a series of *ex parte* communications with the Vice Chair of the HEPB prior to the public meeting before the HEPB.

[7]Although the County repeatedly relies upon the (now expired) 2017 City of Miami Certificate of Appropriateness which found that only the exterior of the Playhouse was protected, the 2005 Historical Designation and incorporated report did not limit designation to the Playhouse interior. See § 23-6.2(g), City of Miami Code of Ordinances.

[8]Rather than provide a reason, *Playhouse II* states that this court "did not look at the basic nature of the proceedings as a whole." I believe that a reading of our opinion demonstrates the contrary. We considered the entire process, from the proceedings before the Historic and Environmental Preservation Board through the Mayoral veto, and carefully analyzed why the veto was not quasi-judicial in nature.

[9]As we said in our opinion, Miami City Charter Section 4(g)(5) spells out the Mayor's veto power, including the power to veto any quasi-judicial decision of the Commission. This provision also gives the Commission the power to override that veto with a four-fifths vote. Nothing about this provision is in the nature of quasi-judicial action by the Mayor.

[10]*Playhouse II* also took issue with this Court's "comparison of "the Mayor's veto power to the State of Florida governor's veto power," saying that this was error. Respectfully, this was a misreading of our opinion. We only mentioned in footnote 7 of that opinion that the Mayor is not described as an executive in the Miami Charter in the way that the Florida Constitution describes the Governor as "the supreme executive power." While we noted this difference, this observation played no part in our decision.

* * *

CARMEN MEDINA AVILES, Appellant, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY & MOTOR VEHICLES, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-215-AP-01. March 22, 2021. An Appeal from the County Court for Miami-Dade County. Counsel: Carmen Medina Aviles, pro se. Elana J. Jones, Assistant General Counsel, DHSMV, for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

(**PER CURIAM.**) **DENIED.** Petitioner is advised to present evidence of lawful status in the United States as defined in 6 C.F.R. §37.3. Additionally, Petitioner should be aware of a press release from the Secretary of the United States Department of Homeland Security, dated March 8, 2021, enabling Venezuelan nationals currently residing in the United States to file initial applications for Temporary Protected Status. (**TRAWICK, WALSH and SANTOVENIA, JJ., concur.**)

* * *

Public employees—Termination—Arbitration—Petition to vacate arbitration award finding that employee's alleged misconduct did not constitute cause for termination and awarding back pay, but declining to reinstate employee to employment due to long-standing conflict between employer and employee is denied—Arbitrator did not exceed his authority in failing to reinstate employee—Award did not exceed authority granted under collective bargaining agreement, and issue for arbitration framed by union was whether discharge was for just cause and, if not, "what shall the remedy be?"

AMALGAMATED TRANSIT, LOCAL 1593, Petitioner, v. HILLSBOROUGH COUNTY TRANSIT AUTHORITY, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Circuit Civil Division. Case No. 20-CA-5240, Division B. March 9, 2021. Counsel: Richard Siwica, Egan, Lev, & Siwica, P.A., Orlando, for Petitioner. Cindy A. Townsend, Bell & Roper, P.A., Orlando, for Respondent.

ORDER DENYING PLAINTIFF/PETITIONER'S PETITION TO VACATE ARBITRATION AWARD

(MARK WOLFE, J.) THIS CAUSE comes before the Court on Petitioner Amalgamated Transit, Local 1593's Petition to Vacate Arbitration Award filed June 25, 2020. The petition seeks to vacate an arbitration award rendered March 27, 2020, on the ground that the arbitrator's decision exceeded his or her authority under the employment agreement between Plaintiff and Defendant. A hearing was held March 4, 2021. Present were Nicholas Wolfmeyer for Petitioner and Cindy Townsend for Respondent. The Court, having reviewed the motion, response, attachments, applicable law, and heard arguments of counsel, and being otherwise fully advised in the premises, finds that:

1. The parties were subject to an employment agreement.

2. Michaela Stuckey was employed by Respondent as a bus operator. Stuckey was terminated from her employment for alleged misconduct.

3. The parties submitted to binding arbitration as provided in the parties' collective bargaining agreement. The arbitrator rendered a decision March 27, 2020. The petition to vacate the award pursuant to section 682.13(1)(d), Florida Statutes, was filed June 25, 2020, within 90 days of service of the award. It is, therefore, timely.

4. The award set forth findings of fact, including a history of conflict between employer and employee, and legal conclusions. The arbitrator found that the alleged misconduct did not constitute just cause for termination on the grounds Respondent had cited. For this reason, the arbitrator awarded back pay to Stuckey. Because of the long-standing conflict between employer and employee, however, the arbitrator declined to reinstate Stuckey to her employment. Petitioner contends that the arbitrator's failure to reinstate Stuckey's employment exceeded his authority under section 682.13(1)(d), Florida Statutes, and the parties' collective bargaining agreement. Petitioner therefore contends that the award, insofar as it denies reinstatement, should be set aside.

5. As set forth in the arbitrator's award, Petitioner provided the arbitrator express and broad authority to fashion a remedy under the facts of the case. Specifically, the issue as framed by the Petitioner and submitted to the arbitrator is as follows: "Was the discharge of Michaela Stuckey for just cause in accordance with the Agreement? *If not, what shall the remedy be*?" (Emphasis added.)

An arbitration award may be vacated only on limited grounds. §682.13, Fla. Stat. Here, the only ground asserted is that the arbitrator exceeded his powers. §682.13(1)(d), Fla. Stat. Petitioner contends that the arbitrator exceeded the authority given arbitrators and arbitration proceedings under the parties' collective bargaining agreement. Under its terms the arbitrator shall:

> (a) Have no power to change the wages, working hours, or conditions of employment or work rules set forth in this Agreement;
>
> (b) Have no power to add to, subtract from, or modify any of the terms of this Agreement;
>
> (c) Deal only with the grievance, which occasioned the appointment;
>
> (d) Shall be bound by any stipulation entered by and between the parties offered into evidence during the course of the hearing.

Petitioner, not without some justification, takes issue with part of the award in light of the arbitrator's legal conclusions. Specifically, the arbitrator determined that "the facts of this case did not support [Respondent] HART's position" that Stuckey engaged in sexual harassment or improper conduct such that her termination was without just cause.[1] For this reason, the arbitrator awarded Stuckey back pay, reduced by any unemployment compensation she received. The arbitrator also found a history of conflict between Respondent and Stuckey. For this reason, the award does not require Respondent to reinstate Stuckey to her position. Petitioner does not oppose the back pay, only the award's refusal to reinstate Stuckey to her former position. Although Article 13 of the collective bargaining agreement permits an arbitrator to award back pay, it does not mandate reinstatement.

In support of its contention that the arbitrator exceeded his authority, Petitioner cites *Visiting Nurse Ass'n of Florida, Inc. v. Jupiter Med. Ctr., Inc*., 154 So. 3d 1115, 1136 (Fla. 2014) [39 Fla. L. Weekly S667a], which holds that an arbitrator exceeds his authority when he goes beyond the authority granted by the parties or the operative documents and decides an issue not pertinent to the resolution of the issue submitted to arbitration. Petitioner's argument fails on two grounds. The first is that Petitioner has not identified any authority of the operating document—the collective bargaining agreement—that the arbitrator exceeded. Second, Petitioner ignores the authority it expressly provided the arbitrator: "Was the discharge of Michaela Stuckey for just cause in accordance with the Agreement? *If not, what shall the remedy be*?" The arbitrator's ability to fashion a remedy under the facts presented was exceptionally broad—and Petitioner endorsed it.

Parties to an agreement containing an arbitration provision specifically bargained for an arbitrator's construction and interpretation of the agreement as an *alternative* to litigation in the court system, as opposed to an additional step in the process. *Visiting Nurse at* 1135-36. Allowing judicial review of the merits of an arbitration award for any reason other than those stated in section 682.13(1) would undermine the purpose of settling disputes through arbitration. *Id.* In addition, "[i]t is well settled that 'the award of arbitrators in statutory arbitration proceedings cannot be set aside for mere errors of judgment either as to the law or as to the facts; if the award is within the *scope of the submission*, and the arbitrators are not guilty of the acts of misconduct set forth in the statute, the award operates as a final and conclusive judgment.' " *Schnurmacher Holding, Inc. v. Noriega*, 542 So.2d 1327, 1328 (Fla.1989) (internal citations omitted) (emphasis added). The fact that the relief granted is such that it could not or would not be granted by a court of law or equity is not a ground for vacating or modifying the award. *Marr v. Webb*, 930 So. 2d 734, 737 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1232a], citing *Schnurmacher,* at 1328; see also *Managed Care Ins. Consultants, Inc. v. United Healthcare Ins. Co*., 228 So. 3d 588, 593 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D2106a] (a claim of legal error by the arbitration panel is not a ground to vacate an arbitration award).

Under the facts of this case, although reinstatement of Stuckey's employment is one remedy, it is not the *only* remedy. *Petitioner v. Respondent*, 2007 WL 7630406 (AAA, 2007), at *5. Such a breach could alternatively be remedied, as it was in this matter, by monetary damages. *Id.* (. . .fact that discharge without just cause was prohibited by the collective bargaining agreement does not clearly require that the remedy for such a breach be reinstatement).

It is therefore ORDERED that the Petition to Vacate Arbitration Award is DENIED in its entirety.

---

[1]Although not set forth in detail here, Stuckey's on-the-job conduct as described in the arbitration award, which conduct involved sexual horseplay, is, in this court's view, at odds with the arbitrator's conclusion that the conduct was not improper, even if it did not rise to the level of sexual harassment. However, this court's assessment of the conduct is *not* a consideration in the court's determination of the petition to vacate the award.

* * *

Counties—Rezoning—Denial—County commission did not err in denying application to rezone agricultural land for creation of planned village where developers did not demonstrate consistency with comprehensive plan disfavoring urban sprawl and requiring that such intense development outside of urban service area be self-sustaining—Because developers did not meet burden to show consistency with comprehensive plan, burden did not shift to county to demonstrate public interests in maintaining current zoning—If burden had shifted, record contains competent substantial evidence of such interests

BALM ROAD INVESTMENT, LLC; CASSIDY HOLDINGS, LLC; BALLEN INVESTMENT, LLC; HIGHWAY 301 INVESTORS, LLC; and MCGRADY ROAD INVESTMENT, LLC, Petitioners, v. HILLSBOROUGH COUNTY, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 19-CA-12782, Division C. Admin. Case No. PD 19-0436 B. March 9, 2021. Counsel: Hala Sandridge, Buchanan Ingersoll & Rooney, PC, Tampa, for Petitioners. Carly J. Schrader, Nabors, Giblin & Nickerson, P.A., Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(HINSON, J.) Petitioners, Balm Road Investment, LLC, Cassidy Holdings, LLC, Ballen Investment, LLC, Highway 301 Investors, LLC, and McGrady Road Investment, LLC (collectively Petitioners), seek review in certiorari of Hillsborough County Board of County Commissioners' (the "Board") denial of their rezoning application from its current Agriculture Rural (AR) zoning to Planned Development (PD) in the Residential Planned - 2 (RP-2) category. The petition is timely, and this court has jurisdiction. Fla. R. App. P. 9.030(c)(3) and 9.190(a). Having reviewed the petition, response, reply, all appendices, and applicable law, the court determines that there are gaps in Petitioners' attempt to demonstrate consistency with the comprehensive plan such that the burden did not shift to the County to show consistency with the plan, or a public interest in maintaining the current zoning. Even if the burden had shifted to the County to do so, the record contains competent, substantial evidence that there are legitimate public interests in maintaining the current zoning. Accordingly, the petition is denied.

PROCEDURAL HISTORY:

Counties are required by Florida law to adopt comprehensive plans, often informally referred to as "comp plans," to establish future land use categories within their boundaries. Chapter 163, Florida Statutes. A comp plan is likened to a constitution for all future development within its boundaries. *Rainbow River Conservation, Inc. v. Rainbow River Ranch, LLC*, 189 So. 3d 312, 313 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D950d]. Zoning regulation is how a comp plan is implemented. *Citrus Cnty. v. Halls River Dev., Inc.*, 8 So. 3d 413, 421 (Fla. 5th DCA 2009) [34 Fla. L. Weekly D613a]. Though comprehensive plans set forth a long-range maximum limits, the present land use, controlled by a zoning ordinance, may be more limited. *See Miami-Dade Cnty. v. Walberg*, 739 So. 2d 115, 117 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D1539c] (quoting *Board of County Commm'rs of Brevard County v. Snyder,* 627 So.2d 469, 475 (Fla.1993)). After a local government adopts a comp plan, all zoning decisions must comply with it. *Rainbow River,* 189 So. 3d at 313.

In Hillsborough County, rezoning requests are evaluated under the Future of Hillsborough Comprehensive Plan ("the Plan").[1] The Plan is required to contain "principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development of. . ." unincorporated portions of the County. § 163.3177(1), Fla. Stat. (2016). The Future Land Use Element ("FLUE") is a required element of the Plan. § 163.3177(6)(a), Fla. Stat. The FLUE is required to designate proposed *future* land uses and must include standards for the distribution of densities and intensities of development. *Id*. The Plan also provides for a Livable Communities Element as an extension of the Plan. The Livable Communities Element[2] contains community and special area studies, including the Balm Community Plan. The Balm Community Plan contains various goals and vision statements for the area, incorporating input from its residents.

The Plan provides for goals of protecting the rural areas which are "planned to remain in long term agriculture, mining or large lot residential development." Hills. Cnty. Ord. 08-13, p.1. The Growth Management Strategy of the Plan sets forth the primary goals of controlling urban sprawl, defining an urban service area that establishes a geographic limit of urban growth, creating compatible development patterns through the design and location of land uses, and identifying a distinct rural area. *Id.* A distinct rural area is characterized by a) the retention of land intensive agricultural uses, b) the preservation of natural environmental areas and ecosystems; and c) the maintenance of a rural lifestyle without the expectation of future urbanization. *Id.* at p. 2. According to the Resolution that denied the requested rezoning, the Urban Service Area is the FLUE's foremost mechanism for the control of urban sprawl. *See also* Hills. Cnty. Ord. 08-13, p. 2. Development is favored within the Urban Service Area to maximize efficient use of land and investment in services. *Id.* The Plan also emphasizes neighborhood protection, and that the "overall density and lot sizes of new residential projects shall reflect the character of the surrounding area." Hills. Cnty. Ord. 08-13, Policy 16.8 at p. 28. In addition, "any density increase shall be compatible with existing, proposed, or planned surrounding development." Hills. Cnty. Ord. 08-13, Policy 16.10.

The Plan established a land use classification of Residential Planned-2 (RP-2), which provides a narrow exception to the FLUE's restriction against the placement of urban services outside the Urban Service Area, and within the Rural Service Area. The specific intent of RP-2 classification is to "designate areas that are suited for agricultural development in the immediate horizon of the Plan, but *may* be suitable for planned villages to avoid a pattern of single dimensional development that could create urban sprawl." Hills. Cnty. Ord. 89-13, p. 190. The Plan language demonstrates that timing of development is a factor in approval. Hills. Cnty. Ord. 89-13, Objective 2, p.5; Objective 4, p.7. In order for the maximum density within the RP-2 land use category of two dwelling units per gross acre to be considered, the Plan requires that for parcels of 160 acres or greater, "Planned Villages" must adhere generally to the following:

> *Residential Gross Density:* . . . Clustering and Mixed Use are required to obtain the maximum gross density per acre. Mixed use for the purposes of this category must demonstrate integration, scale, diversity and internal relationships of uses on site as well as provide shopping and job opportunities, significant internal trip capture and appropriately scaled residential uses.

Hills. Cnty. Ord. 89-13, Appx. A, RP-2 Rural, at p. 190. Planned Villages *may* be allowed as their need or suitability arises. The RP-2 designation allows development of up to two units per acre and related commercial development, subject to locational criteria, which is the *maximum* density contemplated in the Plan. Hills Cnty. Ord. 89-13, Policy 33.5 at p. 65. The Plan intends that these villages be "self-supporting communities that plan for a balanced mix of land uses. The intent of these villages is to maximize internal trip capture and avoid the creation of single dimensional communities that create urban sprawl." Hills. Cnty. Ord. 89-13, Appx. A, RP-2 Rural, at p. 190*; Growth Mgmt. Strategy,* at p.1.

This matter arises from the Board's denial of Petitioners' application to rezone a site of approximately 449 acres in the Balm Community in southern Hillsborough County from Agricultural Rural ("AR") to Planned Development ("PD") for a Planned Village with a maximum of 899 single family lots. Immediately adjacent properties

are zoned AR, with a density of one dwelling unit per five acres, and AS-1, with a density of one dwelling unit per acre. Balm is a rural agricultural community of farms and homes in unincorporated Hillsborough County. Based on the current zoning of one dwelling unit per five acres, it would appear the property's current zoning would support the development of 89 homes, making the requested rezoning an almost 10-fold density increase. Petitioners submitted an application to rezone 17 parcels on the south side of County Road 672—Balm Road—and approximately one mile west of Balm Riverview Road. The property, which lies outside the Urban Service Area, is bounded to the west and south by Environmental Lands Acquisition and Protection Program (also known as "ELAPP") properties and borders the Balm Scrub Nature Preserve. Land to the east includes a mix of fish farms and single-family homes. The nearest residential subdivision is located half a mile away and is not adjacent to the property.

The property is located within the Balm Community Plan,[3] which, as noted above, sets forth an interest in maintaining the rural character enjoyed by its residents. One of the largest industries in the Balm community is agriculture, and the Balm Community Plan sets out goals designed to maintain this industry in the community. The property is, however, within the RP-2 land use category. As part of their application, Petitioners sought to rezone the property to Planned Development (PD), specifically the Planned Village design. §§ 5.03.00, 5.04.00, Land Dev. Code. The Planned Village design is *required* within the RP-2 land use category for projects with proposed densities in excess of one dwelling unit per five gross acres. Here, the proposed project rezoning the 449-acre property seeks a Planned Village which would include: 899 single family detached units with proposed lots of 4,400 square feet, 18,204.75 square feet of neighborhood commercial, 25-acre public K-8 school site, 3.92 acres of public use or open space area, 26.7 acres of open space/village greens intended as a buffer between the development and surrounding area, 34.5 acres for a village node,[4] and 31 acres of environmental preserve/storm water management.

Planning Commission staff found the request to be consistent with the Plan, subject to a number of conditions proposed by Development Services. The staff report contains the specific provisions of the comp plan reviewed and relied upon as a basis for the staff's consistency finding. Although it observed that the character of surrounding land is agricultural and rural, and noted that Petitioners had met buffering requirements, it did not indicate whether it had analyzed the *effect* of the proposed planned village on the surrounding properties and compatibility with the surrounding development. The County's Development Services staff also found the request to be approvable, but like the Planning Commission, it did not specifically analyze compatibility with regard to the increase in density on the surrounding property or neighborhood preservation. Other agencies submitted comments, but none had specific objections, as long as specified conditions were met.

As required by the County's Land Development Code, the matter proceeded to quasi-judicial hearing before a land use hearing officer. This first part of a bifurcated review process is evidentiary, and allows a hearing officer to receive testimony under oath and documentary evidence. In addition to considering the Plan, the parcel's zoning history, reports of reviewing agencies, and permitted uses for the property, the Hearing Officer is also required to consider applicable goals, objectives, and policies contained in the Plan, availability and capacity of public services, nature of any impacts on surrounding land use, environmental impact of the proposed use, and applicable development standards promulgated by the Board. The record is comprised of the application and accompanying documents, staff reports and recommendations, exhibits and documentary evidence, the summary, findings, conclusions, and recommendation of the Hearing Officer, an audio recording of testimony at the hearing, and a verbatim transcript of the proceedings. This is the record that the Board will review in the second hearing.

At the first land use hearing, in addition to county staff and speakers associated with the project application, four citizens residing in the Balm community spoke out against the proposed rezoning and provided written documentation, and one citizen submitted a written statement into the record. The first citizen to speak opposed the project. She discussed protection of long-term agricultural uses, specifically Objective 4 of the Comprehensive Plan,[5] which states that the Rural Area will provide areas for long term, agricultural uses and large lot, low density rural residential uses which can exist without the threat of urban or suburban encroachment, with the goal that no more than 20 percent of all population growth within the County will occur in the Rural Area. Another citizen, was concerned that the dark skies initiative of the Balm Community Plan was not being considered.[6] He also raised safety concerns for the surrounding two-lane roads and intersections, based on existing semi-truck traffic from nearby packing houses, noting that multiple semi-trucks regularly come in and out of these facilities. He expressed concern about the 4,000 square foot lots related to the community goal of discouraging suburban scale development. A third citizen, indicated that the development was not consistent with the immediate area, which includes farmland. As had a previous speaker, he raised concerns regarding existing truck traffic on the two-lane road. In addition to the aforementioned traffic on two-lane roads, a fourth speaker said that he and the other citizens of Balm "moved out to that rural area to have space, to have something more than concrete, asphalt and lights." A fifth citizen submitted a written statement reminding the Board that Balm was "a small, quaint, rural little town" and described its "peace and quiet" and "open spaces." After taking testimony and receiving evidence, the Hearing Officer made various findings of fact and ultimately recommended approval of the rezoning request, subject to the conditions outlined by Development Services.

The second portion of the rezoning process is a public meeting before the Board of County Commissioners. It is limited to the record created in the first proceeding. The Board may hear from interested parties at the public meeting, but no new content may be introduced. §§ 10.03.04. D., 10.03.04. E., Land Dev Code. The Board has the final say and may reach a different determination than the Hearing Officer. The Board's decision is by resolution. §10.03.04.G.1., Land Dev. Code. The resolution must include a statement of compliance or all points of noncompliance with the Plan, if different from the conclusions of the Hearing Officer, and must state specific reasons for any decision contrary to his recommendation. *Id.*

The Board considered the rezoning application and heard oral argument. Ultimately, rezoning was denied. Resolution RR19-093 (the "Resolution") was filed with the clerk on November 19, 2019. As required by the Code, the Resolution gives reasons for rejecting the Hearing Officer's recommendation. Among other things, the Board found:

> The advancement of urban sprawl in the Rural Service Area together with the scale and other aspects of the proposed Planned Development are incompatible with the characteristics of the surrounding area. Therefore, the proposed Planned Development is inconsistent with (a) FLUE Policy 1.4 (defining "compatibility"); (b) the "specific intent" of the RP-2 category in FLUE Appendix A (designating lands suited to agriculture in the near term for possible future development as planned villages); (c) FLUE Objective 1 (requiring that 80 percent of new development be directed to the Urban Service Area); (d) FLUE Objective 4. Rural Area (protecting long term, agricultural uses and large lot, low density rural residential uses from the threat of urban or

suburban encroachment and allowing only 20 percent of new growth within its area); (e) Objective 16. Neighborhood/Community Development, Neighborhood Protection; (f) FLUE Policy 16.10 (requiring density increases to be compatible with existing, proposed, or planned surrounding development); (g) FLUE Planned Village Objective 33 (self-sustainable development); (h) FLUE Planned Villages Policy 33.2 and (i) FLUE Planned Villages Policy 33.6.

The Resolution said that the clustering and mixed use requirements which allow for the RP-2's maximum density of two dwelling units per gross acre along with the RP-2's buffering requirements were not meant as stand-alone formulas to allow a development like the proposed project into the Rural Service Area. It concluded that such development prevents sprawl only if it works as it was intended. The Resolution indicated that allowing development outside the Urban Service Area was not justifiable and would not be consistent with the cited provisions of the FLUE. In addition, it was decided that the more than 12,000 vehicular trips the development would generate was incompatible with the surrounding transportation network. The Resolution included a finding that the retention of the existing AR zoning classification serves a legitimate public purpose as to "the protection of viable long term agricultural lands from urban and suburban encroachment by encouraging agriculture and related uses on parcels of at least five (5) acres." This petition followed.

STANDARD OF REVIEW:

Certiorari review of a quasi-judicial zoning decision is akin to a plenary appeal in that it is "a matter of right." *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000) [25 Fla. L. Weekly S461a]. In such proceedings, the landowner has the initial burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance before the burden shifts to the government to demonstrate that maintaining the existing zoning classification accomplishes a legitimate public purpose. *Martin Cnty v. Yusem*, 690 So. 2d 1288, 1292-93 (Fla. 1997) [22 Fla. L. Weekly S156a]. The circuit court reviews the agency's quasi-judicial decision to determine whether the local government provided due process, whether the local government followed the essential requirements of law, and whether competent substantial evidence in the record supports the decision. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). Due process is not at issue in this proceeding. Regarding the evidence, courts are not permitted to reweigh evidence or substitute their findings for those of the administrative agency. *Haines City Com'ty Dev. v. Heggs*, 658 So.2d 523, 530 (Fla.1995) [20 Fla. L. Weekly S318a]. Moreover, courts are charged with reviewing the record for evidence that supports local government, not which rebuts it. *Broward Cnty v. G.B.V. Intern. Ltd.,* 787 So. 2d 838, 846 (Fla. 2001) [26 Fla. L. Weekly S463a].

Essential Requirements of Law/Competent Substantial Evidence:

If competent substantial evidence supports the local government's decision, the decision is presumed to adhere to the essential requirements of law. *State v. Wiggins*, 151 So. 3d 457, 464 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1894a] (*citing Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs*, 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a]). Thus, the essential requirements of law and the presence of competent substantial evidence are linked. Evidence contrary to the agency's decision is outside the scope of the inquiry; a reviewing court cannot reweigh the "pros and cons" of conflicting evidence, even when it may disagree with it. *Wiggins,* at 464 *(*quoting *Dusseau*). Although contrary evidence may be relevant to the wisdom of the decision, it is irrelevant to the lawfulness of the decision. *Id*.

Petitioners' principal argument in support of quashing the Board's denial of their rezoning request is that the Planned Village concept has been determined or defined not to be urban sprawl. Petitioners contend that the Board failed to apply the County's own criteria and departed from the essential requirements of law when it supposedly determined the mere creation of a Planned Village creates a presumption of urban sprawl. Petitioners add that by determining that a Planned Village creates sprawl, the Board improperly added requirements to the County's Plan and land development code without amending it. The court must disagree with Petitioners here. First, Petitioners mischaracterize the Board's position when it suggests the Board acted on the premise that RP-2 in and of itself constitutes urban sprawl. The Board did not. Rather, the property's location outside the Urban Service Area required the Board to consider whether the project fit the narrow exception applicable to such intense development in the area. Moreover, by the terms of the Plan, such development would not be permissible if it is not self-sustaining. Hills. Cnty. Ord. 89-13, Appx. A, RP-2 Rural, at p. 190. Second, and paradoxically, Petitioners themselves seem to be operating from the inverse assumption that the RP-2 Planned Village is somehow by definition *anti*-sprawl. That assumption disregards the Plan's requirements that ". . .to achieve [maximum] densities. . . developments shall achieve the minimum clustering ratios, on-site job opportunity provisions, shopping provisions, and internal trip capture ratios required by this Plan." *Id*. As the Resolution explains, the requirements which allow for the RP-2's maximum density . . . along with the RP-2's buffering requirements were not meant as stand-alone formulas to allow a request of this density in the Rural Service Area, when there has been no showing of how the compatibility of the development would serve to prevent urban sprawl. The Resolution added that "without such a showing, a departure from the FLUE's fundamental precept of confining urban services to the Urban Service Area is not justifiable and would not be consistent with the cited provisions of the FLUE."

Petitioners have not, and do not claim to have made the required showing apart from meeting design requirements. Indeed, their oft-repeated argument that the RP-2 zoning category is not, by definition, sprawl, is indicative of Petitioners' belief that such a showing was unnecessary. It is Petitioners' burden to demonstrate Plan consistency. *Board of Cnty Comm'rs of Brevard County v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993). If Petitioners demonstrate consistency with the Plan, the burden shifts to the County to show that the project is inconsistent with the Plan or that there is a legitimate public interest in maintaining the current zoning. *Id.* Although Petitioners' design appears to approach stated goals in terms of the clustering ratios, buffers, and land dedicated for commercial and service-oriented uses, this Court found no evidence of on-site job opportunity provisions or internal trip capture ratios as evidence the development would not create urban sprawl. Indeed, with record evidence that the project would result in the generation of more than 12,000 car trips per day, and an additional more than 2,000 trips associated with a school that has not yet been built, the project shows heavy reliance on the automobile for transportation, a major ingredient in urban sprawl. Moreover, aerial photographs in the record show little to no development around the property. Because Petitioners did not meet their burden to show consistency with the Plan, the burden does not shift to the Board to show proof of inconsistency. *St. Johns Cnty v. Smith*, 766 So. 2d 1097, 1100 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D1887b].

Even if this Court assumed that Petitioners demonstrated full compliance with the Plan, it would not automatically entitle Petitioners to the requested rezoning. *See Snyder*, at 475 (Fla. 1993); *Sarasota Cnty v. BDR Invs., LLC*, 867 So. 2d 605, 607 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D552a]; *Miami-Dade Cnty v. Walberg*, 739 So. 2d 115, 117 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D1539c]. It would simply require the County to show that maintaining the current zoning furthers a legitimate public interest. Here, the current use is also

consistent with the Plan. It is the purview of the County, not the court, to make decisions between two zoning alternatives. *Marion Cnty v. Priest*, 786 So. 2d 623, 626 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1098b]. In *Snyder*, the court noted that since comp plans determine *future* growth, "local governments should have the discretion to decide that the maximum development density should not be allowed provided. . . the government's decision is supported by substantial, competent evidence." *Snyder*, at 475. In *BDR Invs.*, the court said that where there is a legitimate public purpose behind maintaining the existing zoning classification, a denial of rezoning is supported even if the requested rezoning was consistent with the Comprehensive Plan. *BDR Inv.*, 867 So. 2d 605 at 608. Here, the Board determined that preserving the land for agricultural use, discouraging development outside the Urban Service Area, and protecting the rural character of the community are legitimate public interests. Hills. Cnty. Ord. 89-13, FLUE Objective 16, at p. 26; *Snyder* at 475; *Alvey v. City of N. Miami Beach*, 206 So. 3d 67 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1028a] (the failure to consider whether proposed change would be consistent with and in scale with the established neighborhood land use pattern would depart from the essential requirements of law).

Petition DENIED.

---

[1]http://www.planhillsborough.org/wp-content/uploads/2012/10/FUTURE-LAND-USE.pdf

[2]http://www.planhillsborough.org/wp-content/uploads/2012/10/LIVABLE-COMMUNITIES_09_15.pdf

[3]The Balm Community Plan may be found in the Livable Communities Element of Hillsborough County's Comprehensive Plan, beginning at p. 214 of that document. *See* fn. 2.

[4]"Village node" refers to an area of office, retail, and "services" space within the development. 5.04.02, Land Dev. Code. Uses include government services, offices, retail, libraries, and adult and child day care services.

[5]Objective 4 is found on p. 7 of the Plan, Hills. Cnty. Ord. 89-13, referenced at fn. 1.

[6]Pg. 215, Balm Comm'ty Plan, Livable Communities Element. *See* fn. 2.

* * *

Licensing—Driver's license—Revocation—Habitual traffic offender—Department of Highway Safety and Motor Vehicles correctly designated licensee convicted of three instances of driving while license suspended within four-month period as HTO and revoked license for five years—Early reinstatement—Hearing officer acted within discretion in denying hardship license to licensee who continuously violated traffic laws by driving while license revoked—Petition for writ of certiorari is denied

TROY GOODNER, Petitioner, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 14th Judicial Circuit (Appellate) in and for Bay County. Case No. 20-1963-CA, Division E. March 22, 2021. Counsel: Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(JOHN L. FISHEL, II, J.) **THIS MATTER** is before the Court on the "Petition for Writ of Certiorari" filed December 2, 2020, the Respondent's "Response to Petition for Writ of Certiorari" filed January 14, 2021, and the Petitioner's "Counter Response to DMV" filed February 17, 2021.[1] Having considered said Petition, Respondent's Response, Petitioner's Reply, the court file and records, and being otherwise fully advised, this Court finds as follows:

I. Facts

The material facts are not in dispute. The Petitioner seeks certiorari review after the Department of Highway Safety and Motor Vehicles (DHSMV) denied his request for early reinstatement of his driver's license. He claims the lower tribunal erred when it upheld the "habitual traffic offender" designation imposed by the DHSMV as he allegedly did not meet the statutory criteria. Petitioner also claims the lower tribunal erred when it upheld the five (5) year revocation imposed by DHSMV as required by an individual designated a "habitual traffic offender" because he should not have been designated a habitual traffic offender in the first place. Finally, Petitioner claims the lower tribunal erred when it denied his request for a hardship license because he met the required statutory criteria to have such issued to him.

II. Standard of Review

"Where a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine [(1)] whether procedural due process [has been] accorded, [(2)] whether the essential requirements of the law have been observed, and [(3)] whether the administrative findings and judgment are supported by competent substantial evidence." *See City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982). It is an error for the Court to reweigh the evidence and substitute its judgment with that of the hearing officer. *Dep't of Highway Safety & Motor Vehicles v. Favino,* 667 So. 2d 305, 309 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a].

III. Analysis

As noted above, the material facts are not in dispute. However, there seems to be some confusion on the Petitioner's part as to what convictions led to his "habitual traffic offender" designation. He claims that this entire situation stems from a "np helmet [sic]" citation he received in Tennessee in 2004. However, a review of the record tells a different story. The Petitioner's driving record shows he was arrested three times for driving on a suspended or revoked driver's license: (1) on August 22, 2018, (2) on December 4, 2018, and (3) on December 10, 2018. The Petitioner pled guilty to all three charges on December 18, 2018. The DHSMV based its five (5) year revocation, beginning on June 13, 2019, on these three convictions. At the Petitioner's hardship license hearing, the lower tribunal noted that the Petitioner had been cited or arrested for "driving under the current revocation as recently as July 16, 2019, February 9, 2020, April 10, 2020, as well as August 25, 2020." All four of these noted violations occurred after the Petitioner's driver's license was revoked on June 13, 2019.

This Court finds it appropriate to set forth the statutory requirements in these circumstances. Section 322.264(1)(d), Florida Statutes, (2019), states:

> A "habitual traffic offender" is any person whose record, as maintained by the Department of Highway Safety and Motor Vehicles, shows that such person has accumulated the specified number of convictions for offenses described in subsection (1) or subsection (2) within a 5-year period:
>
> (1) Three or more convictions of any one or more of the following offenses arising out of separate acts:
>
> . . .
>
> (d) Driving a motor vehicle while his or her license is suspended or revoked.

Within four months, the Petitioner was arrested on three separate instances for driving while his license was suspended or revoked. He pled guilty to all three offenses on December 18, 2018. Clearly, the Petitioner's driving record met the statutory requirement of "[t]hree or more convictions . . . while [d]riving a motor vehicle while his . . . license [was] suspended" within a five (5) year period.

The DHSMV then followed its statutory requirements when a person is designated a "habitual traffic offender." Section 322.27(5)(a), Florida Statutes, (2019), states:

> The department *shall* revoke the license of any person designated a habitual offender, as set forth in s. 322.264, and such person is not eligible to be relicensed for a minimum of 5 years from the date of revocation, except as provided for in s. 322.271. Any person whose license is revoked may, by petition to the department, show cause why his or her license should not be revoked.

(emphasis added).

Accordingly, the statute clearly states that if an individual has been designated a "habitual traffic offender" pursuant to section 322.264 and his driver's license has been revoked as required under section 322.27(5)(a), section 322.271 provides the procedure for re-licensure prior to the expiration of the five (5) year revocation. Section 322.271(1) states:

> A person whose driving privilege has been revoked under s. 322.27(5) may, upon expiration of 12 months from the date of such revocation, petition the department for reinstatement of his or her driving privilege. Upon such petition and after investigation of the person's qualification, fitness, and need to drive, the department shall hold a hearing pursuant to chapter 120 to determine whether the driving privilege shall be reinstated on a restricted basis solely for business or employment purposes.

The statute continues, "[u]pon such hearing, the department shall either suspend, affirm, or modify its order and ***may*** restore to the licensee the privilege of driving on a limited or restricted basis for business or employment use only. § 322.271(3), Florida Statutes (2019) (emphasis added).

Section 322.271 governs the procedure for requesting and granting a hardship license. The statute is clear that the job of the lower tribunal is not to automatically grant a hardship license after twelve (12) months have passed. Instead, the DHSMV must conduct an "investigation of the person's qualification, fitness, and need to drive." §322.271(1). Next, "the department shall hold a hearing . . . to determine whether the driving privilege shall be reinstated on a restricted basis solely for business or employment purposes." *Id.* Finally, the statute requires the lower tribunal to "either suspend, affirm, or modify its order" and, at this time, the lower tribunal "***may*** restore to the licensee the privilege of driving on a limited or restricted basis for business or employment use only." § 322.271(3), Fla. Stat. (emphasis added).

The language in the statute is clearly discretionary, meaning the lower tribunal is not required to grant a hardship license. Indeed, the statute explicitly states that offenders designated as "habitual traffic offender[s]" are "not eligible to be relicensed for a minimum of 5 years from the date of revocation, except as provided for in s. 322.271." § 322.27(5)(a), Fla. Stat.

In its Final Order Denying Early Reinstatement, the lower tribunal cited section 322.263, Florida Statutes (2019), which provides:

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

The purpose behind the statute is to ensure maximum safety on, and prevent continued abuses of, the state's roads. The legislature also provides guidance to the courts and related administrative agencies to "impose increased and added deprivation of the privilege of operating motor vehicles upon habitual offenders who have been convicted repeatedly of violations of traffic laws." *Id.* The record in this matter clearly established Petitioner's continued disregard for the state's laws, licensing requirements, and administrative orders.

IV. Conclusion

Having reviewed the record and without reweighing the evidence or substituting its own judgment for that of the hearing officer, the Court finds that the Petition's due process right was not violated and that he was provided with a meaningful opportunity to be heard. The record also established that the hearing officer's findings were based on competent substantial evidence. The Court further finds that the lower tribunal observed the essential requirements of the law for the following reasons:

1. Petitioner's three convictions dated December 12, 2018, sufficed the statutory requirement for him to be designated a "habitual traffic offender."

2. The DHSMV properly revoked the Petitioner's license for five years.

3. The lower tribunal held a hearing on the Petitioner's request for a hardship license to determine his fitness to drive.

4. The DHSMV found the Petitioner had continuously violated traffic laws and had multiple arrests for driving on a suspended/revoked license.

5. Within its discretion, the lower tribunal denied Petitioner's request for a hardship license.

Therefore, it is

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari filed December 2, 2020, is hereby **DENIED**.

---

[1]The Court notes it received two filings from the Petitioner on March 5, 2021, which the Court construes as supplements to the Petitioner's "Counter Response to DMV."

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath or urine test—Hearings—Telephonic—Hearing officer cannot administer an oath telephonically without a notary, or other person capable of administering oaths, being physically present with witness, or without hearing officer stating on the record that he or she can positively identify the witness

JOSEPH CORDARO, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Division AY. Case No. 50-2019-CA-015583-XXXX-MB. April 21, 2021. Petition for Writ of Certiorari from the Bureau of Administrative Review, Department of Highway Safety and Motor Vehicles. Counsel: Heather Rose Cramer, Palm Beach Gardens, for Petitioner. Elana J. Jones, DHSMV, Tallahassee, for Respondent.

ON RESPONDENT'S MOTION FOR REHEARING

(PER CURIAM.) After this Court's opinion issued on April 7, 2021, Respondent Department of Highway Safety and Motor Vehicles timely filed a motion for rehearing pursuant to Florida Rule of Appellate Procedure 9.330(a). Upon consideration of Respondent's argument, we **GRANT** Respondent's motion for rehearing. We thus withdraw our April 7, 2021 opinion and substitute this opinion in its place.

SUBSTITUTED OPINION

Petitioner Joseph Cordaro seeks certiorari review of a final order issued by the Florida Department of Highway Safety and Motor Vehicles ("DHSMV" or "Respondent") affirming the suspension of his driver license for refusing to consent to a breath or urine test in violation of Florida's implied consent law. Petitioner argues that the hearing officer below violated the essential requirements of law and

deprived Petitioner of procedural due process by administering oaths telephonically without a notary being present with the witnesses. We agree and hold that a hearing officer cannot administer an oath telephonically without a notary (or other person capable of administering oaths) being physically present with the witness *or* without the hearing officer stating on the record that he or she can positively identify the witness.

Section 322.2615, Florida Statutes governs formal review hearings held by the DHSMV when a driver appeals the administrative suspension of his or her license. Respondent relies upon subsection (6)(b) as the basis for giving hearing officers the power to administer telephonic oaths. The statute states in pertinent part:

> Such formal review hearing shall be held before a hearing officer designated by the department, and the hearing officer *shall be authorized to administer oaths,* examine witnesses and take testimony, receive relevant evidence, issue subpoenas for the officers and witnesses identified in documents provided under paragraph (2)(a), regulate the course and conduct of the hearing, question witnesses, and make a ruling on the suspension. The hearing officer *may conduct hearings using communications technology.*

§ 322.2615(6)(b), Fla. Stat. (2019) (emphasis added). According to Respondent, the statute gives hearing officers the power to both administer oaths and to conduct hearings using "communications technology" which is a broad term that includes all manner of telecommunications. *See generally* § 817.034(3), Fla. Stat. (2019) (defining "communications technology"). While it is undisputed that witnesses can testify via telephone at a formal review hearing without offending due process, *see Dep't of Highway Safety & Motor Vehicles v. Bennett*, 125 So. 3d 367, 369-70 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D2376b]; *Dep't of Highway Safety & Motor Vehicles v. Edenfield*, 58 So. 3d 904, 907 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D523a], the DHSMV argues that the language of the statute itself extends this principle to the telephonic administration of oaths.

Petitioner concedes that section 322.2615 allows witnesses to telephonically *appear* at formal review hearings, but argues that an *oath cannot be given telephonically* unless there is a notary or other official who can administer an oath physically present with the witness. Petitioner points to a variety of rules in other Florida tribunals that explicitly demand the physical presence of notaries in order to administer telephonic oaths. *See* Fla. R. Gen. Prac. & Jud. Admin. 2.530(d)(3); Fla. R. Civ. P. 1.451(d); Fla. R. Work. Comp. P. 4.075(f)(3); Fla. Admin. Code R. 28-106.123(5)(b) (2019). Petitioner also relies upon a 1992 opinion rendered by the Florida Attorney General which opined that chapter 117, Florida Statutes does not give a notary power to administer an oath over the telephone and that a notary must be physically present with the witness for an oath to be valid. Op. Att'y Gen. Fla. 1992-95 (1992). Petitioner asserts that, taken together, all of these authorities conclusively demand that an oath cannot be taken telephonically in Florida, regardless of the circumstance, unless a person authorized to administer an oath is physically with the witness. The DHSMV counters that none of the authority cited by Petitioner specifically applies to formal review hearings, and that the language of section 322.2615 creates this exception from the general rule.

Three circuit courts in Florida have opined on whether or not section 322.2615 allows a hearing officer to administer oaths telephonically. The Twentieth Judicial Circuit adopted the reasoning of the DHSMV and concluded that section 322.2165(6)(b) "does not state that the hearing officer or the witness must be in the presence of one another in order to place a witness under oath," and that a telephonic oath is acceptable. *Graca v. State of Fla., Dep't of Highway Safety & Motor Vehicles*, 24 Fla. L. Weekly Supp. 329c (Fla. 20th Cir. Ct. July 13, 2016). In contrast, the Sixth and Thirteenth Judicial Circuits found that "a witness appearing by phone must appear before a duty officer or notary public who can vouch for the witness's identity for such a telephonic oath to be proper" since an oath can only be valid if a witness can be positively identified and prosecuted for perjury if he or she lies under oath. *Eckert v. State Dep't of Highway Safety & Motor Vehicles*, 28 Fla. L. Weekly Supp. 285a (Fla. 13th Cir. Ct. July 1, 2020) (citing *Collins v. State*, 465 So. 2d 1266, 1268 (Fla. 2d DCA 1985)); *Dorofy v. State of Fla., Dep't of Highway Safety & Motor Vehicles*, 28 Fla. L. Weekly Supp. 570b (Fla. 6th Cir. Ct. Aug. 24, 2020).

We agree with the holdings of *Eckert* and *Dorofy* and find that, in order for a telephonic oath to be valid, there must be a positive identification of the witness. The key to a valid oath is that "perjury will lie for its falsity" and that the oath is "an unequivocal act in the presence of an officer authorized to administer oaths." *Collins*, 465 So. 2d at 1268; *Youngker v. State*, 215 So. 2d 318, 321 (Fla. 4th DCA 1968), *abrogated on other grounds by Weaver v. State*, 981 So. 2d 508, 510 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D919a]. However, we recognize that an oath can still be valid as long as a witness "can be certainly identified as the person who actually took the oath." Op. Att'y Gen. Fla. 1992-95 (1992) (citing 67 C.J.S. *Oaths & Affirmations* § 5(a) (1992)). The Court concurs with the Sixth Judicial Circuit in *Dorofy* that, as an alternative to having a notary being physically present with the witness, the hearing officer may state on the record that he or she is able to affirmatively and positively identify the witness' identity and then administer a valid telephonic oath. *Dorofy*, 28 Fla. L. Weekly Supp. at 570b. Since the record here demonstrates that none of the telephonic witnesses were positively identified, the hearing officer did not administer a valid oath consistent with due process. *See Pena v. Rodriguez*, 273 So. 3d 237, 240-41 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1346a].

In addition, the Court finds that the DHSMV's interpretation of section 322.2615(6)(b) is unpersuasive. Respondent's interpretation of the statute ignores the indisputable fact that, in all other Florida judicial or quasi-judicial forums, a telephonic oath is only valid if another person can verify the witness' identity. *See, e.g.*, Fla. R. Gen. Prac. & Jud. Admin. 2.530(d)(3); Fla. Admin. Code R. 28-106.123(5)(b) (2019). *See also Brown v. State*, 101 So. 3d 381, 381-82 (Fla. 1st DCA 2012) [37 Fla. L. Weekly D2522c] (finding error where the judge administered a telephonic oath without a notary during Jimmy Ryce hearing); *E-Z Serve Convenience Stores, Inc. v. Paul*, 720 So. 2d 301, 302 (Fla. 1st DCA 1998) [23 Fla. L. Weekly D2513a] (same, but for workers compensation hearing). It would be an absurd reading of the statute to assume that the Legislature created one exception to this rule in contravention to all other proceedings under Florida law. Because "section 322.2615 is not designed to protect the decision of the hearing officer, but to preserve due process and justice," Petitioner is entitled to relief as the DHSMV's interpretation of the statute offends procedural due process. *Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1173 (Fla. 2017) [42 Fla. L. Weekly S85a].

Accordingly, the Petition for Writ of Certiorari is **GRANTED**. We hereby **QUASH** the hearing officer's November 8, 2019 "Amended Findings of Fact, Conclusions of Law and Decision." The matter is **REMANDED** to the Department of Highway Safety and Motor Vehicles to conduct a new formal review hearing that is consistent with this opinion and the requirements of due process. *See Gordon v. State, Dep't of Highway Safety & Motor Vehicles*, 166 So. 3d 902, 904-05 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1368b] (GILLMAN, BOSSO-PARDO, and BELL, JJ., concur.)

* * *

Municipal corporations—Code enforcement—Abandoned or derelict vehicles—Finding that owner of property adjacent to city-owned swale on which allegedly derelict vehicles were parked violated city code by allowing violations to exist is not supported by competent substantial evidence

RENA MARIE MOFORIS, Appellant, v. CITY OF FORT LAUDERDALE, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE17-017450 (AP). L.T. Case No. CE17062534. March 18, 2021. Appeal from the Code Enforcement Board for the City of Fort Lauderdale, Special Magistrate, Rose-Ann Flynn. Counsel: Gaspar Forteza, Blaxberg, Grayson, Kukoff & Forteza P.A., Miami, for Appellant. Rhonda Montoya Hasan, Office of the City Attorney City, Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM.) This is an appeal of a Final Order entered by a special magistrate in favor of the City of Fort Lauderdale Code Enforcement Board ("City") finding Appellant, Rena Marie Moforis ("Ms. Moforis") in violation of the Fort Lauderdale Code of Ordinances Section 18-4(c) ("Code"), which prohibits the parking of 'derelict vehicles' on private or public property. It is undisputed that Ms. Moforis did not park the vehicles, did not own the vehicles, had no knowledge of the existence of these vehicles at any time before they were towed, and that the vehicles were apparently parked on public city property. Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the final order is hereby REVERSED as set forth below:

In the proceedings below, Ms. Moforis was found in violation of city code by virtue of being the owner of the property adjacent to the public 'city swale,' wherein the vehicles appear to have been located. Ms. Moforis discovered the location of the vehicles only after the final hearing; when her counsel made a public records request, which related to the provision of the city inspector's notes relating to the towing of the vehicles. No actual evidence was presented at the hearing nor provided to Ms. Moforis at any time at or before the hearing. Ms. Moforis contends that she was deprived of due process after never having received a proper abatement notice regarding the alleged derelict vehicles, that the Special Magistrate's final order was not supported by competent substantial evidence and did not comply with the essential requirements of law. The City's Answer Brief and additional filings were stricken in this case. Therefore, analysis of this appeal is based solely on the arguments in the Initial Brief and the record on appeal. *See, Title & Trust Co. of Fla. v. Salameh,* 407 So.2d 1035, 1035-36 (Fla. 1st DCA 1981).

When reviewing an administrative action, "the circuit court must determine whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence." *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982).

Discussion:

Ms. Moforis maintains that she was denied due process after never having received a proper abatement notice regarding the violations, that the Special Magistrate departed from the essential requirements of law in its decision finding her in violation of code, and that the Special Magistrate's decision is not supported by any competent and substantial evidence. This Court specifically addresses the lack of competent, substantial evidence.

Determining if competent, substantial evidence supports the Special Magistrate's decision "involves a purely legal question: whether the record contains the necessary quantum of evidence." *Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship,* 619 So. 2d 996, 1003 (Fla. 2d DCA 1993). Upon review, a court "is not permitted to go farther and reweigh that evidence . . . or substitute its judgment about what should be done." *Id.* Although this Court must only look for evidence that supports the decision below, that evidence still needs to be competent and substantial. Competent evidence must "be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *See Dept. of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a] (quoting *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957)). Substantial evidence must be "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *Id.* "[F]indings must be based on something more than mere probabilities, guesses, whims, or caprices, but rather on evidence in the record that supports a reasonable foundation for the conclusion reached." *Id.*

Here, Ms. Moforis was charged in violation of Code Article 18-4(c), which provides, in relevant part:

> Sec. 18-4. *Abandoned or derelict motor vehicles or vessels prohibited.*
>
> It is declared unlawful and a public nuisance for any owner of any motor vehicle or vessel to violate any of the provisions in this section or for any property owner or occupant to allow a violation of this section to exist. . .
>
> (c) No person shall park, leave or store any derelict vehicle or vessel upon any public or private property except as otherwise provided in the Unified Land Development Regulations.
>
> (d) It shall be the duty of the registered owner of the motor vehicle or vessel or the property owner or property occupant to remove the abandoned or derelict vehicle or vessel.

Fort Lauderdale Code of Ordinances, Art. 18-4.

Further, the Code defines "derelict" as ". . .any motor vehicle or vessel which is in a state of evident disuse, neglect or abandonment; is wrecked or partially dismantled having no motor, engine, transmission, or other major parts necessary for operation; has vegetation underneath as high as the body or frame; has refuse or debris collected underneath; is being used solely for storage purposes; does not have all tires inflated; does not display a current valid license tag; or which threatens or endangers public health, safety and welfare." *Fort Lauderdale Code of Ordinances,* Art. 18-3.

Pursuant to the Code, therefore, unless the violator is the owner of the motor vehicle in question, the violation is that the property owner allows such a condition to exist. Accordingly, in order to adequately assert the existence of a violation of Article 18-4(c), the City was required to present evidence of the requisite factual foundation for the violation. In this case, it was never asserted that Ms. Moforis personally parked, left or stored any derelict vehicle. She was charged merely by virtue of being the owner of the real property adjacent to the public City Swale where the alleged derelict vehicles were purportedly located. In order to prevail on a claim of violation of Code Article 18-4(c) by a property owner, the City was required to present competent evidence of the following four elements:

> (1)That there was a vehicle parked, left or stored;
>
> (2) That such a vehicle was so parked, left or stored upon some particular public or private property;
>
> (3) That the condition of the vehicle at the time of inspection met the Code's definition of "derelict;"
>
> (4)That Ms. Moforis "allowed a violation of this section to exist."

The City was required to provide substantial competent evidence of these facts. This burden "has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonable inferred." *DeGroot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957). The record here is devoid of "competent evidence" or evidence of any kind regarding the above elements. Specifically, Inspector Gottlieb's testimony does not constitute evidence of any of the (4) four factual elements required noted *supra.* Inspector Gottlieb appears to only make a verbatim reading of the violation:

> There are derelict vehicles consistently being parked on the property and swale of this commercial property. This is a recurring violation and the case will be presented to the special magistrate even if the violation is brought into compliance prior to the hearing. Your Honor, this is very similar to the other case that I presented earlier. Ms. Moforis has been in contact with me, and, apparently, she does have a plan to try and keep them in compliance. We would request the same for this case as the other, ten days to come into compliance and five hundred dollars per day thereafter.

Inspector Gottlieb nebulously references "vehicles" rather than any particular vehicle, does not reference any particular time or date, references to different locations ("on the property and swale of this commercial property"). This appears to highlight that the City believed it is not required to present any evidence as to any particular vehicle, much less its condition, its location, or Ms. Moforis' conduct. Further, by wrongfully referring to "the other case that I presented earlier," Inspector Gottlieb impermissibly prosecuted this action by allusion to unknown evidence from another matter, which was not presented in this case.

Ms. Moforis, on the other hand, presented substantial testimony evidence of her refusal to allow such violations to exist as reproduced as follows:

> RESPONDENT: So, my question is that, because we have a 24-hour surveillance and we also have a contract with West Way and we do and I have evidence—tow a lot of cars ourselves, that street, people just drive down from other areas and just park on your property. I even went and hired a manager to stay there all day long just in case. But if _you know one day you can have no car parked there and then the next day somebody can just drive down and leave their car there in front of you. So I don't you know I am doing everything I can. But you know if I get fined $250.00 a day because one person from down the street parks their car down there one day, I understand, but like how does that like accrue? I'm confused. Because the first I heard of the violation was in June and I called Ms. Gottlieb right away to see how I could resolve it.
>
> SPECIAL MAGISTRATE: Okay. Anything else? You know, unfortunately, it is the property owner's responsibility, but if you have someone there 24 hours it should be no problem if someone parks there to get it towed within 24 hours.
>
> RESPONDENT: Yes, if the security is there, but sometimes when they drive by and if she comes it might be 10 minutes difference or an hour. I do have these contracts and we are on top of it all the time.
>
> SPECIAL MAGISTRATE: Okay. well, I appreciate your diligence. and I'm going to order 10 days or $250.00 a day thereafter.

Ms. Moforis, having no legal experience but being armed with common sense cogently highlights to the Special Magistrate that she has 24-hour surveillance to tow away any derelict vehicles, and that she is getting fined $250 per day for third parties leaving their cars on the public street in front of her Property. The Special Magistrate did not acknowledge this testimony as evidence that Ms. Moforis is not "allowing the violations to exist." Instead, the Special Magistrate acknowledges her "diligence" in avoiding third parties from parking on the public City Swale around her Property, but still proceeds to enter a Final Order of violation of Code Article 18-4 against her. Even if Ms. Moforis had not presented this evidence, the City nonetheless failed to allege or introduce evidence supporting the requisite factual foundation for the alleged violation. Thus, the City has failed to meet even the most minimal of evidentiary burdens, and the Final Order rendered thereon must be Reversed.

Accordingly, the final order in favor of Appellee is hereby **REVERSED**, and this case is **REMANDED** to the lower tribunal for further proceedings consistent with this Opinion. Appellant's Motion for Award of Attorney's Fees is hereby **GRANTED** as to appellate attorney's fees, with the amount to be determined by the lower tribunal remand. (BOWMAN, ROBINSON, and COLEMAN, JJ., concur.)

* * *

Municipal corporations—Code enforcement—Due process—Notice—Where notice of code enforcement hearing sent by certified mail was returned unsigned, notice was required to then be provided by posting with proof of posting via affidavit—Affidavit of posting that contained photograph of posted notice, rather than copy of notice required by section 162.12, and which was dated day after hearing was insufficient to obtain jurisdiction over property owner

THOMAS F. THOMAS, Appellant, v. CITY OF FORT LAUDERDALE, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-014655 (AP). City Case No. CE17040090. March 18, 2021. Appeal from a decision by the City of Fort Lauderdale Code Enforcement Special Magistrate. Counsel: Herbert B. Dell, Herbert B. Dell, P.A., Fort Lauderdale, for Appellant. Rhonda Montoya Hasan, City of Fort Lauderdale City Attorney's Office, Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Thomas F. Thomas ("Appellant") appeals an Order Denying Motion to Vacate Order Imposing Fine entered by a City of Fort Lauderdale Special Magistrate on June 20, 2019. Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the Order Denying Motion to Vacate Order Imposing Fine rendered on June 20, 2019, the August 10, 2017, Final Order, and the November 16, 2017 Order Imposing a Fine, Lien and Foreclosure Notice are **REVERSED** as set forth below.

On April 4, 2017, following an inspection of Appellant's property, the City of Fort Lauderdale ("City") found violations for (1) unmaintained landscaping, (2) dirty, stained and debris ridden roof, and (3) overgrowth and trash. Beginning on May 2, 2017, the City, sent notices to Appellant via certified mail return receipt requested, but all certified mailings were returned to the City as unsigned. Thereafter, the City posted notices at the property on July 12, 2017, and at City Hall on July 20, 2017.

On August 10, 2017, a City of Fort Lauderdale Special Magistrate held a hearing on the violations and entered a Final Order against Appellant. On November 16, 2017, a subsequent hearing was conducted and an Order Imposing a Fine, Lien and Foreclosure Notice was entered against Appellant. Appellant was not in attendance at either hearing. On November 5, 2018, after the violations remained uncured and accumulated to $54,450.00 in fines, the City notified Appellant of its intent to foreclose on its lien. On November 14, 2018, Appellant claims to have finally have become aware of the violations, lien, and hearings and immediately cured the violations. Soon thereafter, on December 5, 2018, the City declared the property in compliance. Appellant then filed his Verified Motion to Vacate Final Order on December 11, 2018, citing to the City's failure to comply with the notice requirements section 162.12, Florida Statutes. After conducting a hearing on June 20, 2019, the City of Fort Lauderdale Special Magistrate denied Appellant's Motion to Vacate.

Pursuant to section 162.11, an appeal of a code enforcement board's order to the circuit court "shall not be a hearing *de novo* but shall be limited to appellate review of the record created before the enforcement board." *Sarasota County v. Bow Point on Gulf Condo. Developers, LLC,* 974 So. 2d 431, 433 n.3 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2551b]. Where the circuit court reviews local governmental administrative action three questions are asked: (1) whether due process was afforded, (2) whether the administrative body findings and judgment are supported by competent, substantial evidence; and (3) whether the essential requirements of law have been observed. *Dusseau v. Metro. Dade County Bd. of County Com'rs,* 794

So. 2d 1270, 1274 (Fla. 2001) [26 Fla. L. Weekly S329a]; *Lee County v. Sunbelt Equities, II, Ltd. P'ship,* 619 So. 2d 996, 1003 (Fla. 2d DCA 1993).

Appellant argues that the City failed to comply with the notice requirement of section 162.12 because the City elected to provide notice via certified mail but since it was returned unserved, section 162.12 requires proof of the posted publication via affidavit. *See* § 162.12, Fla. Stat. Appellant claims that the code violation case file does not contain a proper affidavit rather photographs of the posted notice. Appellant also argues that the affidavit contained within the City's appendix fails to satisfy section 162.12 as it does not contain an attached copy of the subject notice and is signed the day **AFTER** the Special Magistrate conducted the August 10, 2017 code violation hearing. As such, Appellant contends that since he was not afforded proper notice his procedural due process rights were violated. We agree.

"Procedural due process requires both reasonable notice and a meaningful opportunity to be heard." *Yue Yan v. Byers,* 88 So. 3d 392, 394 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D1183a] (citations omitted). "The notice must be 'reasonably calculated,' under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* "The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance." *Id.*

Florida Statutes Chapter 162 governs County or Municipal Code Enforcement. Section 162.06 is titled "enforcement procedures" and states, in pertinent part:

> A violation of the codes is found, the code inspector ***shall notify the violator*** and give him or her a reasonable time to correct the violation. Should the violation continue beyond the time specified for correction, the code inspector ***shall notify*** an enforcement board ***and request a hearing***. The code enforcement board, through its clerical staff, ***shall schedule a hearing, and written notice of such hearing shall be hand delivered or mailed as provided in s. 162.12 to said violator***. At the option of the code enforcement board, notice may additionally be served by publication or posting as provided in s. 162.12.

§ 162.06(2), Fla. Stat. (emphasis added).

Section 162.12 details notice requirements with subsection (1) spelling out the methods in which notice ***must*** be provided, allowing for four options: (a) certified mail, return receipt requested; (b) hand delivery by statutorily designated person; (c) leaving notice at the violator's usual place of residence with any person residing therein who is above 15 years of age and informing such person of the contents of the notice; or (d) in the case of commercial premises, leaving the notice with the manager or other person in charge. § 162.12(1)(a)-(d), Fla. Stat.

In the event notice is elected to be provided by certified mail, section 162.12(1)(a) provides "[i]f any notice sent by certified mail is not signed as received within 30 days after the postmarked date of mailing, notice may be provided by posting as described in subparagraphs (2)(b)1. and 2." § 162.12(1)(a), Fla. Stat. Subparagraph (2)(b)1 allows for, in lieu of publication in a newspaper, that notice may be posted at both the property and a municipal or county government office. § 162.12(2)(b)(1), Fla. Stat. And subparagraph (2)(b)2 outlines that proof of the aforementioned posting be by affidavit and include a copy of the notice posted and the date and places of posting. § 162.12(2)(b)(2), Fla. Stat. Lastly, section 162.12(3) provides that "[e]vidence that an attempt has been made to hand deliver or **mail notice** as provided in subsection (1), ***together*** **with proof of publication or posting as provided in subsection (2)**, shall be sufficient to show that the notice requirements of this part have been met, without regard to whether or not the alleged violator actually received such notice." § 162.12(3), Fla. Stat. (emphasis added).

Here, the City elected to send notice by certified mail, which was returned unsigned. The City argues that the "may" listed in section 162.12(1)(a) eludes to the legislatures desire to make the posting of publication referenced in subparagraphs (2)(b)1 and 2 optional. But this interpretation is incorrect as notice **MUST** be sent via one of the four options listed in section 162.12(1), referenced above. When the certified mail option is elected and returned unsigned, notice may be provided via subparagraphs (2)(b)1 and 2 (the "posting option") as an alternative to providing notice via one of the other three options listed in section 162.12(1). Proof of publication was not provided via affidavit as required, rather photographs were taken and entered into the violation case file. The Affidavit of Due Diligence signed by the Code Enforcement Officer does not contain the required attached notice and is dated the day **AFTER** the August 10, 2017 hearing, thereby insufficient to obtain jurisdiction over Appellant.

The City further argues that (1) its failure to complete the required affidavit is "harmless error", (2) that the photographs are better evidence that notice was received than the affidavit, (3) that section 162.12 does not contain a requirement for *when* the affidavit must be completed therefore an *ex post facto* affidavit should be allowed to suffice, and (4) that Appellant has confused notice pursuant to section 162.12 with service of process therefore the argument is a "red herring". We disagree without further explanation.

Ultimately, Appellant was not afforded proper notice as the City failed to comply with the requirements of section 162.12, Florida Statutes. As such, Appellant's due process rights were violated. "When a code violation is discovered, the violator must receive a notice of a hearing under section 162.12." *City of Tampa v. Brown,* 711 So. 2d 1188 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D1061b], *see also,* § 162.06, Fla. Stat. Further, "a lien is not acquired unless applicable notice requirements are strictly complied with." *Stresscon v. Madiedo,* 581 So. 2d 158, 159-60 (Fla. 1991). Additionally, where there is a lack of jurisdiction over the defendant, the judgment is absolutely null and void on its face. *Tucker v. Diannne Electric, Inc.,* 389 So. 2d 683, 684 (Fla. 5th DCA 1980). The case file clearly reflects that the City failed to comply with section 162.12. The burden lies with the City to prove that it has satisfied the statutory notice requirements. *See Ciolli v. City of Palm Bay,* 59 So. 3d 295, 297 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D795a]; *Little v. D'Aloia,* 759 So. 2d 17 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D675a]. The City has failed to satisfy its burden.

As such, it is:

ORDERED that the Order Denying Motion to Vacate Order Imposing Fine dated June 20, 2019, the August 10, 2017 Final Order and the November 16, 2017 Order Imposing a Fine, Lien and Foreclosure Notice are hereby **REVERSED** as **VOID** for the reasons provided above. (BOWMAN, ROBINSON, and COLEMAN, JJ., concur.)

* * *

CLUB M CREW 960, LLC, Appellant, v. RANDALL TIPTON, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-024863. L.T. Case No. 07-2019WR. March 18, 2021. Appeal from the Broward County Office of Professional Standards/Human Rights Section, Christopher Narducci, Hearing Officer. Counsel: Robert L. Jennings, Jennings and Valancy, P.A., Stuart, for Appellant. Jeffrey Waintroob Roberts, Roberts Attorneys, P.A., Palm Beach Gardens, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and

the Final Order rendered on September 12, 2019 is hereby **AFFIRMED**. (BOWMAN, ROBINSON, and COLEMAN, JJ., concur.)

* * *

Licensing—Driver's license—Revocation—Leaving scene of accident involving injury—For purposes of revoking driver's license under section 322.28(4)(b), "conviction" includes both adjudicated offenses of leaving scene of accident involving injury and offenses in which adjudication is withheld

FRANSLINE MOLEON, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 20th Judicial Circuit (Appellate) in and for Collier County. Case No. 18-AP-03. April 11, 2018. Counsel: Derek Verderamo, for Petitioner. Mark L. Mason, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(SHENKO, J.) THIS CAUSE comes before the Court on Fransline Moleon's Petition for Writ of Certiorari, brought pursuant to Fla. Stat. §322.31. Having reviewed the petition, the response, the record provided and attached to the petition, and the applicable law, and upon due consideration, the Court finds as follows:

1. Petitioner is challenging Respondent's Final Order of License Revocation issued after a formal review hearing, which sustained the revocation of Petitioner's driving privilege pursuant to Fla. Stat. §322.2615 for Failing to Stop and Render Aid Involving Injury or Death as authorized by §322.27 F.S. (See copy of Final Order of License Revocation attached to the petition).

2. On March 21, 2017, Petitioner pled no contest to Fail to Stop, Remain at Crash Involving Injury other than Serious Bodily Injury, F.S. 316.027(2)(a), a third degree felony. Petitioner was sentenced to 24 months of probation and adjudication was withheld. The Court further Ordered that Petitioner's driver license be revoked for 6 months. Respondent revoked Petitioner's driver license for 3 years, pursuant to F.S. 322.28(4)(b). (See record attachments to the petition).

3. A formal review hearing was held on November 29, 2017.[1] The documents submitted by Petitioner for review by the Hearing Officer included a certified copy of the Judgment and Sentence for criminal case 16-CF-1215A, and a certified copy of a Motion for Issuance of Hardship License.

4. During the hearing, Petitioner, through Counsel, argued that there was an Adjudication Withheld in the Judgment and Sentence and that without an Adjudication there was no conviction as required, by F.S. 322.28(4)(b), for the 3 year revocation of Petitioner's driver license. In the Final Order, dated December 19, 2017, the Hearing Officer found that "there is competent substantial evidence to find that the Petitioner's driving privilege was properly revoked by the Department."

5. In the Petition for Writ of Certiorari, Petitioner argues that the record lacks competent and substantial evidence to support that Petitioner was convicted of the offense because adjudication was withheld, and that F.S. 322.28(4)(b) requires a conviction before the revocation of Petitioner's driver license for the minimum period of 3 years.

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. The Court is not entitled to reweigh the evidence, to reevaluate the credibility of the evidence, or to substitute its judgment for that of the agency. *Haines City Community Development v. Heggs,* 658 So. 2d 523 (Fla. 1995) [20 Fla. L. Weekly S318a].

7. Petitioner contends that the Hearing Officer departed from the essential requirements of law and denied Petitioner due process when she upheld the license revocation despite the lack of any language in F.S. 316.027 or F.S. 322.28 distinguishing between an adjudication of guilt and a withhold of adjudication. Petitioner adds that a F.S. 316.027(2)(e) states that a driver who violates paragraph (a), (b), or (c) shall have his or her driver license revoked for a period of at least 3 years as provided in F.S. 322.28(4)(b) which states that upon conviction for a violation of F.S. 316.027(2)(a), (b), or (c) involving injury, serious bodily injury, or death, the court shall revoke the driver license of the person convicted for a minimum period of 3 years.

8. The Supreme Court of Florida addressed the issue of whether or not a conviction results when a trial court withholds adjudication in *Raulerson v. State,* 763 So. 2d 285 (Fla. 2000) [25 Fla. L. Weekly S542a]. After an analysis of the legislative intent regarding Chapter 322, the Court, in *Raulerson,* noted that conviction is defined without reference to an adjudication and that the focus of the definition is whether an offense was committed relating to the operation of motor vehicles on highways in violation of Chapter 322, and not on the decision of whether to impose or withhold adjudication. As a result of the decision in *Raulerson,* the disposition in the instant case, regardless of whether adjudication is withheld or imposed, is a conviction, pursuant to F.S. 322, for the purpose of revoking Petitioner's driving privilege.

9. 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 denied due process. The record does contain competent substantial evidence to support the decision of the Hearing Officer to affirm the revocation of Petitioner's driving privilege.

Accordingly, it is

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

---

[1]A copy of the Transcript of Proceedings of the formal review hearing is attached to the petition and may be referenced herein as (T.).

* * *

Volume 29, Number 2
June 30, 2021
Cite as 29 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—ORIGINAL

Torts—Automobile accident—Venue—Pretrial publicity—Motion for change in venue due to publicity of trial of codefendant is denied—Defendants have not shown actual pervasive community bias that would make it impossible to seat impartial jury

DUANE WASHINGTON, et al., Plaintiffs, v. SINCLAIR BROADCAST GROUP, INC., et al., Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 18-CA-861. March 28, 2021. David Frank, Judge. Counsel: Robert Scott Cox, Law Offices of Robert Scott Cox, PLLC, Tallahassee; and Ben Crump, Ben L. Crump, PLLC, for Plaintiffs. Robert C. Crabtree, Tallahassee, for NAVL and Greater Bay Relocation Services; Charles F. Beall, Jr., Pensacola, for Greater Bay Relocation Services; John A. Rine, Elizabeth A. Kirkhart, and David L. Luck, Lewis Brisbois Bisgaard & Smith, LLP, Tampa, for Sinclair and Sheridan; Robert L. Shannon, Atlanta, GA, for Sinclair and Sheridan; Michael A. Satre, for Fox Rothschild, LLP; and Steven M. Purtiz and Christina L. Pardiek, Pennington Law Firm, P.A., Tallahassee, for Watkins and Copeland, for Defendants.

AMENDED ORDER ON DEFENDANTS' JOINT VERIFIED MOTION FOR CHANGE OF VENUE DUE TO EXTENSIVE PRETRIAL PUBLICITY

This cause came before the Court for hearing on March 26, 2021 on defendants' joint verified motion for change of venue, and the Court having reviewed the motion, exhibits, the separately filed affidavit, and the response, considered evidence, heard argument of counsel, and being otherwise fully advised in the premises, finds

Judicial default was entered against defendant Top Auto on August 3, 2020. The damages only jury trial against Top Auto was on October 2, 2020 and resulted in a large verdict. The trial against the remaining defendants is set for June 11, 2021. The remaining defendants now request that their trial be moved to Orlando, or at least to Leon County, on the ground that extensive pretrial publicity of the trial against Top Auto has made it impossible to obtain a fair trial in the current venue, Gadsden County.

The Court writes to address defendants' argument that federal case law controls their request to move the trial because of alleged pervasive and adverse pretrial publicity. Federal jurisprudence plays an important role, but it does not control. This Court is required to follow precedent and guidance from the Florida Supreme Court, the First District Court of Appeal, and the other Florida district courts where the First District has not spoken.

To begin, the base right at issue—the right to trial by jury in civil cases—does not emanate from the federal Constitution. The federal Constitution's Sixth Amendment guarantee of an impartial trial by jury for criminal cases is applied to the states through the Fourteenth Amendment. The Seventh Amendment's right to trial by jury in civil cases is not incorporated into the states.[1]

The right to trial by jury for the parties in this case comes from Florida's first Constitution, drafted in 1838, which states, "The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law." The provision, ". . .contemplated, without doubt, a continuation of jury trials in all cases where such was the practice at the common law, and there is nothing in the subsequent constitutions to indicate a change of meaning in this respect." *Wiggins v. Williams*, 36 Fla. 637, 650-51, 18 So. 859, 863 (Fla. 1896).

In addition to the right to trial by jury, Florida law also requires jurors in civil cases to be impartial. "The *sine qua non* of our system of trial by jury is that juries should be comprised of fair and impartial members who stand indifferent to the outcome of the proceeding. A prospective juror should be excused for cause if there is a reasonable doubt as to whether he or she will be able to render an impartial verdict based solely on the evidence and the law." *City of Live Oak v. Townsend*, 567 So.2d 926, 928 (Fla. 1st DCA 1990) (citations omitted).

And under Florida law, "[a] change of venue shall be granted when it appears impracticable to obtain a qualified jury in the county where the action is pending." Fla. Stat. §47.121 (2020).

It is quite clear that Florida's right to an impartial jury trial in civil cases is a creation of state law.

"[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984).

Even where state courts address federal rights, the United States Supreme Court, "has no supervisory jurisdiction over state courts. . . ." *Chandler v. Florida*, 449 U.S. 560, 570, 101 S. Ct. 802, 807, 66 L. Ed. 2d 740 (1981). "[I]n reviewing a state-court judgment, [it is] confined to evaluating it in relation to the Federal Constitution." *Id*.

This is the process when Florida state courts address the U.S. Constitution's Sixth Amendment (federal) right to an impartial jury in criminal cases. Federal courts do not "supervise" state courts as they apply this constitutional protection. State appellate courts review the trial court's proceedings and set forth the standards for deciding when a change in venue is appropriate. There is a plethora of Florida appellate decisions on this. An example of one recent Florida case setting forth the standard is *Gonzalez v. State*, 253 So.3d 526, 529 (Fla. 2018) [43 Fla. L. Weekly S361a]:

> To determine whether a change of venue is proper, the trial court must consider: "(1) the extent and nature of any pretrial publicity and (2) the difficulty encountered in actually selecting a jury." *Griffin v. State*, 866 So.2d 1, 12 (Fla. 2003) [28 Fla. L. Weekly S723a]. When considering the second prong, the court must consider "whether any difficulty encountered in selecting a jury . . . reflected a pervasive community bias against [the defendant] which so infected the jury selection process that it was impossible to seat an impartial jury." *Rolling v. State*, 695 So.2d 278, 287 (Fla. 1997) [22 Fla. L. Weekly S141a]. "[I]f prospective jurors can assure the court during voir dire that they are impartial despite their extrinsic knowledge, they are qualified to serve on the jury, and a change of venue is not necessary." *Id*. at 285 (citing *Davis v. State*, 461 So.2d 67, 69 (Fla. 1984)).

Of course, federal courts are available when parties contend that state courts have strayed from the minimum requirements of federal constitutional law. It appears that Florida's standards governing pretrial publicity changes of venue have been tested by direct review in the United States Supreme Court on only a few occasions. The Florida courts passed these tests with flying colors. See *Davis v. Florida*, 473 U.S. 913, 105 S.Ct. 3540, 87 L. Ed. 2d 663 (1985) (petition for writ of certiorari denied); *Dobbert v. Florida*, 432 U.S. 282, 303, 97 S.Ct. 2290, 2303, 53 L. Ed. 2d 344 (1977) ("Petitioner in this case has simply shown that the community was made well aware of the charges against him and asks us on that basis to presume unfairness of constitutional magnitude at his trial."); *Murphy v. Florida*, 421 U.S. 794, 800, 95 S.Ct. 2031, 2036, 44 L. Ed. 2d 589 (1975) (actual existence of an opinion affecting impartiality in the mind of the juror raises the presumption of partiality).

Among the numerous Florida state court cases on this issue, defendants only cite two in their 246-page motion plus exhibits. This perhaps because defendants preferred to mention a case where the change of venue for pretrial publicity in a civil case was granted; and they are extremely rare. It is easy to understand why, given the standard that must be applied.

Defendants first cite *City of Miami v. Cornett*, 463 So.2d 399, 402 (Fla. 3d DCA), cause dismissed, 469 So.2d 748 (Fla. 1985), appar-

ently for the general proposition that civil juries, like criminal juries, should be impartial. This is a tenet with which few would disagree. The holding of the case, however, dealt with the standard for peremptory *Neil* challenges, which is not at issue here.

Defendants next cite *Thornton v. DeBerry By & Through DeBerry*, 548 So. 2d 1177, 1178 (Fla. 4th DCA 1989). *Thornton* is one of the rare cases affirming a change of venue in a civil case. However, the facts in the present case—a limited number of local newspaper and television news stories along with social media posts over a short span of time months before trial—fall woefully short of the considerably more egregious facts in *Thornton*. See *Thornton* at 1178-79. Moreover, *Thornton* reminds us that the proper analysis is accomplished at jury selection, not prior to trial when all that is available is speculation about what potential jurors might be thinking. "The court also gave examples *from the voir dire responses* indicating the continuing notoriety of the case in the community." *Id*.

What *Thornton* does not do is set forth a different standard for pretrial publicity changes of venue in civil cases. In fact, there is no statute, rule, or case, about which the Court is aware, that requires or even suggests that the standard applied to civil cases is any different than that which governs criminal cases. Accordingly, the *Florida* case law discussed above, see *Gonzalez*, controls.

Even if there were evidence of pervasive and adverse publicity, that alone is insufficient. "Just because there is intense media coverage does not prove that anyone cared to read about it, listen to it, view it or cared one [whit] about the coverage." *Franklin v. State*, 137 So.3d 969, 985 (Fla. 2014) [39 Fla. L. Weekly S19a] (court noting statement by the trial judge below). As plaintiff pointed out at the hearing, it is hard to imagine thousands of Gadsden County residents glued to their electronic devices following news reports of a one-day personal injury automobile accident trial while the nation is consumed with one of the most controversial elections in U.S. history and a devastating pandemic.

This is true even for a county described by defendants as an extremely small, "tight knit" community. Our Florida Supreme Court has noted that the small size and rural nature of a community does not answer the question:

> Similarly, in *Copeland,* the defendant was convicted of the kidnapping, rape, and murder of a nineteen-year-old woman in Wakulla County. 457 So.2d at 1014. The defendant argued the trial court erred in denying his motion for a change of venue because the "general atmosphere of hostility against him was established by testimony that the crimes were the main topic of conversation in the rural community of Wakulla County." *Id*. at 1017. We disagreed, holding a change of venue is not required "in every highly publicized criminal prosecution in a rural community." *Id*. Even where "every member of the jury panel had read or heard something about the crime," a presumption of impartiality is supported by venire members' assurances that "they would be able to disregard the previously gained information and render a verdict based on the evidence presented in court." *Id*. It is the defendant's burden to overcome this presumption and "demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.' " *Id*. (quoting *Murphy v. Florida*, 421 U.S. 794, 800, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975)).

Ellerbee v. State, 232 So.3d 909, 920-21 (Fla. 2017) [42 Fla. L. Weekly S973a].[2]

Rather than meet their burden to show actual bias, defendants ask this Court to accept as sufficient their expert psychologist's "scholarship" and opinion that residents of Gadsden County must have been impacted based on studies of pretrial publicity in other cases and venues. This would be a dangerous detour from established (and binding) Florida law and this Court declines to do so.

Finally, defendants argue and assume that a "factually incorrect" statement that one of the defendant vehicle's running lights were off has been so intensely publicized that an impartial jury could not be seated in Gadsden County. First, no court or jury has determined this fact. Defendant's declaration to the contrary does not make the fact "incorrect," it makes it disputed. Second, and most importantly, whether the statement is true or false, a proper voir dire easily addresses potential jurors' exposure to such information.

Accordingly, it is ORDERED and ADJUDGED that the motion is DENIED with leave to re-assert at jury selection.

---

[1]"The Supreme Court has consistently held that states are not constitutionally required to provide a jury trial in civil cases." *Gonzalez-Oyarzun v. Caribbean City Builders, Inc.*, 798 F.3d 26 (1st Circuit 2015), explaining *McDonald v. City of Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) [22 Fla. L. Weekly Fed. S619a]. "Although the {McDonald] Court acknowledged a trend of expanding the scope of incorporated rights, it also clarified—by referencing the principle of stare decisis—that its Seventh Amendment incorporation cases are still binding." *Id*. See also, "*Gonzalez–Oyarzun v. Caribbean City Builders, Inc.*," Harvard Law Review, December 10, 2014, 128 Harv. L. Rev. 767, and "Ripe for Incorporation: The Seventh Amendment and the Civil Jury Trial," Clayton LaForge, American Bar Association, Appellate Practice Article, December 16, 2015.

[2]There are six counties in the Second Judicial Circuit. Gadsden County is the second largest in population, right below Leon and above Wakulla.

* * *

Insurance—Personal injury protection—Coverage—Declaratory judgments—Default declaratory judgment finding that insurer was not required to pay PIP benefits to insured or assignees because insured made false statement with intent to conceal or misrepresent material fact relating to claim does not entitle insurer to summary judgment against medical provider where provider was not provided notice and opportunity to defend its interests before default was entered—Moreover, default against insured cannot be enforced against provider who was either non-party or codefendant in action

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff, v. JONTAIE POON, et al., Defendants. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2016-CA-0010480-O. April 5, 2021. Paetra T. Brownlee, Judge. Counsel: Daniel Shapiro, Cole Scott & Kissane, Tampa, for Plaintiff. Tricia Neimand, Anthony-Smith Law, P.A., Orlando, for Defendant Good Health Inc.

ORDER ON STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S MOTION FOR RECONSIDERATION AS TO ITS MOTION FOR SUMMARY JUDGMENT ON ALL CLAIMS FOR PIP BENEFITS UNDER THE JONTAIE POON POLICY

THIS MATTER comes before the Court on the Plaintiff's "State Farm Mutual Automobile Insurance Company's ("State Farm") Motion for Reconsideration as to its Motion for Summary Judgment on All Claims for PIP Benefits Under the Jontaie Poon Policy," the Defendant Good Health Inc.'s ("Good Health") Response in Opposition to State Farm's Motion for Reconsideration as to its Motion for Summary Judgment on All Claims for PIP Benefits Under the Jontaie Poon Policy," and the Defendant Advanced 3D Diagnostics, Inc.'s ("Advanced 3D") Response in Opposition to State Farm's Motion for Reconsideration.[1] After considering the foregoing materials, as well as State Farm's original Motion for Summary Judgment, the filings in opposition to that Motion, as well as the arguments made during the hearing on December 15, 2020, and being otherwise fully advised in the premises, the Court hereby finds and concludes as follows.

On November 16, 2016, Plaintiff filed its Complaint for Declaratory Relief, seeking a declaration that if its insureds knowingly made false or misleading statements regarding the underlying automobile accident, then they and their assignees were not entitled to benefits under the insurance contract. On or about January 9, 2017, upon motion by State Farm, the Clerk of Court entered a default against Good Health, Advanced 3D and Defendant Jontaie Poon ("Poon"), for failure to serve any responsive pleading or filing. In June of 2017,

State Farm moved for and obtained an Order Granting Plaintiff's Motion for Final Judgment Against Defendant Jontaie Poon. That Order found Poon made false statements with the intent to conceal or misrepresent a material fact relating to the accident claim and provided, in relevant part: "Since Jontaie Poon's submitted false or misleading statement related to her December 13, 2015 accident claim, [State Farm] is not required to pay Personal Injury Protection benefits to Jontaie Poon or his assignees related to Jontaie Poon's December 13, 2015 accident claim."

Years later, on April 14, 2020, Good Health moved to quash service of process and vacate the clerk's default entered against it, arguing that it had been improperly served. On May 12, 2020, the Court entered an Agreed Order, granting Good Health's motion to quash service of process and to vacate the Clerk's Default and directed Good Health to file its response to State Farm's Complaint within 20 days, which it timely did.

On September 28, 2020, State Farm moved for summary judgment, arguing judgment should be entered in its favor under section 627.736(4)(h), Florida Statutes, due to the language in the order granting the default stating that State Farm is not required to pay any benefits or damages under Poon's policy. Good Health argued that it had been improperly defaulted at the time the order granting default judgment was entered, and so the judgment could not be enforced against it.

The Court held a hearing on State Farm's Motion for Summary Judgment on December 15, 2020, and denied the motion at the hearing. State Farm then moved for rehearing, arguing that, because the Court's predecessor previously determined the issue of coverage, section 627.736(4)(h) of the Florida Statutes requires judgment in its favor. That section provides:

> Benefits are not due or payable to or on the behalf of an insured person if that person has committed, by a material act or omission, insurance fraud relating to personal injury protection coverage under his or her policy, if the fraud is admitted to in a sworn statement by the insured or established in a court of competent jurisdiction. Any insurance fraud voids all coverage arising from the claim related to such fraud under the personal injury protection coverage of the insured person who committed the fraud, irrespective of whether a portion of the insured person's claim may be legitimate, and any benefits paid before the discovery of the fraud is recoverable by the insurer in its entirety from the person who committed insurance fraud.

State Farm's argument, however, overlooks the due process violations in this case, which require the Court to deny summary judgment. In that regard, it is undisputed that Good Health was erroneously defaulted at the time the order granting the default judgment was entered. Further, Good Health did not receive notice of the hearing on State Farm's Motion for Final Judgment Against Defendant Jontaie Poon, as evidenced by the Certificate of Service on that notice. It is, therefore, undisputed that Good Health had no notice and opportunity to defend its interests at the time the order on the motion for default was entered, in violation of its due process rights. *See VMD Fin. Services, Inc. v. CB Loan Purchase Associates, LLC,* 68 So. 3d 997, 999 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1970a] ("Due process requires that a party " 'be given . . . a real opportunity to be heard and defend in an orderly procedure, before judgment is rendered against him.' "). Good Health was completely denied the opportunity to defend its interest before the default, finding no party could recover under the policy, was entered. *See id.*

Additionally, it bears note that it is unclear whether the order granting the motion for default in this case constitutes a fraud "established in a court of competent jurisdiction." *See* § 627.736(4)(h), Fla. Stat. There was no evidence of any fraud admitted by the Court, and no finding on the merits as to this point. Poon was simply defaulted.

Finally, as argued by Good Health, the plain language of section 86.091 forbids the Court from enforcing judgments against non-parties. §86.091, Fla. Stat. ("When declaratory relief is sought, all persons may be made parties who have or claim any interest which would be affected by the declaration. No declaration shall prejudice the rights of persons not parties to the proceedings."). But even if the Court considers Good Health to have been a party at the time the default was entered—although State Farm never argued in response that Good Health was a proper party at the time—it is well-settled that a default judgment against one defendant cannot be enforced against a co-defendant. *See Kelly v. Torres,* 260 So. 3d 410, 412 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2625a] ("A default judgment against one co-defendant, however, is not effective to terminate the cause of action against a co-defendant who was not served with process until after the judgment was rendered . . . Further, the mere entry of a default is not the equivalent of a judgment, nor is it a final disposition: 'a default does not affect the status, rights, or liability of a codefendant.' ") (citations omitted); *see also Khazaal v. Browning*, 717 So. 2d 1124, 1125 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D2240a] ("The problem, however, is that they relied on the default judgment against one co-defendant to establish the liability of the other co-defendant, then used that default to obtain a final default judgment adjudicating the liability of both defendants. This was error.").

In light of the foregoing, it is hereby ORDERED AND ADJUDGED as follows:

1. The Plaintiff's motion for rehearing is DENIED.

---

[1]On March 23, 2021, State Farm and Advanced 3D filed a Joint Stipulation for Dismissal With Prejudice, dismissing both State Farm's claims against Advanced 3D, as well as Advanced 3D's counterclaim against State Farm.

* * *

Insurance—Property—Class action seeking additional interest due on loss on which insurer confessed judgment in prior suit is dismissed with leave to amend where claims for relief are entirely based on failure to comply with section 627.70131(5)(a), which sets forth time frames for payment of property claims and cannot form sole basis for private cause of action—Further, by filing separate action seeking only additional interest that plaintiff could have pursued in original suit, plaintiff has improperly split its cause of action—Case is not appropriate for class action where overwhelming number of factually intensive and individualized inquiries will be necessary—Any amended complaint must be brought as individual action

FLORIDA DRY SOLUTIONS, LLC, a/a/o Edel Vega, Plaintiff, v. SECURITY FIRST INSURANCE COMPANY, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-011196-CA-01, Section CA24. March 28, 2021. Antonio Arzola, Judge. Counsel: Jose P. Font and Dahlene K. Miller, Font & Nelson, PLLC, Fort Lauderdale, for Plaintiff. Marcy Levine Aldrich, Bryan T. West, and Scott E. Allbright, Jr., Akerman LLP, Miami, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS

On March 12, 2021, the Court conducted a hearing on Defendant's Motion to Dismiss the Class Action Complaint (the "Motion"). The Court heard argument of counsel, reviewed the file, and was otherwise fully advised. It is therefore **ORDERED** and **ADJUDGED** as follows:

1. Defendant's Motion is GRANTED.

2. Plaintiff's claims for relief in the Class Action Complaint (the "Complaint") are based entirely on an alleged violation of Fla. Stat. § 627.70131(5)(a). Pursuant to the clear terms of that provision, ". . . failure to comply with this subsection does not form the sole basis for a private cause of action." *See also State Farm Fla. Ins. Co. v. Silber*, 72 So. 3d 286, 290 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2298a]

("the last sentence of the statute closes the door on any insured unless there is a viable independent cause of action."). Here, Plaintiff fails to state a cause of action because the sole basis of its claim is the alleged violation of Fla. Stat. 627.70131(5)(a).

3. The Court finds that the class action cases and other authority cited by Plaintiff at the hearing do not involve Fla. Stat. § 627.70131 and do not address its prohibition against a private cause of action.

4. Plaintiff alleges that it previously sued Defendant on the same loss (claim no. 86845) [the "prior lawsuit"]. (Compl. ¶ 14). Plaintiff also alleges that Defendant confessed judgment in the prior lawsuit on or about March 2, 2018 for the services performed by Plaintiff. (*Id.*) Plaintiff alleges that, pursuant to that confession, Defendant made a payment in the amount of $4,347.10, an amount covering Plaintiff's invoice for its services ($4,189.16) plus at least some interest thereon. (*Id.* ¶¶ 14, 17-18). While Plaintiff alleges that Defendant had underpaid interest in that Action (*Id.* ¶ 19), Plaintiff chose not to pursue such unpaid interest in the prior lawsuit, choosing instead to bring this separate class action seeking interest on behalf of itself and a class defined as (*Id.* ¶ 33):

> All of SFIC's Insureds and/or their assignees in the State of Florida who: (a) notified SFIC of an initial, reopened, or supplemental property insurance claim; (b) SFIC accepted as being entitled to coverage and payment more than 90 days after the claim was reported (or within 15 days after there were no longer circumstances beyond its control); (c.) at the time that the coverage determination and payment was made as stated, SFIC did not comply with its statutory, and/or common law, obligation to pay interest in relation to the unlawful breach of its contractual obligation to its Insureds and/or their assignees.

5. The Court is concerned that, by bringing this separate action seeking only the additional interest allegedly due to Plaintiff, Plaintiff has (a) improperly split its cause of action and; (b) divested itself of standing to pursue the additional interest that Plaintiff could have pursued in the prior lawsuit. The rule against splitting a single cause of action requires that all damages accruing to a party as a result of a single wrongful act—here the alleged misconduct regarding the payment of Plaintiff's claim for water remediation services—must be brought in one action. *See Aquatherm Indus., Inc. v. Fla. Power & Light Co.*, 84 F.3d 1388, 1395 (11th Cir. 1996) ("Florida law is clear that the rule against splitting causes of action makes it incumbent upon plaintiffs to raise all available claims in one action.") (internal citations and quotations omitted); *Bryant v. Tarman*, 21 So. 3d 137, 137 (Fla. 5th DCA 2009) [34 Fla. L. Weekly D2276a] (auto accident claim for bodily injury and property damage could not be split); *Bryant v. Allstate Ins. Co.*, 584 So. 2d 194, 195 (Fla. 5th DCA 1991) ("The rule against splitting a cause of action requires that all damages sustained by a party as a result of a single wrongful act are lost if not claimed or recovered in one action.").

6. In addition, the Court finds that this case is not appropriate for class action treatment because of the overwhelming number of factually intensive and individualized inquiries that will be necessary given the class definition proffered by the Plaintiff (Compl. ¶ 33). For example:

• Whether Defendant "unlawful[ly] breached its contractual obligation" to each class member;

• Whether Defendant failed to comply with its obligation "to pay interest in relation to the unlawful breach of its contractual obligation" to each class member;

• Whether each class member has standing to bring an action against the Defendant, whether by an assignment of benefits or otherwise;

• Whether each class member notified Defendant of an initial, reopened, or supplemental property insurance claim (and how and when such notification took place);

• Whether Defendant accepted that each class member was "entitled to coverage and payment more than 90 days after the claim was reported (or within 15 days after there were no longer circumstances beyond its control;"

• Whether each class member's claim is barred by *res judicata*, prior settlement or release, or is the subject of separate pending litigation by that class member against Defendant.

For these reasons, the Court finds that this case is inappropriate for class action treatment on its face. *See Cordell v. World Ins. Co.*, 418 So. 2d 1162, 1164 (Fla. 1st DCA 1982) (affirming dismissal of class claims arising out of separate insurance contracts); *see also Integra Health Servs., Inc. v. Progressive Am. Ins. Co.*, 2008 WL 6914623 (Fla. 17th Jud'l Cir. 2008), *aff'd,* 18 So. 3d 1129 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1879g] (dismissing class allegations in auto insurance case).

7. The Court also finds that Plaintiff's claim for unjust enrichment is deficient. Among other things, it ultimately relies on the existence of an insurance policy and an assignment of benefits. (Compl. ¶¶ 33, 50).

8. The Court will provide the Plaintiff with the opportunity to amend to attempt to identify a basis other than Fla. Stat. § 627.70131(5)(a) alone for its cause of action. *See Silber*, 72 So. 3d at 290. Such claim shall be brought as an individual action; and not as a class action for the reasons stated above. Any such amended complaint shall be filed within twenty (20) days of the date of this Order. Failure to amend the complaint in accordance with this Order shall result in a dismissal of this case.

* * *

Criminal law—Murder—Death penalty—*Hurst* error— Nonunanimous recommendation of death—Resentencing—Double jeopardy—Defendant whose death sentence was reversed by Florida Supreme Court because of *Hurst* error and remanded for new penalty phase argues that, because 11-1 vote for death was acquittal as to death penalty, new penalty phase is barred by principles of double jeopardy and imposition of sentence of life without possibility of parole is required—Defendant's argument fails where nonunanimous jury verdict for death was not acquittal under death penalty scheme in place at time of trial

STATE OF FLORIDA, Plaintiff, v. HARREL BRADDY, Defendant, Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F98-37767, Section 60. March 27, 2021. Miguel M. de la O, Judge. Counsel: Christine Zahralban, for Plaintiff. Karen Gottlieb and Steven Yermish, for Defendant.

ORDER DENYING AMENDED MOTION TO RESENTENCE [HARREL] BRADDY TO LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE

THIS CAUSE came before the Court on Defendant, Harrel Braddy's ("Braddy"), Amended Motion to Resentence [Harrel] Braddy to Life Imprisonment Without the Possibility of Parole ("Motion"). The Court has reviewed the Motion, the State's Response, Braddy's Reply, heard argument of Counsel on March 25, 2021, and is fully advised in the premises. The Motion is **DENIED**.[1]

I. BACKGROUND.

Relevant to our discussion here, Braddy was convicted of first-degree murder. After the penalty phase, the jury recommended a sentence of death by a vote of eleven to one. On direct appeal, the Florida Supreme Court affirmed Braddy's convictions in 2012. *Braddy v. State*, 111 So. 3d 810 (Fla. 2012) [37 Fla. L. Weekly S703a]. In 2017, pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) [41 Fla. L. Weekly S433a], the Florida Supreme Court "vacate[d] the

death sentence and remand[ed] [his] case for a new penalty phase." *Braddy v. State*, 219 So. 3d 803, 827 (Fla. 2017) [42 Fla. L. Weekly S671a].

II. BRADDY'S CLAIM.

The Motion argues that a new penalty phase will violate Braddy's right to be free from double jeopardy under the United States and Florida Constitutions. Boiled to its essence, Braddy's argument is that this Court should deem the 11-1 vote for death an "acquittal" as to the death penalty and conclude that double jeopardy principles bar the State from again seeking a death sentence.

It is settled, and undisputed here, that the imposition of a life sentence following trial prohibits the State from subsequently seeking the death penalty at a retrial. *See Bullington v. Missouri*, 451 U.S. 430, 446 (1981) ("[b]ecause the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him, with respect to the death penalty, at his retrial."). The key question presented by the Motion is whether Braddy was "acquitted" as to the death penalty. If he was, the Motion must be granted; if he was not, it must be denied.

Braddy argues that in *Davis v. State*, 207 So. 3d 142 (Fla. 2016) [41 Fla. L. Weekly S528a], the Florida Supreme Court transformed pre-*Hurst* unanimous jury recommendations for death into binding findings of fact. On this basis, the Florida Supreme Court has declined to vacate death sentences imposed pursuant to a unanimous death recommendation where the Court could determine based on the jury instructions that the jurors made the findings *Hurst* constitutionally requires.

Braddy argues that this same analysis should be applied in cases where the jury recommendation for death was *not* unanimous. Braddy urges this Court to deem the non-unanimous recommendation for death in his case as a binding finding of fact by the jury that Braddy should not receive a death sentence. If treated as such, Braddy posits that the non-unanimous recommendation of death is actually an "acquittal" on the issue of the death penalty and, therefore, the State is barred by double jeopardy principles from again seeking a death sentence.

III. APPLICABLE LAW.

Today, under the death penalty scheme Florida instituted post-*Hurst*, a non-unanimous jury verdict following a penalty phase would be an acquittal as to the death penalty. However, under the scheme in place at the time of Braddy's trial, a non-unanimous vote for death was in no sense of the word an "acquittal" with regards to the death penalty. Therefore, Braddy's claim fails.

The cases upon which Braddy bases his claim do not support the relief he seeks. The Motion's logical underpinnings rely principally on two dissents by Justice Sonia Sotomayor from denials of certiorari in *Middleton v. Florida*, 138 S. Ct. 829 (2018) [27 Fla. L. Weekly Fed. S108a] and *Reynolds v. Florida*, 139 S. Ct. 27 (2018) [27 Fla. L. Weekly Fed. S591b].

Setting aside the minimal, if any, precedential value of a dissent from the denial of certiorari, Justice Sotomayor does not actually endorse Braddy's argument in *Middleton* or *Reynolds*. Rather, Justice Sotomayor rejects the Florida Supreme Court's post-*Hurst* approach of denying a new penalty phase to defendants sentenced to death following unanimous jury recommendations for death. In other words, Justice Sotomayor's dissents in *Middleton* and *Reynolds* support the view that *all* defendants sentenced to death pre-*Hurst* are entitled to a new penalty phase because the jury recommendations in their cases should not be treated as binding.

The Motion also cites to *United States v. Candelario-Santana*, 977 F.3d 146 (1st Cir. 2020), where the First Circuit found the Government was barred from seeking the death penalty because the jury rendered a non-unanimous verdict of life imprisonment and the trial court imposed the sentence. When the First Circuit reversed the conviction and remanded the case for retrial, the Double Jeopardy Clause barred the Government from again seeking the death penalty because it concluded the jury had actually "acquitted" Candelario-Santana by virtue of its verdict.

In *Wright v. State*, 586 So. 2d 1024 (Fla. 2002) [27 Fla. L. Weekly S98a], the jury recommended a life sentence, but the trial Court overrode the recommendation and imposed a death sentence. The Florida Supreme Court concluded the trial court erroneously overrode the jury's recommendation of life because there was evidence in the record to support the jury's recommendation. "To sustain a jury override, this Court must conclude that facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ." *Id.* at 1031. Because the Florida Supreme Court reversed Wright's conviction due to a jury selection error, the Court then addressed whether the jury's reasonable recommendation of life imprisonment was binding at a retrial. The Court concluded it was and barred the State from seeking a death sentence at retrial.

> Under well-settled Florida law, we have held that life imprisonment is the only proper and lawful sentence in a death case when the jury reasonably chooses not to recommend a death sentence. Thus, when it is determined on appeal that the trial court should have accepted a jury's recommendation of life imprisonment pursuant to *Tedder*, the defendant must be deemed acquitted of the death penalty for double jeopardy purposes. Art. I, § 9, Fla. Const.
>
> To rule otherwise would force death-sentenced prisoners to risk giving up the life recommendation by arguing for a new trial, and would place capital appellants in the anomalous position of having to choose between arguing guilt phase or penalty phase issues on appeal, even if they reasonably believe that the trial court committed reversible errors in each phase. Putting capital appellants in the position of having to make this "Hobson's choice" would be fundamentally unfair and inconsistent with the Florida Constitution. Art. I, §§ 9, 17, Fla. Const.

Id. at 1032.

Braddy's case comes to this Court in a far different posture than *Candelario-Santana* and *Wright.* Those juries voted for a life sentence; Braddy's jury recommended a death sentence and the trial court imposed it. Braddy now asks this Court to conclude that a jury recommendation of a death sentence, and imposition of a death sentence by the trial court, should nevertheless be treated as an "acquittal" on the issue of the penalty. This conclusion is unsupported by any precedent. Indeed, all existing binding precedent steers the Court's decision in the opposite direction.

> At no point during petitioners' first capital sentencing hearing and appeal did either the sentencer or the reviewing court hold that the prosecution had "failed to prove its case" that petitioners deserved the death penalty. Plainly, the sentencing judge did not acquit, for he imposed the death penalty. While the Arizona Supreme Court held that the sentencing judge erred in relying on the "especially heinous, cruel, or depraved" aggravating circumstance, it did not hold that the prosecution had failed to prove its case for the death penalty.
>
> Petitioners argue, however, that the Arizona Supreme Court "acquitted" them of the death penalty by finding the "evidence [insufficient] to support the sole aggravating circumstances found by the sentencer." . . . We reject the fundamental premise of petitioners' argument, namely, that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution always constitutes an "acquittal" of that circumstance for double jeopardy purposes. *Bullington* indicates that the proper inquiry is whether the sentencer or reviewing court has "decided that the prosecution has not proved its case" *that the death penalty is appropriate*. We are not prepared to extend *Bullington* further . . . .

Poland v. Arizona, 476 U.S. 147, 154-156 (1986) (emphasis in original) (citations omitted). *See Tisdale v. State*, 257 So. 3d 357, 360-61 (Fla. 2018) [43 Fla. L. Weekly S600b] ("Tisdale first argues that chapter 2016-13 should apply to his case and entitles him to a life sentence without the possibility of parole based upon double jeopardy principles. We reject this argument. Tisdale's jury was sworn and rendered its recommendation before the passage of chapter 2016-13. Because the recommendation supported imposition of the death penalty at the time the jury was sworn and jeopardy attached, double jeopardy principles do not bar a new penalty phase trial.") (citations omitted); *Victorino v. State*, 241 So. 3d 48, 50 (Fla. 2018) [43 Fla. L. Weekly S123a] ("Victorino next argues that because none of the four jury recommendations for the death penalty in his case were unanimous, he was 'acquitted' of the death penalty and therefore subjecting him to a new penalty phase, in which he will again be eligible for the death penalty, violates the prohibition against double jeopardy. This claim is meritless.").

IV. CONCLUSION.

This Court is constrained to deny the Motion because it is decisively unsupported by the current state of the law. This is not to say that Braddy's Motion is without superficial appeal. The idea that a 12-0 vote to recommend death pre-*Hurst* is binding and bars a new penalty phase post-*Hurst*, but an 11-1 vote is not equally binding, can appear unfair. However, even according to Justice Sotomayor, the unfairness is to the defendants sentenced to death by unanimous jury recommendations pre-*Hurst* who the Florida Supreme Court deems ineligible for a new penalty phase; not to Braddy who was sentenced to death, whose conviction and death sentence were affirmed on direct appeal, and who nevertheless has been granted a new penalty phase.

[1]The State argued during the hearing on this Motion that the Court is bound to follow the mandate of the Florida Supreme Court, which remanded Braddy' case "for a new penalty phase." Although well-taken, the point is moot because the Motion is denied on its substantive merits.

* * *

Criminal law—Pretrial release—Defendant who was not charged within 21 days of arrest was entitled to adversary preliminary hearing—State's filing of charges and amended charges after expiration of 21-day period does not vitiate defendant's entitlement to hearing—Where state failed to present evidence at adversary preliminary hearing, defendant is entitled to release on own recognizance

STATE OF FLORIDA, Plaintiff, v. JOSEPH STEWART, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F21-625, Division 09. March 30, 2021. Joseph Perkins, Judge. Counsel: Evelyn Lopez, for Plaintiff. David Harden, for Defendant.

ORDER GRANTING MOTION FOR IMMEDIATE RELEASE ON OWN RECOGNIZANCE

On February 12, 2021, thirty days after his arrest, the State charged Joseph Stewart with armed robbery with a deadly weapon. Four days later, Stewart requested an adversary preliminary hearing pursuant to Rule 3.133(b)(1) of the Florida Rules of Criminal Procedure, which the Court scheduled for March 16, 2021. On March 11, 2021, the State filed an amended information dropping the armed robbery charge and instead charging Stewart with strongarm robbery arising from the same factual incident. On March 16, 2021, the State failed to produce any witnesses or evidence to establish probable cause. A few hours later Stewart filed a Motion for Immediate Release on Own Recognizance, which the Court heard the next day. For the reasons below, the Motion is GRANTED.[1]

Rule 3.133(b)(1) and (5) provide:

> **(1) When Applicable.** A defendant who is not charged in an information or indictment within 21 days from the date of arrest or service of the capias on him or her shall have a right to an adversary preliminary hearing on any felony charge then pending against the defendant. The subsequent filing of an information or indictment shall not eliminate a defendant's entitlement to this proceeding.
>
> . . .
>
> **(5) Action on Hearing**. If from the evidence it appears to the judge that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the judge shall cause the defendant to be held to answer to the circuit court; otherwise, the judge shall release the defendant from custody unless an information or indictment has been filed, in which event the defendant shall be released on recognizance subject to the condition that he or she appear at all court proceedings or shall be released under a summons to appear before the appropriate court at a time certain. Such release does not, however, void further prosecution by information or indictment but does prohibit any restraint on liberty other than appearing for trial. A finding that probable cause does or does not exist shall be made in writing, signed by the judge, and, together with the evidence received in the cause, shall be filed with the clerk of the circuit court.

Id.

Stewart was entitled to an adversary preliminary hearing because the State did not charge him within 21 days of arrest. *See* Rule 3.133(b)(1). The State's subsequently charging Stewart and amending the charges does not vitiate this entitlement. *See id.*; *Beicke v. Boone*, 527 So. 2d 273, 275 (Fla. 1st DCA 1988) (holding that "any felony charge then pending against him" in Rule 3.133(b)(1) includes "all charges pending as a result of the criminal episode at the time of the hearing, not just those made at the time of the arrest"). Where, as here, the State does not present evidence at a duly demanded adversary preliminary hearing, a defendant is entitled to release on the defendant's own recognizance on charges resulting from the criminal episode for which the defendant was arrested. *Id.* at 275.[2]

The State cites *Kennedy v. Crawford*, 479 So. 2d 758 (Fla. 3d DCA 1985) for the proposition that Stewart's release is inappropriate because the Court has not affirmatively found no probable cause for the charges. Specifically, the State relies on language providing that Rule 3.133 contemplates release in only two situations, one of which being, as applicable here, "where Order Granting Motion for Immediate Release on Own Recognizance a ***finding of no probable cause*** is made in either a nonadversary or adversary hearing . . . ." *Id.* at 761 (emphasis added). The issue in *Kennedy*, however, related to the timeframe for holding an adversary preliminary hearing,[3] not whether an affirmative finding of no probable cause is a precondition to release under that Rule. Thus, the quoted language in *Kennedy* is *dicta*, and the language of Rule 3.133(b)(5) governs. When a defendant has duly demanded an adversary preliminary hearing, the plain meaning of the first sentence of Rule 3.133(b)(5) permits a court to hold a defendant to answer to the circuit court only if the judge affirmatively finds that probable cause exists to believe that an offense has been committed. *See id.* ("If from the evidence it appears to the judge that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the judge shall cause the defendant to be held to answer to the circuit court[.]"). Without such an affirmative showing, the Court is required to release the defendant. *See id.* ("[O]therwise, [if an information has been filed] . . . the defendant shall be released on recognizance subject to the condition that he or she appear at all court proceedings . . . .").

Here, the Court did not affirmatively find probable cause (because the State did not present evidence at the adversary preliminary hearing), and at the time of the hearing the State had already filed charges. Thus, Defendant is released on recognizance subject to the condition that he appear at all court proceedings.

[1]The Court granted the Motion in open court on March 17, 2021. This written order merely memorializes the order.

[2]The facts in *Beicke* are materially identical to the facts here. Although *Beicke* was decided 33 years ago, the parties did not present, and the Court's own research did not reveal, any other on point district court or Supreme Court opinion. As a result, *Beicke* is currently binding on all trial courts in Florida. *See Link v. State*, 273 So. 3d 1115, 1116 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1226b].

[3]The *habeas* petitioner argued that he was entitled to release under Rule 3.133(b) because the State failed to give him an adversary preliminary hearing within twenty-one days of arrest. The Third District rejected petitioner's argument and held that the State is only obligated to provide an adversary preliminary hearing within a reasonable time of demand for such hearing made after the State fails to file charges within twenty-one days of arrest. *Id*. at 761.

* * *

Insurance—Personal injury protection—Rescission of policy—Material misrepresentations—Policy provided no coverage for claims made by insured where insured failed to disclose accident that occurred while policy was lapsed for nonpayment of premium and provided insurer with bank account known to have insufficient funds for premium payments on multiple occasions, and insurer would not have reinstated lapsed policy if insured had disclosed information on accident and bank account—Insurer was also entitled to rescind policy and deny coverage for failure to disclose use of insured vehicle to provide ridesharing services through Uber and Lyft

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. DUNIET SANTANA HOYOS, et al., Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-017655-CA-01, Section CA24. April 6, 2021. Antonio Arzola, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Duniet Santana Hoyos, Pro se, Defendant.

ORDER ON PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AGAINST THE DEFENDANT, DUNIET SANTANA HOYOS, ONLY

THIS CAUSE having come before this Court via Zoom video conferencing at the hearing on March 17, 2021, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendant, DUNIET SANTANA HOYOS, ***only,*** and the Court having considered the same, it is hereupon,

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

Factual Background

Plaintiff, Direct General Insurance Company brought the instant Action for Insurance Fraud, Declaratory Judgment and Breach of Insurance Contract against the named insured Defendant, Duniet Santana Hoyos, and the Defendants, Luis Daniel Soberoni Companioni, Edgardo De J. Toledano, Alexander Concepcion Morejon, Lazaro Barrueta-Rosell and Raidel Aguado Conception, regarding the misleading information provided by Duniet Santana Hoyos to Direct General Insurance Company, regarding misrepresentations made by the insured of no losses during the time the policy for insurance lapsed from November 20, 2019 through December 2, 2019 for nonpayment until the policy for insurance was reinstated on December 2, 2019, as well as providing Plaintiff with a bank account known by Duniet Santana Hoyos to have insufficient funds for insurance payments on multiple occasions. Plaintiff denied coverage under the policy of insurance on the basis that Duniet Santana Hoyos misrepresented to the Carrier that no loss occurred during the lapsed policy period between November 20, 2019 through December 2, 2019.

Notwithstanding the Defendants, Duniet Santana Hoyos, Luis Daniel Soberoni Companioni, Edgardo De J. Toledano, Alexander Concepcion Morejon, Lazaro Barrueta-Rosell And Raidel Aguado Conception intentionally causing multiple motor vehicle accidents with one another during the time period of November 30, 2019 through February 18, 2020, an investigation of the facts and circumstances surrounding the alleged motor vehicle accidents also revealed that Duniet Santana Hoyos made material misrepresentations on the application for insurance, thereby breaching the contract for insurance. Specifically, on the application for insurance dated November 20, 2019, Defendant, Duniet Santana Hoyos failed to disclose that the insured vehicle was being utilized for the Lyft ridesharing program.

Mr. Duniet Santana Hoyos initially completed an application for a policy of automobile insurance from Direct General Insurance Company on November 20, 2019. Mr. Duniet Santana Hoyos failed to disclose that the insured vehicle was being used for business purposes when completing the application for insurance. Mr. Duniet Santana Hoyos answered "NO" to the following application question, which provides:

> Are any vehicles used for delivery, rideshare programs such as Uber and Lyft, the pickup of goods or any other commercial purpose (example's include, but are not limited to pizza, newspaper or mail delivery), or emergency response type vehicles or vehicles used for emergency response purposes?

Pursuant to the policy of insurance issued to Duniet Santana Hoyos, Direct General Insurance Company may void the insurance policy as follows:

MISREPRESENTATION AND FRAUD

A. This Policy was issued in reliance on the information provided on **your** written or verbal insurance application. **We** reserve the right, at **our** sole discretion, to void or rescind this Policy if **you** or a **relative**:

1. Made any false statements or representations to **us** with respect to any material fact or circumstance; or

2. Concealed, omitted or misrepresented any material fact or circumstance or engaged in any fraudulent conduct;

in any application for this insurance or when renewing this Policy. **We** will not be liable and will deny coverage for any **accident**, **loss** or claim occurring thereafter.

A fact or circumstance will be deemed material if **we** would not have:

1. Written this Policy;
2. Agreed to insure the risk assumed; or
3. Assumed the risk at the premium charged.

This includes, but is not limited to, failing to disclose in a verbal or written application all person residing in your household or regular operators of a covered auto.

Further, Florida Statute § 627.409(1) provides:

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

On the application for insurance dated November 20, 2019, Defendant, Duniet Santana Hoyos had a continuing duty to disclose **all accidents, violations, and nonchargeable incidents** to Plaintiff, Direct General Insurance Company. On the application for insurance

dated November 20, 2019, Defendant, Duniet Santana Hoyos signed the pertinent portion of the Applicant's Statement, which provides:

Fraud Warning:

Per Florida Statute 817.234(1)(b), any person who knowingly and with intent to injure defraud, or deceive any insurer files a statement of claim or an application containing false, incomplete, or misleading information is guilty of a felony of the third degree.

Pursuant to the "Duties After an Accident or Loss" section of the subject policy, it states as follows:

General Duties:

B. **We** must be notified promptly of how, when and where the **accident** or **loss** happened. Notice shall include at a minimum the following:

C. All known facts and circumstances, including, the time of occurrence, the location, the driving conditions as well as all known names, addresses and telephone numbers of any injured persons and witnesses;All known license plate information of vehicles involved or vehicle descriptions; andAll known driver's license information of persons involved.

In addition, pursuant to the policy of insurance issued to DUNIET SANTANA HOYOS, DIRECT GENERAL INSURANCE COMPANY may cancel the insurance policy as follows:

Cancellation

3. We may cancel this policy as follows:

b. If this is a new policy that has been in effect for at least 60 days or if this is a renewal or continuation policy:

i. We will cancel only for the following reasons:

(1) Nonpayment of premium; or

2. If your driver's license or that of:

a) Any driver who lives with you; or

b) Any regular operator;

Has been suspended or revoked. This must have occurred during:

1. The policy period; or

2. The 180 days immediately preceding the original effective date of the Policy; or

3. Material misrepresentation or fraud.

Plaintiff, Direct General Insurance Company, argued in their summary judgment that, had Duniet Santana Hoyos disclosed the accident of November 30, 2019 during the time the policy for insurance lapsed from November 20, 2019 through December 2, 2019 for nonpayment until the policy for insurance was reinstated on December 2, 2019, as well as providing Defendant with a bank account known by Plaintiff to have insufficient funds on multiple occasions, Plaintiff, Direct General Insurance Company would not have reinstated the policy for insurance.

Analysis Regarding Insurance Fraud as to Defendant, Duniet Santana Hoyos

The Court hereby finds that the Defendant, Duniet Santana Hoyos had a continuing duty to disclose **all accidents, violations, and nonchargeable incidents** to Plaintiff, Direct General Insurance Company. On the application for insurance dated November 20, 2019, Defendant, Duniet Santana Hoyos signed the pertinent portion of the Applicant's Statement, which provides:

Fraud Warning:

Per Florida Statute 817.234(1)(b), any person who knowingly and with intent to injure defraud, or deceive any insurer files a statement of claim or an application containing false, incomplete, or misleading information is guilty of a felony of the third degree.

The Defendant, Duniet Santana Hoyos provided misleading information to Direct General Insurance Company, regarding misrepresentations of no losses during the time the policy for insurance lapsed from November 20, 2019 through December 2, 2019 for nonpayment until the policy for insurance was reinstated on December 2, 2019, as well as providing Plaintiff with a bank account known by Duniet Santana Hoyos to have insufficient funds for insurance payments on multiple occasions. Plaintiff denied coverage under the policy of insurance on the basis that Duniet Santana Hoyos misrepresented to the Carrier that no loss occurred during the lapsed policy period between November 20, 2019 through December 2, 2019.

By failing to disclose the motor vehicle accident which occurred November 30, 2019 during the time the policy for insurance lapsed from November 20, 2019 through December 2, 2019 for nonpayment until the policy for insurance was reinstated on December 2, 2019, as well as providing Defendant with a bank account known by Plaintiff to have insufficient funds on multiple occasions, Defendant, Duniet Santana Hoyos, made material misrepresentations with the Plaintiff, Direct General Insurance Company, thereby breaching the contract for insurance.

The investigation of the facts and circumstances surrounding the alleged motor vehicle accident revealed that Defendant, Duniet Santana Hoyos collaborated in a scheme of staging multiple motor vehicle accidents involving the insured 2009 Nissan Titan (VIN: 1N6BA07D99N307579) and 2016 Toyota Corolla (VIN: 2T1BURHE3GC653083), and participated in a scheme to defraud the Plaintiff, Direct General Insurance Company, by omitting misleading and incomplete information on the statement of no loss, as well as providing a bank account with insufficient funds on multiple occasions, in order to stage multiple motor vehicle accidents and submit claims under the policy for insurance, bearing policy # XXXXXX2885, issued by Plaintiff, Direct General Insurance Company.

Furthermore, the investigation of the facts and circumstances surrounding the alleged motor vehicle accidents revealed that on January 8, 2020, Edgardo De J. Toledano was driving the insured 2016 Toyota Corolla (VIN: 2T1BURHE3GC653083) when the insured vehicle was involved in a motor vehicle accident. Meanwhile, Edgardo De J. Toledano was also the opposing vehicle driver of the motor vehicle accident that took place on December 5, 2019.

Pursuant to Florida Statute § 817.234(1)(a)(1):

False and fraudulent insurance claims

A person commits insurance fraud punishable as provided in subsection (11) if that person, with the intent to injure, defraud, or deceive any insurer:

1. Presents or causes to be presented any written or oral statement as part of, or in support of, a claim for payment or other benefit pursuant to an insurance policy or a health maintenance organization subscriber or provider contract, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim.

Here, had Duniet Santana Hoyos disclosed the accident of November 30, 2019 during the time the policy for insurance lapsed from November 20, 2019 through December 2, 2019 for nonpayment until the policy for insurance was reinstated on December 2, 2019, as well as providing Defendant with a bank account known by Plaintiff to have insufficient funds on multiple occasions, Plaintiff, Direct General Insurance Company would not have reinstated the policy for insurance.

Therefore, the coverage denial was proper for any and all claims arising from any motor vehicle accident in relation to the subject insurance policy due to insurance policy being rescinded and/or cancelled pursuant to the insured's multiple misrepresentations. As a result of the Defendant, Duniet Santana Hoyos submitting mutiple claims for staged motor vehicle accidents, there is no insurance

coverage for any claims arising from any motor vehicle accidents involving the insurance policy bearing policy number XXXXXX2885.

Analysis Regarding Whether the Undisclosed Business or Commercial Use (Uber/Lyft) was Material to the Risk

The Court ruled that the question of materiality is considered from the perspective of the insurer. The Court found that "[a] material misrepresentation in an application for insurance, whether or not made with knowledge of its correctness or untruth, will nullify *any policy* issued and is an absolute defense to enforcement of the policy." *United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (3rd DCA 2009) [34 Fla. L. Weekly D1578a]. The Court ruled that the failure to disclose the business or commercial use of the insured vehicle (Uber/Lyft) that would have resulted in a denial of the application due to the unacceptable risk is sufficient to support a rescission. *See Privilege Underwriters Reciprocal Exch. v. Clark,* 174 So. 3d 1028, 1031 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1810a]. Additionally, the Court found that as Defendant, Duniet Santana Hoyos failed to provide testimony to contradict Plaintiff's claim that the disclosure would have caused Plaintiff to not accept the risk nor issue the policy, then Plaintiff was entitled to rescind. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen*, 999 F.2d 1532 (1993).

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

Analysis Regarding the Carrier's Application for Insurance being Clear and Unambiguous

Florida case law dictates that a party who signs a contract is bound by the contents of that contract whether he/she read its contents or not, unless that party can prove some form of coercion, duress, fraud in the inducement. See *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Benton,* 467 So.2d 311, 312 (Fla. 5th DCA 1985) ("As a matter of law a party who voluntarily executes a document knowing it is intended to establish contractual relationships between the parties but without reading it is bound by its terms in the absence of coercion, duress, fraud in the inducement or some other independent ground justifying rescission."). *See also New York Life Ins. Co. v. Tedder*, 113 Fla. 649, 153 So. 145 (Fla. 1933) ("The rule is too well settled to admit of controversy that one who affixes his signature to a written instrument will be prima facie presumed, in the absence of proof of fraud, to have intended thereby to authenticate and become bound by the contents of the instrument so signed.").

An applicant's failure to read an application for insurance prior to signing does not prevent an insurer from rescinding the policy on the basis of nondisclosure of material information. *See Nationwide Mut. Fire. Ins. Co. v. Kramer,* 725 So.2d 1141, 1143 (Fla.2d DCA 1998) [23 Fla. L. Weekly D2326a]. Florida Courts have consistently held that a party's failure to read a contract does not invalidate the contract. See *Allied Van Lines, Inc. v. Bratton,* 351 So. 2d 344, 347 (Fla. 1977) ("No party to a written contract in this State can defend against its enforcement on the sole ground that he signed it without reading it.").

The Court hereby finds that the Plaintiff's application for insurance is clear and unambiguous regarding the applicant's obligation to disclose pertinent information at the time of the policy inception on the application. The Court hereby finds that the Plaintiff's application for insurance clearly and unambiguously required the applicant (Duniet Santana Hoyos) to disclose the business use of the insured vehicle(s) at the time of the policy inception. In addition to providing a "NO" response to application question #8, the applicant (Duniet Santana Hoyos) initialed the Applicant's Statement and signed the application for insurance, which provided the following acknowledgment:

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

The Carrier, Direct General Insurance Company has a right to rely on the information provided by Duniet Santana Hoyos on the application for insurance. In addition, Direct General Insurance Company has a right to rely on the information provided by Duniet Santana Hoyos on the statement of no loss during the time that the policy had lapsed due to non-payment of premiums/returned bank item. Since the Carrier relied on the representations by Duniet Santana Hoyos on the application and/or the statement of no loss to its detriment, the Carrier is entitled to rescind the policy due to the material misrepresentation. The Court hereby finds that since the terms of the Carrier's application are clear and unambiguous, it is irrelevant whether Duniet Santana Hoyos subsequently claimed that the "agent did not ask" the questions on the application since Duniet Santana Hoyos signed the application which is a legal contract and thus, Duniet Santana Hoyos is bound by the terms and conditions of the contract. Further, the Defendant, Duniet Santana Hoyos, did not establish any proof of coercion, duress, and/or fraud in the inducement during the application process.

In addition, since Duniet Santana Hoyos signed the application and acknowledged the above terms, he cannot later claim that he did not understand the application or that the agent did not ask him and/or explain to him the questions on the application.

Analysis Regarding the Florida Statute Governing Policy Rescissions

The Court hereby finds that the subject insurance policy was rescinded void *ab initio* pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy issued by Direct General Insurance Company. Accordingly, the Court hereby finds that the PIP statute (Florida Statute § 627.736) does not govern policy rescissions nor the amount of time to rescind an insurance policy. Specifically, F.S. § 627.736(4)(i) does not apply to policy rescissions based on a material misrepresentation at the inception of the contract. The provisions of F.S. § 627.736(4)(i) pertain solely to investigating a "fraudulent insurance act," not a material misrepresentation on an application for insurance.

Conclusion

This Court finds that the Defendant, Duniet Santana Hoyos participated in a scheme to defraud the Plaintiff, Direct General Insurance Company, by omitting misleading and incomplete information on the reinstatement application for insurance and during his statement of no loss, as well as a providing a bank account with insufficient funds in order to stage multiple motor vehicle accidents and submit claims under the policy for insurance, bearing policy # XXXXXX2885, issued by Plaintiff, Direct General Insurance Company.

In addition, this Court finds that the Plaintiff, Direct General Insurance Company's application for insurance unambiguously required Defendant, Duniet Santana Hoyos, to disclose that the insured vehicle was being used for business purposes when completing the application for insurance, that Plaintiff provided the required

testimony to establish said that Defendant, Duniet Santana Hoyos' failure to disclose the business use of the insured vehicle was a material misrepresentation because Plaintiff would not have accepted the risk nor issued the policy, and thus Plaintiff properly rescinded the subject policy of insurance. Consequently, Plaintiff properly denied coverage for all motor vehicle accidents at issue.

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

a. The hearing was held via Zoom video conferencing on March 17, 2021. The Defendant, DUNIET SANTANA HOYOS was provided proper notice of the hearing and failed to appear at the hearing. Alexander L. Avarello, Esq. appeared at the hearing as counsel for the Plaintiff. The Defendant, DUNIET SANTANA HOYOS was defaulted by the Clerk for failing to respond to the Complaint. In addition, the Defendant, DUNIET SANTANA HOYOS failed to file any response and/or opposition to the Motion for Final Summary Judgment.

b. Therefore, the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against DUNIET SANTANA HOYOS is hereby **GRANTED**.

c. This Court ***hereby enters final judgment*** for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendant, DUNIET SANTANA HOYOS, only.

d. This Court hereby reserves jurisdiction to consider any claim for costs and attorneys' fees as to Defendant, DUNIET SANTANA HOYOS, only.

e. This Court finds that the facts alleged by the Plaintiff, DIRECT GENERAL INSURANCE COMPANY, in its Complaint for Declaratory Judgment and in the Affidavit of Jorge Padilla, are not in dispute, which are as follows:

f. The Court hereby finds that the Defendant, Duniet Santana Hoyos, participated in a scheme to defraud the Plaintiff, DIRECT GENERAL INSURANCE COMPANY, by omitting misleading and incomplete information on the reinstatement application for insurance and during his statement of no loss, as well as a providing a bank account with insufficient funds in order to stage multiple motor vehicle accidents and submit claims under the policy for insurance, bearing policy # XXXXXX2885, issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY;

g. Pursuant to the insurance policy, DIRECT GENERAL INSURANCE COMPANY may void or cancel the policy based on fraud or material misrepresentation. Specifically, when a person making a claim under this policy has concealed or misrepresented any material fact or circumstance, or engaged in fraudulent conduct, the Plaintiff, DIRECT GENERAL INSURANCE COMPANY, may void or cancel this policy and/or deny coverage for an accident or loss;

h. The Defendant, DUNIET SANTANA HOYOS participated in a scheme to defraud the Plaintiff, DIRECT GENERAL INSURANCE COMPANY, by omitting misleading and incomplete information on the reinstatement application for insurance as well as a providing a bank account with insufficient funds in order to stage multiple motor vehicle accidents and submit claims under the policy for insurance, bearing policy # XXXXXX2885, issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY;

i. The Defendant, DUNIET SANTANA HOYOS failed to disclose and failed to report any business use or commercial use of the insured vehicle on the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # XXXXXX2885, issued by DIRECT GENERAL INSURANCE COMPANY;

j. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY provided Defendant, DUNIET SANTANA HOYOS on November 27, 2019 with a Notice of Rescission regarding the rescission that took effect at inception on November 20, 2019 due to installment non-payment;

k. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, relied on the Defendant, DUNIET SANTANA HOYOS' representations on the Reinstatement Notice on December 2, 2019. Based on this reliance, Plaintiff, DIRECT GENERAL INSURANCE COMPANY reinstated the subject insurance policy due to the Defendant, DUNIET SANTANA HOYOS representing that he was not involved in any accidents during the lapsed period of November 20, 2019 through December 2, 2019;

l. During the lapse of insurance coverage, the Defendant, DUNIET SANTANA HOYOS, was involved in a motor vehicle accident that occurred in Miami-Dade County on November 30, 2019;

m. The Defendant, DUNIET SANTANA HOYOS, had a continuing duty to notify Plaintiff, DIRECT GENERAL INSURANCE COMPANY, of all accidents, violations, and nonchargeable incidents under the policy for insurance, bearing policy # XXXXXX2885, issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY;

n. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY provided Defendant, DUNIET SANTANA HOYOS on December 2, 2019 with a Notice of Reinstatement regarding the rescission that took effect at inception on November 20, 2019 due to installment non-payment effective on December 2, 2019;

o. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY provided Defendant, DUNIET SANTANA HOYOS on December 26, 2019 with a Notice of Cancellation due to insufficient funds effective on January 6, 2020;

p. Due to the Defendant, DUNIET SANTANA HOYOS' failure to comply with the post-loss duties under the subject insurance policy issued by DIRECT GENERAL INSURANCE COMPANY, there are no insurance coverages available to the Defendant, DUNIET SANTANA HOYOS for the motor vehicle accidents which occurred before, during and/or after the policy term;

q. There is no insurance coverage for the motor vehicle accidents which occurred during and/or after the policy term since the insured, DUNIET SANTANA HOYOS, made material misrepresentations and misrepresented facts in the procurement of the insurance coverage as set forth therein;

r. There is no personal injury protection ("PIP") insurance coverage benefits available to the Defendant, DUNIET SANTANA HOYOS, nor available to any medical provider, doctor and/or medical entity who accepted an assignment of benefits, under the policy of insurance, bearing policy # XXXXXX2885, issued by DIRECT GENERAL INSURANCE COMPANY for the motor vehicle accidents which occurred during and/or after the policy term;

s. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, may deny benefits under the subject insurance policy for DUNIET SANTANA HOYOS or any assignee of DUNIET SANTANA HOYOS for the motor vehicle accidents which occurred during and/or after the policy term;

t. There is no insurance coverage under the policy of insurance, policy # XXXXXX2885, issued by DIRECT GENERAL INSURANCE COMPANY for the motor vehicle accident which occurred on November 30, 2019;

u. There is no insurance coverage under the policy of insurance, policy # XXXXXX2885, issued by DIRECT GENERAL INSURANCE COMPANY for the motor vehicle accident which occurred on December 5, 2019;

v. There is no insurance coverage under the policy of insurance, policy # XXXXXX2885, issued by DIRECT GENERAL INSURANCE COMPANY for the motor vehicle accident which occurred on December 8, 2019;

w. There is no insurance coverage under the policy of insurance,

policy # XXXXXX2885, issued by DIRECT GENERAL INSURANCE COMPANY for the motor vehicle accidents which occurred on January 8, 2020;

x. There is no insurance coverage under the policy of insurance, policy # XXXXXX2885, issued by DIRECT GENERAL INSURANCE COMPANY for the motor vehicle accident which occurred on January 30, 2020;

y. There is no insurance coverage under the policy of insurance, policy # XXXXXX2885, issued by DIRECT GENERAL INSURANCE COMPANY for the motor vehicle accident which occurred on January 31, 2020;

z. There is no insurance coverage under the policy of insurance, policy # XXXXXX2885, issued by DIRECT GENERAL INSURANCE COMPANY for the motor vehicle accident which occurred on February 9, 2020;

aa. There is no insurance coverage under the policy of insurance, policy # XXXXXX2885, issued by DIRECT GENERAL INSURANCE COMPANY for the motor vehicle accident which occurred on February 10, 2020;

ab. There is no insurance coverage under the policy of insurance, policy # XXXXXX2885, issued by DIRECT GENERAL INSURANCE COMPANY for the motor vehicle accidents which occurred on February 18, 2020;

ac. There is no insurance coverage under the policy of insurance, policy # XXXXXX2885, issued by DIRECT GENERAL INSURANCE COMPANY for any motor vehicle accident(s);

ad. The Defendant, DUNIET SANTANA HOYOS breached the insurance policy contract and application for insurance, under the policy of insurance, bearing policy # XXXXXX2885, issued by DIRECT GENERAL INSURANCE COMPANY;

ae. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # XXXXXX2885, is rescinded and is void ab initio. The subject insurance policy was rescinded void *ab initio* pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy issued by DIRECT GENERAL INSURANCE COMPANY;

af. There is no insurance coverage for the named insured, DUNIET SANTANA HOYOS for any bodily injury liability coverage, property damage liability coverage, or personal injury protection coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2885, for any motor vehicle accident;

ag. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify DUNIET SANTANA HOYOS for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2885, for any motor vehicle accident;

ah. There is no personal injury protection ("PIP") insurance coverage for DUNIET SANTANA HOYOS arising from any motor vehicle accidents, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2885;

ai. The Defendant, DUNIET SANTANA HOYOS, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2885;

aj. There is no insurance coverage for any motor vehicle accidents under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2885;

ak. There is no personal injury protection coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2885, for any motor vehicle accident;

al. There is no bodily injury liability insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2885, for any motor vehicle accident;

am. There is no property damage liability insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2885, for any motor vehicle accident;

an. Therefore, DIRECT GENERAL INSURANCE COMPANY is entitled to recover against DUNIET SANTANA HOYOS for the recovery any and all personal injury protection (PIP) benefits previously paid under the policy of insurance, bearing policy number XXXXXX2885, for claims and injuries arising from the alleged accidents, under the policy of insurance, bearing policy number XXXXXX2885, plus costs, interest, and attorneys' fees.

* * *

Insurance—Commercial property—Declaratory judgments—Action against second excess insurer seeking determination of application of layered commercial liability policies to loss in hotel bookings due to COVID-19 pandemic—Motion for summary judgment seeking judicial interpretation of written insurance policies is not required to be accompanied by separate statement of undisputed material facts—Insured was not required to authenticate policies where insurer admitted that policies attached to complaint appear to be genuine and are best evidence of their terms—Collective liability of primary and two excess insurers is not restricted by primary insurer's policy-specific sub-limit for "cancellation of bookings" coverage—Language on participation page of shared property policy form stating that collective liability of insurers shall not exceed any appropriate sub-limit of liability does not limit liability of second excess insurer where no appropriate sub-limit for cancellation of bookings coverage is set or incorporated by reference in that policy—Complete exhaustion of underlying limits of primary and first excess policy is not required for second excess policy's coverage to be triggered where that policy only requires that aggregate limit for particular peril be reduced or exhausted—Where aggregate limits of primary and first excess insurer's coverages for cancellation of booking were reduced by appropriately disclosed sub-limits, and both sub-limit amounts were exhausted by payment of those amounts, second excess insurer became primary carrier for cancellation of bookings coverage up to its policy limit—Priority of payments provision does not prevent first excess insurer's payment of coverage sub-limit under settlement from counting toward exhaustion of first excess layer—Policy provision providing coverage for cancellation of bookings due to contagious or infectious disease does not require that losses be tied to specific cases of disease occurring at insured hotel—Exclusion for "fungus, wet rot, dry rot, virus and bacteria" does not preclude claim related to COVID-19 pandemic where policy unambiguously provides coverage for cancellation of bookings resulting from "contagious and/or infectious disease"

MDM BRICKELL HOTEL GROUP, LTD., et al., Plaintiff, v. HOMELAND INSURANCE COMPANY OF NEW YORK, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-021418-CA-01. April 1, 2021. Michael A. Hanzman, Judge. Counsel: Eugene E. Stearns, Matthew Wyatt Buttrick, and Veronica L. de Zayas, for Plaintiffs. Christine M. Rellena, Stefany D. Esfandiary, Dan Millea, and Elizabeth Kniffen, for Defendant.

ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO INSURANCE POLICY INTERPRETATION

I. INTRODUCTION

Before the Court is "Plaintiffs' Motion for Partial Summary Judgment as to Insurance Policy Interpretation" ("Motion") (Docket

Entry 18). The Motion asks the Court to adjudicate five disputes over the "interpretation" of three layered commercial liability insurance policies. Specifically, Plaintiffs urge the Court to conclude, as a pure matter of law, that:

(a) the "collective liability" of the insurers that issued the policies is not capped by the "Cancellation of Bookings" coverage sub-limit ($1 million) contained in the primary insurer's policy;

(b) there is no requirement that all underlying limits be completely exhausted in order for Defendant's excess policy to be triggered;

(c) the "Priority of Payment" provision does not require that a primary/underlying carrier "concede" coverage in order for any payment made by the insurer to count as "exhausting" its policy;

(d) coverage for "Cancellation of Bookings" caused by "contagious and/or infectious disease" is not dependent upon the disease being present "at an insured location"; and

(e) Defendant's coverage for "Cancellation of Bookings" is not subject to its policy's "Fungus, Wet Rot, Dry Rot, Virus and Bacteria Exclusion."

Mot. pp. 13-18. The Motion was fully briefed, and the Court entertained oral argument on February 16, 2021. The matter is now ripe for disposition and, for the reasons discussed herein, the Court grants the Motion in its entirety.

II. RELEVANT FACTS

Plaintiffs, MDM Brickell Hotel Group Ltd., MDM Hotel Group, Ltd., and DC Hotels, Ltd. (collectively "MDM" or "Plaintiffs"), own and operate three hotels in the greater Miami area—the JW Marriott Miami, the Marriott Miami Dadeland, and the Courtyard Miami Dadeland. In 2019 MDM purchased a layered suite of primary and excess property insurance based on a shared policy form, a copy of which is attached to Plaintiffs' Motion and to the Complaint ("Policy Form" or "Property Policy Form"). That shared policy form provides both traditional and non-traditional coverages, including coverage for losses resulting from "the cancellation of, and/or inability to accept bookings or reservations for accommodation, and/or interference with the business at any insured location" due to "contagious and/or infectious disease." Policy Form at Endorsement No. 3. This case involves claims made by MDM under the excess policy issued by Defendant Homeland Insurance Company of New York ("Defendant" or "Homeland") for loss allegedly sustained as a result of the COVID-19 pandemic; in particular, loss caused by the cancellation of, or inability to accept, bookings/reservations.

A. The Plaintiffs' Insurance Coverage

Plaintiffs are Named Insureds under a layered program of property insurance consisting of six (6) contracts, three (3) which are relevant to this case. Each policy was issued in early 2019 for a one-year term commencing May 1, 2019. *See* Compl. ¶ 11; Answer ¶ 11. The "primary" layer of coverage was issued by Westchester Surplus Lines Insurance Company ("Westchester"). That policy, identified as Westchester Policy No. D37419345006, has an overall limit of $5 million per occurrence, subject to various terms and conditions (the "Westchester Primary Policy"). *See* Compl. ¶ 15 & Ex. A; Answer ¶¶ 15, 18. The first excess layer of insurance was issued by Great Lakes Insurance SE ("Great Lakes"). That policy, identified as Great Lakes Policy No. GLSE180078, provides an additional $5 million of coverage per occurrence, again subject to various terms and conditions (the "Great Lakes Excess Policy"). *See* Compl. ¶ 16 & Ex. B; Answer ¶¶ 16, 18. The second excess layer of insurance was issued by Defendants Homeland. That policy, identified as Homeland Excess Policy No. 795-00-97-20-0000, provides an additional $90 million of coverage per occurrence, again subject to certain terms and conditions (the "Homeland Excess Policy"). *See* Compl. ¶ 17 & Ex. C; Answer ¶¶ 17-18. Each of these three policies has its own set of declarations and other forms, but they share the same "Property Policy Form." *See* Compl. ¶ 19 & Exs. A-C; Answer ¶ 19.

1. The Shared Property Policy Form

The shared Property Policy Form begins with a "Participation Page" that actually spans two pages. It states at the outset that:

> In consideration of the premium charged, the subscribers hereto, hereinafter referred to as the Insurer(s) and/or Company(ies), do severally, but not jointly, agree to indemnify the Insured for the amount recoverable in accordance with the terms and conditions of the Policy.
>
> Provided that:
>
> 1. The collective liability of Insurers shall not exceed the Limit of Liability or any ***appropriate*** Sub-limit of Liability or any Annual Aggregate limit.
>
> 2. The liability of each of the Insurers shall not exceed the Participation Limit set against its name.

Property Policy Form p. 1 (emphasis added). The Property Policy Form does not define, or elaborate upon, what is to be considered an "***appropriate***" Sub-limit of Liability. Rather, it merely informs the reader (*i.e.,* the insured) that the "collective liability" of all carriers "shall not exceed" whatever "***appropriate***" Sub-limit of Liability ***might*** be applicable, leaving to the insured the task of figuring out what sub-limits ***might*** cap coverage.

The Participation Page then goes on to identify the "Named Insured" as the Plaintiffs and other related entities, and the "Lines Bound" as:

Insurers	Policy No.	Participation
Westchester Surplus Lines Insurance Company	D37419345006	$5,000,000 part of Primary $5,000,000
Great Lakes Insurance Company SE	GLSE180078	$5,000,000 part of $5,000,000 excess of $5,000,000
Homeland Insurance Company of New York	795 00 9720	$90,000,000 part of $90,000,000 excess of $10,000,000 excluding Named Storm
Endurance American Specialty Insurance Company	ESP30000324102	$10,000,000 part of $10,000,000 excess of $10,000,000 for Named Storm Only for the JW Marriott—1109 Brickell Avenue, Miami, FL
Colony Insurance Company	XP180225-1	$8,000,000 part of $16,000,000 excess of $20,000,000 for Named Storm Only for the JW Marriott—1109 Brickell Avenue, Miami, FL
Arch Specialty Insurance Company	ESP1000402-00	$8,000,000 part of $16,000,000 excess of $20,000,000 for Named Storm Only for the JW Marriott—1109 Brickell Avenue, Miami, FL

Id. An insured reviewing this schedule would thus assume (justifiably) that the Homeland policy provided $90 million of coverage over and above the $5 million primary policy, and the first layer of excess, subject to any limitations (*i.e.,* exclusions, "sub-limits," etc.) located

(*and conspicuously disclosed*) elsewhere in the polic(ies).

The Participation Page also includes a provision titled "Aggregate Exhaustion," which provides that:

> In the event of the reduction of the aggregate Limits of Liability of the Primary and Underlying Excess Insurances (as applicable) this Policy shall pay excess over the reduced aggregate limit. In the event of exhaustion of the aggregate Limits of Liability of the Primary and Underlying Excess Insurances (as applicable) this Policy, subject to all its provisions, shall continue in force as Primary Insurance in respect of the peril for which the aggregate Limit of Liability has been so exhausted and the deductible or self-insured amount applicable to that peril, shall apply to this Policy.

Id. at 1-2. This type of provision is often referred to as a "drop-down" clause, as it requires an excess carrier to act as primary insurance under specified circumstances. The provision dictates that once an aggregate limit in an underlying layer is "reduc[ed]," the next layer is obligated to "pay excess over the reduced aggregate limit"; and once an aggregate limit in an underlying layer has been "exhaust[ed]," the next layer drops down and becomes "Primary Insurance" with respect to the peril for which the limit has been exhausted. *Id.* The policy does not, however, restrict the way in which any "aggregate limit" in an underlying policy must be "reduced" or "exhausted" in order for this "drop-down" clause to be triggered. All that is required is that the "aggregate limit" in an underlying policy be "reduced" or "exhausted"—period.

The standard policy Participation Page also contains a "Priority of Payment" clause which provides:

> **Priority of Payment**
>
> It is hereby understood and agreed that notwithstanding anything contained herein to the contrary that in the event of a claim hereunder which involves more than one interest and/or coverage and/or peril; it shall be at the sole option of the Insured to apportion recovery under this Policy when submitting final proof of loss, subject to the overall amount of claim not exceeding the overall limit of liability contained herein for any one loss.
>
> For the purpose of attachment of coverage for excess layers, it is further agreed that loss involving any interest and/or peril covered in primary or underlying excess layers, but not covered in higher excess layers, shall be recognized by such excess layers as eroding or exhausting the occurrence limits of the primary and/or underlying excess layer(s). Nothing herein, however, shall be deemed coverage in such layer(s) to include loss from any interest and/or peril not covered in the excess layer(s) itself.
>
> Nothing herein contained shall be held to vary, alter, waive or change any of the terms, limits or conditions of the policy except as herein above set forth.

Id. at 1-2. This provision affords the Insured the "option" to apportion recovery among interests, perils, and coverages as it sees fit, and it also serves to ensure that payments for matters covered in underlying layers count towards exhaustion even if "not covered in higher excess layers." *Id.*

The next relevant part of the shared Property Policy Form consists of a series of numbered sections, including one titled "Coverage." That section first provides traditional Direct Damage coverage for real and personal property, as well as traditional Time Element coverages such as "Business Interruption," reciting that:

> Except as hereinafter excluded, this policy covers:
>
> A. **Real and Personal Property**
>
> (1) The interest of the Insured in all real and personal property including but not limited to property owned, used, leased or intended for use by the Insured . . . .
>
> B. **Business Interruption**
>
> (1) Loss resulting from necessary interruption of business conducted by the Insured, whether total or partial, and caused by loss, damage, or destruction covered herein during the term of this policy to real and personal property [insured hereunder]
>
> . . . .

Id. at 7-8 (§§ 8(A)(1), (B)(1)). The shared Property Policy Form then incorporates a series of numbered endorsements which provide less traditional coverages, as well as other terms and conditions. Endorsement No. 3, for instance, is titled "Hotel Enhancement Endorsement," and provides four types of additional coverages, as follows:

> 1) **Contaminated Water**
>
> The Policy is extended to cover the Time Element loss as a result of the Insured's inability to normally operate an insured location due to contamination of the water supply to such insured location, provided such contamination is caused by loss or damage to the public water system by a cause of loss not otherwise excluded.
>
> 2) **Consequential Loss**
>
> a) When a master key or grand master key is lost, damaged or destroyed from a cause of loss not otherwise excluded under this Policy, this Policy shall be liable for:
>
> i) actual cost to replace keys;
>
> ii) "re-keying of" to accept new keys; or
>
> iii) when needed, new locks including cost of installation of the new locks.
>
> b) When a key to a lock is lost, damaged or destroyed from a cause of loss not otherwise excluded under this Policy, this Policy shall be liable for the cost to replace entry keys or key cards and to adjust locks to accept new entry keys or key cards.
>
> 3) **Extra Expense - Goodwill**
>
> The recoverable Extra Expense loss shall also include the reasonable and necessary extra costs incurred by the Insured of the following during the Period of Recovery:
>
> Extra costs incurred to relocate guests to a comparable facility including the reasonable additional cost for increased room rates. Such extra costs shall also include the necessary expense to return such guests following resumption of operations.
>
> 4) **Cancellation of Bookings**
>
> Notwithstanding that Time Element loss covered under this Policy must be caused by or result from a peril not otherwise excluded, this Policy is extended to cover the Time Element loss sustained by the insured resulting from:
>
> a) the cancellation of, and/or inability to accept bookings or reservations for accommodation, and/or interference with the business at any insured location; and/or
>
> b) the cancellation of, and/or inability to accept bookings or reservations, and/or interference with the business at any restaurant, spa, golf course, health club or other facility of the Insured at any insured location;
>
> all as a direct result of:
>
> (i) the occurrence of murder, suicide, contagious and/or infectious disease, food or drink poisoning, vermin, pests or defective sanitation;
>
> (ii) (a) the outbreak of riot or civil commotion[,]
>
> (b) The occurrence of fire, or explosion, or windstorm, or flood, or earthquake within the radius of 25 miles of an insured location to the extent such Time Element loss is not otherwise covered under this Policy such as under the Civil or Military Authority or Ingress/Egress Extensions;
>
> (iii) injury or illness sustained by any person arising from or traceable to foreign or injurious matter in food and drink provided on the premises of the Insured or the threat thereof[;]
>
> (iv) closing the whole or part of the premises of the Insured by order of a Public Authority consequent upon the existence or threat of hazardous conditions either actual or suspected at an insured location to the extent such closure is not otherwise covered elsewhere under this Policy such as under the Civil or Military Extension;

(v) the pollution by oil, chemical or other substance of any beach, waterway or river within a radius of 25 miles of the insured location[;]

(vi) loss of satellite transmission signals and internet connections[;]

(vii) a Mandatory Evacuation at an insured location. . . .

Id. at Endorsement No. 3, ¶¶ 1-4.

The fourth of those additional coverages, "Cancellation of Bookings," has several distinctive features. Unlike the traditional Time Element coverage for "Business Interruption," the coverage provided for "Cancellation of Bookings" does not require "loss, damage, or destruction" to insured property for coverage to be triggered. It also expressly applies "[n]otwithstanding" any "exclu[sions]," and it *explicitly* encompasses losses resulting from "contagious and/or infectious disease." *Id.*

The shared Property Policy Form also contains "Program Limits of Liability." That section discloses that each participating Insurer "shall not be liable for more than its proportion of $100,000,000 per occurrence, except" for certain coverages which are subject to sub-limits, as follows:

A. With respect to the perils of Flood and Earthquake, this Company shall not be liable, per occurrence and in any one policy year, for more than its proportion of $10,000,000, which shall apply separately to each peril as referred to in Section 14.

B. With respect to the peril of Named Storm, this Company shall not be liable, per occurrence, for more than its proportion of $10,000,000, except $36,000,000 for the JW Marriott - 1109 Brickell Avenue, Miami, FL.

C. $500,000 per occurrence as respects Accounts Receivable

D. $10,000,000 per accident as defined in Section 15 for Boiler &Machinery, except as follows:

1) $250,000 Expediting Expenses

2) $250,000 Hazardous Substances

3) $250,000 Data Restoration

4) $250,000 Contingent Time Element

5) $250,000 Demolition and Increased Cost of Construction

6) $250,000 Newly Acquired Locations

7) $250,000 Service Interruption

8) $250,000 Spoilage

E. $2,000,000 per occurrence as respects Contingent Time Element(First Tier suppliers and customers only)

F. $100,000 per occurrence as respects Defense Costs

G. $10,000,000 per occurrence as respects Demolition and Increased Cost of Construction, except: Included as respects 1109 Brickell Avenue, Miami, FL 33131

H. $500,000 per occurrence as respects Electronic Data Processing Equipment

I. $100,000 per occurrence as respects Electronic Data Processing Media

J. $100,000 per occurrence as respects Electronic Data Processing in Transit

K. $1,000,000 per occurrence as respects Errors and Omissions

L. $250,000 per occurrence as respects Expediting Expense

M. $500,000 per occurrence as respects Fine Arts

N. $100,000 per occurrence as respects Fire Brigade and Extinguishing Expenses

O. $500,000 per occurrence as respects Installation of Property

P. $2,000,000 per occurrence as respects Leasehold Interest

Q. $250,000 per occurrence as respects Loss Adjustment Expenses

R. $1,000,000 per occurrence as respects Miscellaneous Unnamed Locations

S. $250,000 per occurrence and annual aggregate as respects Mold resulting from a covered cause of loss

T. $2,500,000 per occurrence as respects Newly Acquired Property for a period of 90 days, then covered under Miscellaneous Unnamed Locations

U. $200,000 per occurrence as respects Outdoor Property, Signs and Fences

V. $10,000 per occurrence as respects Personal Effects not to exceed $2,000 per person

W. $500,000 per occurrence for Personal Property of Others

X. $50,000 per occurrence and annual aggregate as respects Pollutant Clean up and Removal

Y. $100,000 per occurrence as respects Protection of Property

Z. $25,000 per occurrence as respects Research and Development

AA. $50,000 per occurrence as respects Royalties

BB. $1,000,000 per occurrence as respects Off-Premises Service Interruption—Property Damage & Time Element combined

CC. $100,000 per occurrence as respects Soft Costs

DD. $25,000 per occurrence as respects Sue & Labor

EE. $500,000 per occurrence as respects Property in Transit

FF. $100,000 per occurrence as respects trees, shrubs, lawns and plants not to exceed $25,000 per individual tree, plant or shrub

GG. $500,000 per occurrence as respects Valuable Papers and Records

HH. $100,000 per occurrence as respects Locks & Keys

II. $250,000 per occurrence as respects Hotel Guest & Tenant Relocation Expense

Id. at 3-5 (§ 3).

The last two sub-provisions in this list—"HH" and "II"—pertain to coverages in the Hotel Enhancement Endorsement; specifically, the coverage for "Consequential Loss" relating to the need to replace locks and keys, and the coverage for "Extra Expense - Goodwill" associated with hotel guest relocations. Absent from this list, however, is ***any*** reference to the Hotel Enhancement Endorsement coverage for "Cancellation of Bookings." in other words, although the shared Property Policy Form includes sub-limits for two of the Hotel Enhancement Endorsement coverages, it does ***not*** contain ***any*** sub-limit pertaining to the coverage for "Cancellation of Bookings."

Finally, the shared Property Policy Form contains an endorsement titled "Policy Language Applicable to the Individual Company(ies) Noted." That endorsement states, in pertinent part, that:

> In addition to each Company(ies)'s Declaration's Page (excluding any pre-printed terms and conditions), Price, Renewal Date, Premium Credits, Premium Payment Conditions, State Statue Amendatory Endorsements and Producer Compensation Notices / Disclosures, if applicable; *the following Company(ies)'s endorsements, forms, exclusions, etc. . . are added and apply only towards the individual Company(ies) to which such is noted.* No other Company(ies) may claim such wording as their own, whether more or less restrictive, in the event of loss to apply against all recovery. . . .

Id. at Endorsement No. 4 (emphasis added). Following this statement, on the same page, begins a list of "endorsements, forms, exclusions, etc." included within each participating Insurer's policy. On this list, under the heading "Westchester Surplus Lines Insurance Company," is "MS 208386 (8/17) General Amendatory Endorsement," which is the endorsement wherein a sub-limit of $1,000,000 is added for "Cancellation of Bookings" coverage ***provided by Westchester***. That endorsement reads:

> As respects to Westchester Surplus Lines Insurance Company's participation, the following changes are made to MDM Hotel Group, [L]td[.] Manuscript Property Form, Policy No. D37419345006; supersede any term, provision or endorsement to the contrary in this policy; and apply notwithstanding such term, provision or endorsement:
>
> In Section 3. PROGRAM LIMITS OF LIABILITY, the following is added:
>
> JJ. Cancellation of Bookings - $1,000,000 per occurrence and annual aggregate sub-limit.

Compl. Ex. A, Westchester General Amendatory Endorsement, Form

MS 208386. Thus, the Westchester Primary Policy was modified by endorsement to include a sub-limit for "Cancellation of Bookings" in the amount of "$1,000,000 per occurrence and annual aggregate." *Id.*

Like the Westchester Primary Policy, the Great Lakes Excess Policy also contains its own unique declarations, followed by the shared Property Policy Form and other policy-specific forms. Of relevance here, the declarations include a section titled "Sub-Limits" which states that "[s]ub-limits are a part of, and not in addition to the Limit(s) of Liability as shown within *this* Policy." (Emphasis added). It then says that:

> Great Lakes' Sub-limits are 100% share of the Rivington Partner's Sub-limits stated below:
>
> $5,000,000 Per Occurrence and in the Annual Aggregate for the peril of Flood[;]
>
> $5,000,000 Per Occurrence and in the Annual Aggregate for the peril of Earthquake[;]
>
> All other sub-limits are per the controlling underlying policy[.]

Compl. Ex. B, Great Lakes Commercial Property Coverage Part Declarations. In practical terms, this discloses (albeit not so clearly) that Great Lakes adopted the "other sub-limits" in the primary Westchester policy as its own, including the sub-limit for "Cancellation of Bookings" in the amount of $1,000,000 per occurrence and annual aggregate. *Id.*

As a result of these insurer-specific declarations, the Westchester and Great Lakes policies limited "Cancellation of Bookings" coverage to $1 million sub-limits. The Homeland Excess Policy, by contrast, does not contain ***any*** provision setting forth its own sub-limits for this coverage, or ***any*** provision adopting all the sub-limits of the primary policy. The only sub-limits in the Homeland Excess Policy are those set forth in the shared Property Policy Form which, as noted above, does ***not*** include a sub-limit relating to the coverage for "Cancellation of Bookings."

The Homeland Excess Policy does, however, include a separate endorsement which Homeland contends is relevant to this case. That endorsement is titled "Fungus, Wet Rot, Dry Rot, Virus and Bacteria Exclusion" and states:

> The following exclusion is added to this Policy and replaces any provision to the contrary: . . .
>
> This Policy does not insure against loss or damage caused directly or indirectly by or resulting from the actual or threatened existence, growth, presence, proliferation, spread, release, transmission, migration, dispersal or any activity of fungus, wet rot, dry rot, virus, or bacteria. This Policy does not cover the costs or expenses of removal, disposal, decontamination or replacement of any property which has been contaminated by fungus, wet rot, dry rot, virus or bacteria. . . .
>
> Except as otherwise specifically stated, this exclusion applies to and limits or bars coverage under this Policy for loss or damage that may be covered by the underlying insurance. Such loss or damage is excluded regardless of any other peril, cause or event contributing concurrently or in any sequence to the loss. Such loss or damage is also excluded regardless of whether the event is caused by an act of nature or is otherwise caused, occurred suddenly or gradually, involved isolated or widespread damage, or occurred as a result of any combination of perils, causes or events. . . .

Compl. Ex. C, Homeland Endorsement Form OBSP BR 204 01 19.

B. **The COVID-19 Outbreak and Resulting Claims**

On March 1, 2020, Florida's Governor issued Executive Order No. 20-51, which directed the Department of Health to declare a Public Health Emergency after COVID-19 was discovered in this State. *See* Compl. ¶ 32; Answer ¶ 32. Later that month, the Miami-Dade County Mayor issued Emergency Order 09-20 and an Amendment thereto, which imposed restrictions on hotel operations within the County. Compl. ¶ 34; Answer ¶ 34.

Shortly thereafter, MDM asserted claims under its suite of property insurance for the business losses it had sustained, and was continuing to sustain, as a result of the COVID-19 pandemic and associated governmental restrictions. Compl. ¶¶ 39-40; Answer ¶¶ 39-40.

C. **The Primary and First Excess Carriers' Coverage Determinations and Payments**

Westchester agreed to tender payment under the coverage for "Cancellation of Bookings" in the full amount of its $1,000,000 per occurrence and annual aggregate sub-limit. Compl. ¶¶ 41-44 & Exs. D-E; Answer ¶¶ 41-44. Plaintiffs accepted that tender.

In a letter dated July 31, 2020, Great Lakes denied liability under the Property Policy Form sections providing traditional Time Element coverages, as well as under the specially endorsed coverage for "Cancellation of Bookings." *See* Compl. ¶ 45 & Ex. F; Answer ¶ 45. The parties then entered into a Settlement Agreement in which Great Lakes agreed to pay $1,000,000 to settle the claim under its Excess Policy. That Settlement Agreement provided that:

> 2. Settlement Amount. MDM agrees to accept, and [Great Lakes] agree[s] to pay, $1,000,000 under the disputed coverage in the Great Lakes Excess Policy for Cancellation of Bookings, which amount represents full exhaustion of Great Lakes Insurance SE's maximum potential Limit of Liability under the disputed coverage for Cancellation of Bookings, and is being paid in full satisfaction of any and all claims of any kind under any coverage against [the Great Lakes] Releasees in any way arising out of or related to [the claim under Great Lakes' Policy], the MDM Properties, or the COVID-19 pandemic.
>
> * * *
>
> 12. Denial of Coverage. [The Great Lakes] Releasees deny that any insurance proceeds are due to MDM as a result of the alleged aforementioned loss and claim(s), deny the existence of coverage for Business Interruption and/or Cancellation of Bookings under the Great Lakes Excess Policy, deny the existence of coverage for Claim Number 123408 and/or any of MDM's alleged losses or damages arising out of or related to the COVID-19 pandemic, and further state that this Agreement reflects the settlement of a disputed claim.
>
> * * *
>
> 15. Compromise of Disputed Claim / No Admission of Liability. The settlement documented by this Agreement is the compromise of a disputed claim, and the payment described above is not to be construed as an admission of liability on the part of Releasees, by whom coverage and liability are expressly denied.

Compl. ¶¶ 56-57 & Exs. H-I; Answer ¶¶ 56-57.

MDM then demanded excess coverage from Homeland. *See* Compl. ¶ 58; Answer ¶ 58; Affidavit of Homeland Adjuster Robert Krier ¶ 13.

D. **Homeland's Coverage Determination with Respect to "Cancellation of Bookings"**

On August 25, 2020, before MDM and Great Lakes achieved the settlement discussed above, MDM received a letter from Homeland which communicated its coverage position with respect to the claim under the Homeland Excess Policy. *See* Compl. ¶ 58 & Ex. J; Answer ¶ 58; Affidavit of Robert Krier ¶ 13. In addition, after being apprised of the settlement, Homeland issued a second letter which "supplement[ed]" that coverage position. *See* Compl. ¶¶ 68-69 & Ex. L; Answer ¶¶ 68-69; Affidavit of Robert Krier ¶¶ 14-15. Those letters insisted that Homeland has no liability under the coverage for "Cancellation of Bookings" for at least five reasons, all of which have been re-asserted in this case through affirmative defenses. *See* Compl. Exs. J, L; Aff. Def. 5-7, 12-13.

First, much like Great Lakes did before agreeing to pay $1,000,000 to settle the claim, Homeland relies on the language in the shared Property Policy Form that appears at the top of the Participation Page, stating "[t]he collective liability of Insurers shall not exceed the Limit

of Liability or any appropriate Sub-limit of Liability or any Annual Aggregate limit." Homeland's initial coverage letter argued that, as a consequence of this "collective liability" wording, "no coverage is owed by the excess insurers . . . beyond the $1,000,000 sub-limit tendered by [Westchester pursuant to] the "Cancellation of Bookings" coverage." Compl. Ex. J (p. 4). Likewise, Homeland's Fifth Affirmative Defense asserts that this "collective liability" language, coupled with Westchester's sub-limit for "Cancellation of Bookings," "limit the collective liability of Westchester, Great Lakes, and Homeland for "Cancelation of Bookings" coverage to $1 million per occurrence, and further limit[s] the annual aggregate of losses under the "Cancellation of Bookings" coverage to $1 million." Aff. Def. 5.

Second, although the Westchester, Great Lakes, and Homeland policies all contain the Aggregate Exhaustion "drop-down" clause referenced above, Homeland contends that exhaustion of the underlying carriers' aggregate sub-limits for "Cancellation of Bookings" is not sufficient to trigger liability under its policy. Homeland's initial coverage letter asserted that "[f]or any claim to potentially trigger Homeland's Policy, there must be complete exhaustion of the underlying [policy] limits" of $5,000,000 per layer. Compl. Ex. J (p. 2). Similarly, its Seventh Affirmative Defense states that "[i]nsurance coverage for MDM is unavailable under the Homeland Policy because the full amount of the Westchester Primary and the Great Lakes Excess Policies for the Policy Period have not been exhausted pursuant to the terms and conditions of the Westchester Primary and the Great Lakes Excess Policies, and the Homeland Policy." Aff. Def. 7.

Third, while it is undisputed that Great Lakes paid $1,000,000 to settle the claim under its policy, Homeland argues that the payment does not count towards exhaustion of underlying limits in light of the Priority of Payment clause. Its supplemental coverage letter asserted that, under the second paragraph of that clause, Great Lakes had to "concede" coverage for the losses claimed in order for "the settlement amount paid by Great Lakes [to] erode or exhaust the limits of the Great Lakes' [sic] policy." Compl. Ex. L (pp. 3-4). Homeland's Sixth Affirmative Defense also quotes the Priority of Payment provision and states that "[b]ecause the claimed loss was not covered in the underlying excess layer, the occurrence limits of the underlying excess layer were not eroded or exhausted such that coverage attached in Homeland's excess layer." Aff. Def. 6.

Fourth, although the "Cancellation of Bookings" sub-provision referencing disease does not contain a geographical limitation like other sub-provisions do, Homeland insists that it only covers losses resulting from the occurrence of disease "at an insured location." Compl. Ex. L (p. 5). It maintains that MDM's claim is "limited in whole or in part, because it cannot show that its alleged cancellation of or inability to accept bookings is a direct result of the occurrence of COVID-19 or based upon the existence or threat of hazardous conditions at an insured location." Aff. Def. 12.

Fifth, while the coverage for "Cancellation of Bookings" expressly applies "[n]otwithstanding" any "exclu[sions]" and encompasses losses resulting from "contagious and/or infectious disease," Homeland contends that any claim related to COVID-19 is nonetheless precluded by the "Fungus, Wet Rot, Dry Rot, Virus and Bacteria Exclusion" in its policy. Compl. Exs. J (p. 4), L (p. 2); Aff. Def. 13.

III. ANALYSIS

A. Alleged Procedural Deficiencies

In response to MDM's Motion, Homeland first says that partial summary judgment should be denied on procedural grounds. It claims that the Motion is facially deficient because it was not accompanied by a separate "statement of undisputed material facts" or "competent summary judgment evidence." Opp'n pp. 5-6. It also contends that the insurance policies relied upon in this case have not been properly "authenticated." *Id.* pp. 6-7. The Court disagrees.

Though MDM's Motion recites certain background facts for purposes of context, the requested relief does not turn on issues of fact. The Motion seeks a judicial interpretation of written insurance policies. Thus, there was no need for MDM to submit a "statement of undisputed material facts" or "summary judgment evidence" under Fla. R. Civ. P. 1.510(c) or CBL Rules 4.2 & 4.5.

Nor was MDM required to authenticate the insurance policies relied upon in this case, which are attached to the Complaint and Motion as Exhibits A, B, and C. In its response to MDM's Complaint, the Defendant *admitted* that those policies "appear" to be genuine and are "the best evidence of their terms." Answer ¶¶ 18-26, 30-31. It also repeated that acknowledgment in its "Statement of Disputed Material Facts" at ¶¶ 6-12. In any event, MDM has since eliminated the issue of authenticity by supplementing its Motion with an Affidavit from its corporate risk manager confirming that the policies attached to the Complaint and Motion are "true, correct, and complete cop[ies]" thereof. Affidavit of Zaida Aparicio ¶¶ 5-7.

B. Legal Standards Governing Insurance Policy Interpretation

The interpretation of a contract, including one of insurance, presents a pure question of law, and is an exercise that rarely requires more than an examination of the policy itself. *Smith v. State Farm Mut. Auto. Ins. Co.,* 231 So. 2d 193 (Fla. 1970) (". . . the construction and interpretation of a contract is to be decided by the Court and not by the jury"); *Penzer v. Transp. Ins. Co.,* 29 So. 3d 1000 (Fla. 2010) [35 Fla. L. Weekly S73a] (insurance policy interpretation is a question of law); *Jones v. Utica Mut. Ins. Co.,* 463 So. 2d 1153, 1157 (Fla. 1985) ("[i]t is well settled that the construction of an insurance policy is a question of law for the court"); *Friedman v. Virginia Metal Products Corp.,* 56 So. 2d 515, 517 (Fla. 1952) (in interpretating an insurance contract, "[c]onsideration of extrinsic evidence is a rare matter of last resort to be employed only when an ambiguity cannot be resolved without 'outside aid' "); *Stuyvesant Ins. Co. v. Butler,* 314 So. 2d 567, 570 (Fla. 1975) (". . . if the language of the policy is plain and unambiguous, the words must be given their commonly accepted meaning; and when the meaning of the policy provision is clear and free from doubt, it will be enforced as written and resort will not be made to extrinsic evidence for the purpose of arriving at a proper construction of the language used").

Like any contract, an insurance agreement is "construed in accordance with the plain language of the policy as bargained for by the parties." *Fayad v. Clarendon Nat. Ins. Co.,* 899 So. 2d 1082, 1086 (Fla. 2005) [30 Fla. L. Weekly S203a] (internal citations omitted). The terms of the policy "should be taken and understood in their ordinary sense," *Siegle v. Progressive Consumers Ins. Co.,* 819 So. 2d 732, 736 (Fla. 2002) [27 Fla. L. Weekly S492a], and must be read "as a whole, endeavoring to give every provision its full meaning and operative effect." *Auto-Owners Ins. Co. v. Anderson,* 756 So. 2d 29, 34 (Fla. 2000) [25 Fla. L. Weekly S211a]. The contract should receive a construction that is "reasonable, practical, sensible, and just," and the Court must apply the terms of the policy as they would be understood by "ordinary people." *Gen. Star Indem. Co. v. W. Florida Vill. Inn, Inc.,* 874 So. 2d 26, 29 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1070b]; *State Farm Fire & Cas. Co. v. Castillo,* 829 So. 2d 242, 244 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D1845a] (". . . terms utilized in an insurance policy should be given their plain and unambiguous meaning as understood by the 'man-on-the-street' ").

"If the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the [other] limiting coverage, the insurance policy is considered ambiguous," *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.,* 913 So. 2d 528, 532

(Fla. 2005) [30 Fla. L. Weekly S633a], and "any ambiguity which remains after reading each policy as a whole and endeavoring to give every provision its full meaning and operative effect must be liberally construed in favor of coverage and strictly against the insurer." *Washington Nat. Ins. Corp. v. Ruderman,* 117 So. 3d 943, 949-50 (Fla. 2013) [38 Fla. L. Weekly S511a]. But a court should not search for an ambiguity when none truly exists or, through interpretive gymnastics, give the contract a ". . . strained, forced or unrealistic construction." *Siegle,* 819 So. 2d at 736. Rather a court must apply the parties' contract as written, not "rewrite" it under the guise of judicial construction. *Gulliver Sch., Inc. v. Snay,* 137 So. 3d 1045 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D457a] ("[w]here contracts are clear and unambiguous, they should be construed as written, and the court can give them no other meaning"); *Pol v. Pol,* 705 So. 2d 51, 53 (Fla. 3d DCA 1997) [23 Fla. L. Weekly D75a] ("[i]t is well established that a court cannot rewrite the clear and unambiguous terms of a voluntary contract.").[1]

Finally, ***and importantly for purposes of this case***, "where an insurance policy is 'drawn in such a manner that it requires the proverbial Philadelphia lawyer to comprehend the terms embodied in it, the courts should and will construe them liberally in favor of the insured and strictly against the insurer to protect the buying public who rely upon the companies and agencies in such transactions.' " *Washington Nat'l,* 117 So. 3d at 951 (quoting *Hartnett v. Southern Ins. Co.*,181 So. 2d 524, 528 (Fla. 1965)); *see also Bell Care Nurses Registry, Inc. v. Continental Cas. Co.,* 25 So. 3d 13, 17 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2300a] (same); *Thornton v. American Family Life Assur. Co. of Columbus,* 225 So. 3d 1012, 1014 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D2006a] (same).

C. **The Court's Interpretive Rulings**

1. **The "Collective Liability" of the Insurers is Not Restricted By Westchester's Policy-Specific Sub-Limit for "Cancellation of Bookings"**

The first issue as to which MDM seeks the entry of summary judgment pertains to Homeland's Fifth Affirmative Defense, which is premised on the language in the shared Property Policy Form which appears at the top of the Participation Page:

> In consideration of the premium charged, the subscribers hereto, hereinafter referred to as the Insurer(s) and/or Company(ies), do severally, but not jointly, agree to indemnify the Insured for the amount recoverable in accordance with the terms and conditions of the Policy.
>
> Provided that:
>
> 1. The collective liability of Insurers shall not exceed the Limit of Liability or any appropriate Sub-limit of Liability or any Annual Aggregate limit.
>
> 2. The liability of each of the Insurers shall not exceed the Participation Limit set against its name.

Property Policy Form p. 1. Again, Homeland contends that the "collective liability" of the Insurers under the coverage for "Cancellation of Bookings" here was limited by the Westchester General Amendatory Endorsement which imposed a $1,000,000 per occurrence and annual aggregate sub-limit for "Cancellation of Bookings." Compl. Ex. J (p. 4); Aff. Def. 5; Opp'n, 10. The Court disagrees.

While the participation page does say that the "collective liability" of the insurers shall not exceed "any ***appropriate*** Sub-limit," (emphasis added) nowhere does the policy tell an insured what those "***appropriate***" sub-limits are, leaving an insured to try to figure it out on their own. And an insured desperately trying to do so would quickly see that following this provision is a list of "Program Limits" which does ***not*** include ***any*** sub-limit for "Cancellation of Bookings." An insured trying to decipher this convoluted contract would next see that Endorsement No. 4, attached to the program policy, expressly provides:

> In addition to each Company(ies)'s Declaration's Page (excluding any pre-printed terms and conditions), Price, Renewal Date, Premium Credits, Premium Payment Conditions, State Statue Amendatory Endorsements and Producer Compensation Notices / Disclosures, if applicable; *the following Company(ies)'s endorsements, forms, exclusions, etc. . . are added and apply only towards the individual Company(ies) to which such is noted.* No other Company(ies) may claim such wording as their own, whether more or less restrictive, in the event of loss to apply against all recovery. . . .

Id. at Endorsement No. 4 (emphasis added). This clause does not require the proverbial Philadelphia Lawyer to parse out its meaning. Its meaning is crystal clear: the insurers cannot rely upon limitations imposed by another carrier in that other carrier's policy specific endorsements (*i.e.*, "following Company(ies)'s endorsements"). And almost immediately following this provision is a list of endorsements/forms/exclusions of *each* insurance company. Item "JJ," which set forth the Westchester $1 million sub-limit, and which bears the identification number MS208386, is listed under Westchester only—Westchester clearly being the "Company . . . noted" to which this endorsement applies. For this reason, an insured reading this contract would logically conclude that this sub-limit pertains to—and ***only*** to—the Westchester primary policy.

If, as Homeland suggests, the language on the Participation Page ("the collective liability of the Insurers shall not exceed any appropriate Sub-limit of Liability") means that ***all*** sub-limits in ***any*** policy apply to every single participating insurer, then the language of Endorsement No. 4 ("the following Company (ies)'s endorsements, forms, exclusions, etc. . . . are added and apply only towards he individual Company(ies) to which such is noted") is rendered meaningless, as ***all*** sub-limits adopted by any carrier would automatically apply to all carriers. That is precisely what Homeland wishes the policy said, and it now asks this Court to "rewrite" the Shared Property Policy Form to say: "The collective liability of Insurers shall not exceed the Limit of Liability or any Sub-limit of Liability *imposed by any carrier* . . . ." Had the policy said this, there is no doubt that the proverbial "man-on-the-street" would conclude that the Westchester $1 million sub-limit on "Cancellation of Bookings" would apply to ***all*** carriers, including Homeland. But rather then saying, in plain English, that the "collective liability" of all insurers is capped by ***any*** sub-limit imposed by ***any*** carrier, the contract instead says that the insurers' "collective liability" will be capped by any "***appropriate***" sub-limit—whatever that may mean—leaving it to the insured (and now this Court) to try and figure out what is an "***appropriate***" sub-limit. The answer is simple: an "***appropriate***" sub-limit is one that is: (a) clearly and unambiguously disclosed; and (b) contained *either* on the common participation page *or* on an endorsement to the policy of the carrier who seeks to impose it—here Homeland. Homeland did not adopt Westchester's General Amendatory Endorsement which set a sub-limit of liability on claims related to "Cancellation of Bookings," ***or*** issue its own endorsement imposing a sub-limit on this coverage. And this Court will not, through judicial "interpretation," engraft such a sub-limit onto its policy.

Defendant could have easily, with the stroke of a pen, put this issue to rest by either: (a) expressly and clearly adopting the Westchester $1 million sub-limit for this coverage; or (b) including its *own* endorsement imposing a sub-limit for "Cancellation of Bookings" coverage (as Westchester did). Had Homeland done either, Plaintiff would have been warned, in plain English, that they would not be protected against this risk over and above the set sub-limit, and this Court would not have been forced to spend countless hours parsing through this

complicated Program Policy. But insurers, including this one, have yet to heed the warning given by our Supreme Court over fifty (50) years ago, when it observed that:

> There is no reason why such policies cannot be phrased so that the average person can clearly understand what he is buying. And so long as these contracts are drawn in such a manner that it requires the proverbial Philadelphia lawyer to comprehend the terms embodied in it, the courts should and will construe [sic] them liberally in favor of the insured and strictly against the insurer to protect the buying public who rely upon the companies and agencies in such transactions.

Hartnett, 181 So. 2d at 528. In this case the Court, though perhaps not as sophisticated as the "proverbial Philadelphia lawyer," had to spend hours sifting through this contract to try and decipher whether the Homeland policy was subject to the Westchester $1 million sub-limit for "Cancelation of Bookings" coverage. And the Court could find ***no*** provision supporting Homeland's "interpretation." That is because Defendant chose not to close the door on this issue through clear and precise drafting, thereby advising their insured "what [they were] buying." *Id.*

In sum, the Court—based upon a reading of this contract "as a whole"—concludes that the "Cancellation of Bookings" coverage afforded by the Homeland policy is not capped by the $1 million sub-limit imposed by Westchester. And in a best-case scenario for Homeland, the policy is ambiguous on this point. Either way the insured prevails, because in the case of an ambiguity the Court would do what the law requires and what it has done many times before—construe the policy in favor of coverage. *See, e.g., Sky Bell Asset Managements, LLC and Sky Bell Select, L.P., v. National Union Fire Insurance Co. of Pittsburgh, Pa, and Federal Insurance Co.,* 23 Fla. L. Weekly Supp. 535a (Fla. 11th Jud. Cir., Apr. 14, 2016); *Sharon Urscheler v. Coastal Construction,* 24 Fla. L. Weekly Supp. 31a. (Fla. 11th Jud. Cir., Apr. 22, 2016).

2. **Complete Exhaustion of all Underlying Limits is not Required in Light of the "Aggregate Exhaustion" Provision**

The next issue as to which MDM seeks the entry of summary judgment relates to the requirement of "exhaustion." Specifically, the question is whether the Homeland Excess Policy requires complete exhaustion of all underlying limits—*i.e.,* $5,000,000 per layer—in order for Homeland excess coverage to be triggered. Homeland contends that it does, but that position is belied by the provision in the shared Property Policy Form titled "Aggregate Exhaustion:"

> In the event of the reduction of the aggregate Limits of Liability of the Primary and Underlying Excess Insurances (as applicable) this Policy shall pay excess over the reduced aggregate limit. In the event of exhaustion of the aggregate Limits of Liability of the Primary and Underlying Excess Insurances (as applicable) this Policy, subject to all its provisions, shall continue in force as Primary Insurance in respect of the peril for which the aggregate Limit of Liability has been so exhausted and the deductible or self-insured amount applicable to that peril, shall apply to this Policy.

Property Policy Form pp. 1-2.

Under the plain language of this provision as it would be understood by the "man-on-the-street," once an aggregate limit in an underlying layer has been "reduc[ed]" or "exhausted," the next layer must "pay excess over" the reduced/exhausted aggregate limit; and once an aggregate limit in an underlying layer is "exhaust[ed]," the next layer drops down and becomes "Primary Insurance" as to the peril for which the limit has been reduced/exhausted. *Id.* The concept is not complicated, and the provision clearly operates to render an excess layer "primary" for a particular peril whenever an underlying aggregate limit for that peril is reduced/exhausted. *Id.* And as the Court said earlier, it makes no difference how the "aggregate limit" of an underlying policy is "reduced" or "exhausted" (*i.e.,* whether through endorsement, sub-limit, payment, etc.). All that matters is that the "aggregate limit" of the underlying policy be "reduced" or "exhausted."

Nonetheless, according to Homeland, the Aggregate Exhaustion provision was only intended to apply in the event of *multiple claims over time.* It argues that:

> Under the Aggregate Exhaustion provision, read in the context of all of the provisions of the Participation Page, if the Limits of Liability in the primary and underlying excess layers have been reduced (*i.e.,* partially exhausted) by payment of a covered loss or losses, but have not been exhausted, the Homeland Excess Policy will provide excess payment for a subsequent covered loss over the reduced aggregate Limit, up to the applicable limit for that covered loss. The Homeland Excess Policy becomes primary only in the event that the underlying Limits have been exhausted by a previous claim or claims *and* an additional claim is presented and that peril is insured by the Homeland Excess Policy none of which occurred here.

Opp'n p. 12 (emphasis in original).

Whether read in the context of other provisions, or by itself, there is nothing in the language of this provision that supports Homeland's "interpretation." Nowhere in the text of the Aggregate Exhaustion provision will one find the words "previous," "additional," or even "claim." Nor is there any other language that purports to require multiple claims over time in order for an excess layer to be rendered primary. The only requirement is that an aggregate limit in an underlying layer has been "reduced" or "exhaust[ed]," in which case the next layer must drop down and become "Primary Insurance." That is what the shared policy form plainly provides, and the Court must give effect to that language "as it was written." *Travelers,* 889 So. 2d at 785; *World Fin. Group,* 300 So. 3d at 1222-23.

In addition, Homeland further suggests that even if its interpretation of the Aggregate Exhaustion provision were found to be incorrect, "there would remain a dispute of material fact as to whether Great Lakes' payment of $1 million to settle its coverage dispute with Plaintiffs was a "Cancellation of Bookings" coverage payment that exhausts Great Lakes' excess layer as to that coverage." Opp'n p. 13. It claims that "[a]t the very least, this dispute of material fact precludes summary judgment on [its] Seventh Affirmative Defense." *Id.*

The Court fails to see how there can be a legitimate dispute on this issue in light of the language in the shared policy form which allows an Insured to allocate recovery as it sees fit, and the text of the operative Settlement Agreement itself. However, even if there were a legitimate dispute on this issue, it would not preclude the relief sought here. The requested ruling is not dependent upon facts; it seeks a *legal* determination that the Homeland Excess Policy does not require complete exhaustion of all underlying limits in order for coverage to be triggered. The issue is therefore entirely appropriate for resolution on summary judgment. *See, e.g., Jones,* 463 So. 2d at 1157; *Volusia County,* 760 So. 2d at 131; *World Fin. Group,* 300 So. 3d at 1222-23.

MDM is entitled to the ruling it seeks under the plain and unambiguous language of the Aggregate Exhaustion provision. The Court, therefore, enters summary judgment against Homeland as to its Seventh Affirmative Defense, insofar as it asserts that the Homeland Excess Policy requires complete exhaustion of all underlying limits for coverage thereunder to be triggered. Here, the aggregate limits of the Westchester and Great Lakes policy were "reduced" by appropriately disclosed sub-limits, *and* the reduced limits were later "exhausted" when both carriers paid the sub-limit amount specified in their policies. Homeland then became the primary carrier for this coverage, up to its $90 million limit.

3. **The "Priority of Payment" Provision Does Not Preclude a Payment Under Disputed Coverage from Counting Towards Exhaustion**

The third issue as to which MDM seeks the entry of summary judgment pertains to the policy provision titled "Priority of Payment." In Homeland's supplemental coverage letter, Homeland read the second paragraph of that provision to mean that Great Lakes had to formally "concede[ ]" coverage for "Cancellation of Bookings" in order for its $1,000,000 payment "[to] erode or exhaust the limits of the Great Lakes' policy." Compl. Ex. L (p. 4). Homeland also reasserted that position in its Sixth Affirmative Defense, which states in pertinent part that "[b]ecause the claimed loss was not covered in the underlying excess layer, the occurrence limits of the underlying excess layer were not eroded or exhausted such that coverage attached in Homeland's excess layer." Aff. Def. 6. In other words, according to Homeland:

> [U]nder the Priority of Payment provision, coverage does not attach at Homeland's excess layer without a covered interest and/or peril in the underlying Great Lakes excess layer. This is consistent with the Aggregate Exhaustion and collective liability language of the manuscript policy's Participation Page. . . . [MDM's] claimed loss is not covered by the Great Lakes policy and did not erode any limits in the underlying Great Lakes layer. Therefore, even if [MDM] alleged losses were covered under the Homeland policy, coverage does not attach because the underlying layers were not eroded or exhausted.

Opp'n p. 14.

Homeland's position finds no support in the Homeland Excess Policy, including the Priority of Payment provision relied upon. Nothing in that provision requires an underlying carrier to concede or make a determination of coverage in order for a payment to count towards exhaustion. In fact, the provision serves a diametrically *opposite* purpose. The first paragraph gives the Insured the "option" to apportion recovery among interests, perils, and coverages as it sees fit, and the second paragraph ensures that losses covered in an underlying layer count for purposes of exhaustion even if the losses are "not covered in higher excess layers:"

> It is hereby understood and agreed that notwithstanding anything contained herein to the contrary that *in the event of a claim hereunder which involves more than one interest and/or coverage and/or peril; it shall be at the sole option of the Insured to apportion recovery under this Policy when submitting final proof of loss,* subject to the overall amount of claim not exceeding the overall limit of liability contained herein for any one loss.
>
> For the purpose of attachment of coverage for excess layers, it is further agreed that loss involving any interest and/or peril *covered in primary or underlying excess layers, but not covered in higher excess layers, shall be recognized by such excess layers as eroding or exhausting the occurrence limits of the primary and/or underlying excess layer(s).* Nothing herein, however, shall be deemed coverage in such layer(s) to include loss from any interest and/or peril not covered in the excess layer(s) itself.

Property Policy Form p. 2 (emphasis added). In other words, the Homeland Excess Policy not only fails to support Homeland's position on this issue, it squarely refutes that position and warrants the entry of summary judgment. *Id.*

Perhaps recognizing this, Homeland alternatively seeks to recast this issue as "a disputed fact issue." Opp'n p. 14. It asserts that the Motion "ask[s] this Court to decide . . . whether Great Lakes' settlement payment constitutes payment for a covered loss that erodes an underlying limit." Opp'n p. 14. In actuality, however, what the Motion asks this Court to decide is whether the Priority of Payment provision precludes a payment under "disputed coverage" from constituting exhaustion of the limit for that coverage, as Homeland contends it does. The issue is entirely legal in nature and thus appropriate for summary judgment. *See, e.g., Jones,* 463 So. 2d at 1157; *Volusia County,* 760 So. 2d at 131; *World Fin. Group,* 300 So. 3d at 1222-23. And nothing in this provision requires that an underlying insurer "concede" or "acknowledge" coverage in order for a payment made to be considered a "reduction" or "exhaustion" of its limits. The Court thus enters summary judgment against Homeland as to its Sixth Affirmative Defense, insofar as it asserts that the Priority of Payment provision precludes a payment under "disputed coverage" from constituting exhaustion of the limit for such coverage.

4. **The "Cancellation of Bookings" Sub-Provision Referencing "Contagious and/or Infectious Disease" Does Not Require Losses Be Tied to Cases of Disease "at an Insured Location"**

The next issue as to which MDM seeks the entry of summary judgment relates to the "Cancellation of Bookings" sub-provision that expressly references "contagious and/or infectious disease." In Homeland's view, losses that directly result from the COVID-19 pandemic and related governmental restrictions are not recoverable under that sub-provision *per se*; the losses must be tied to confirmed COVID-19 cases "at an insured location." Compl. Ex. L (p. 5); Aff Def. 12.

Once again, however, Homeland's argument is refuted by the plain language of the insurance policy. The "Cancellation of Bookings" sub-provision referencing "contagious and/or infectious disease" does not contain a geographic limitation like other sub-provisions do:

> Notwithstanding that Time Element loss covered under this Policy must be caused by or result from a peril not otherwise excluded, this Policy is extended to cover the Time Element loss sustained by the insured resulting from:
>
> a) the cancellation of, and/or inability to accept bookings or reservations for accommodation, and/or interference with the business at any insured location; and/or
>
> b) the cancellation of, and/or inability to accept bookings or reservations, and/or interference with the business at any restaurant, spa, golf course, health club or other facility of the Insured at any insured location;
>
> all as a direct result of:
>
> (i) the occurrence of murder, suicide, contagious and/or infectious disease, food or drink poisoning, vermin, pests or defective sanitation;
>
> (ii) (a) the outbreak of riot or civil commotion[,]
>
> (b) The occurrence of fire, or explosion, or windstorm, or flood, or earthquake *within the radius of 25 miles of an insured location* to the extent such Time Element loss is not otherwise covered under this Policy such as under the Civil or Military Authority or Ingress/Egress Extensions;
>
> (iii) injury or illness sustained by any person arising from or traceable to foreign or injurious matter in food and drink provided *on the premises of the Insured* or the threat thereof[;]
>
> (iv) closing the whole or part of the premises of the Insured by order of a Public Authority consequent upon the existence or threat of hazardous conditions either actual or suspected *at an insured location* to the extent such closure is not otherwise covered elsewhere under this Policy such as under the Civil or Military Extension;
>
> (v) the pollution by oil, chemical or other substance of any beach, waterway or river *within a radius of 25 miles of the insured location*[;]
>
> (vi) loss of satellite transmission signals and Internet connections[;]
>
> (vii) a Mandatory Evacuation *at an insured location. . . .*

Property Policy Form, Endorsement No. 3, ¶ 4 (emphasis added).

Needless to say, if the "Cancellation of Bookings" sub-provision referencing "murder," "suicide," "disease," etc. was meant to apply only where such conditions occurred "on the premises of the Insured," "at an insured location," or with a specified radius of an insured

location, it could have easily been written to include one of those conditions. It was not. The sub-provision contains no geographic limitation or other physical tie to the insured locations. *Id.* All that is required is that the loss "be caused by" or "result from" the particular peril.

Nonetheless, Homeland asks this Court to read the sub-provision as if it contains the words "at an insured location." It argues that:

> When the Cancellation of Bookings provision is considered in the context of the policy as a whole, it is clear that the coverage begins with the premise that the specified condition must occur at an insured location, *unless* otherwise expanded to other locations . . . when necessary to avoid confusion and to affirmatively expand the radius of an event that could cause bookings cancellation.

Opp'n pp. 17-18 (emphasis in original). The Court disagrees. Nothing in the Homeland Excess Policy when read "as a whole" supports Homeland's position. In fact, its position is conclusively foreclosed by three "Cancellation of Bookings" sub-provisions which *include* the words "on the premises of the Insured" or "at an insured location":

> (iii) injury or illness sustained by any person arising from or traceable to foreign or injurious matter in food and drink provided *on the premises of the Insured* or the threat thereof[;]
>
> (iv) closing the whole or part of the premises of the Insured by order of a Public Authority consequent upon the existence or threat of hazardous conditions either actual or suspected *at an insured location* to the extent such closure is not otherwise covered elsewhere under this Policy such as under the Civil or Military Extension; . . .
>
> (vii) a Mandatory Evacuation *at an insured location.*

Property Policy Form, Endorsement No. 3, ¶¶ 4(iii), (iv), and (vii) (emphasis added).

Obviously, Homeland knew how to limit coverage to instances where a particular peril occurred on, or within a precise radius of, an "insured location." Yet it did not place any such limitation on the "Cancellation of Bookings" coverage for this particular peril, and "a *negative* inference may [therefore] be drawn from the exclusion of [such] language" in the sub-provision referencing contagious and/or infectious disease. *Southern Owners Ins. Co. v. Keep it Simple, Inc.,* 2020 WL 6323905, at *4 (S.D. Fla. July 13, 2020) (emphasis added); *Fowler v. Gartner,* 89 So. 3d 1047, 1048 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1293a] ("[a]s a general proposition, the use of different language in different contractual provisions strongly implies that a different meaning was intended").

Finally, Homeland insists that applying the plain language of this sub-provision would lead to "an absurd result," but it offers no support for that conclusory, self-serving declaration. Opp'n p. 18.[2] It does not explain *why* it would be "absurd" to expect its policy to provide coverage if a "murder" or "suicide" across the street from an insured location resulted in a cancellation of bookings. Nor does Homeland explain why it would be absurd to expect coverage when a global outbreak of "contagious and/or infectious disease" results in significant cancellations of bookings and other interference with hotel business. Put simply, there is nothing the least bit absurd about the result of applying this policy as plainly written. And while Homeland may now wish that the coverage for "Cancellation of Bookings" was worded differently, the Court's task is to apply the contract as written, not to relieve Homeland from what it may now, in hindsight, find to be an improvident bargain. *Intl Expositions, Inc. v. City of Miami Beach,* 274 So. 2d 29 (Fla. 3d DCA 1973) (" [c] ourts may not rewrite, alter or add to terms of a written agreement between the parties and may not substitute their judgment for that of the parties in order to relieve one from alleged hardship of an improvident bargain."). If the sub-provision pertaining to "contagious and/or infectious disease" was intended to apply only when the disease occurs "at an insured location," it could have easily been written to say just that. It does not, and the Court is not at liberty to add a limitation Homeland did not see fit to draft itself.

The Court therefore enters summary judgment against Homeland with respect to its Twelfth Affirmative Defense, insofar as it asserts that the sub-provision referencing "contagious and/or infectious disease" only covers losses resulting from the occurrence of disease "at an insured location."

5. The Coverage for "Cancellation of Bookings" is Not Subject to the "Fungus, Wet Rot, Dry Rot, Virus and Bacteria Exclusion"

The fifth and final issue as to which MDM seeks summary judgment pertains to Homeland's assertion that any claim relating to COVID-19 is precluded by the "Fungus, Wet Rot, Dry Rot, Virus and Bacteria Exclusion" in its policy. With respect to this issue, Homeland begins by stating that the coverage for "Cancellation of Bookings" is entirely "consistent with" and "not contradict[ed]" by the Fungus, Wet Rot, Dry Rot, Virus and Bacteria Exclusion, but it then goes on to say that the claim asserted in this case is "barr[ed]" by the exclusion, which "makes clear there can be no coverage for *any* virus-related claim of *any* kind." Opp'n p. 19 (emphasis added).

Homeland's positions in this regard are difficult to reconcile but ultimately need not be, as they are both belied by the plain and unambiguous language of the Hotel Enhancement Endorsement. The portion of that endorsement which provides coverage for "Cancellation of Bookings" states in pertinent part that:

> *Notwithstanding* that Time Element loss covered under this Policy must be caused by or result from *a peril not otherwise excluded,* this Policy is *extended to cover* the Time Element loss sustained by the insured resulting from:
>
> a) the cancellation of, and/or inability to accept bookings or reservations for accommodation, and/or interference with the business at any insured location; and/or
>
> b) the cancellation of, and/or inability to accept bookings or reservations, and/or interference with the business at any restaurant, spa, golf course, health club or other facility of the Insured at any insured location;
>
> all as a direct result of:
>
> (i) the occurrence of murder, suicide, contagious and/or infectious disease, ...

Property Policy Form, Endorsement No. 3, ¶ 4 (emphasis added). In other words, the coverage applies "[n]otwithstanding" the existence of potentially applicable "exclu[sions]," and thus cannot, by definition, be precluded by the Fungus, Wet Rot, Dry Rot, Virus and Bacteria Exclusion in the policy. *Id.* Though Homeland insists that the Court must read that policy "as a whole," its Opposition does not even *mention* the endorsement language quoted above. Homeland acts as if that language does not exist, even though it plainly does and must be given "its full meaning and operative effect." *Auto-Owners,* 756 So. 2d at 34; *Intervest,* 133 So. 3d at 498.

Moreover, while the foregoing is sufficient to justify summary judgment on this issue, it also bears noting that the coverage for "Cancellation of Bookings" explicitly encompasses losses due to "contagious and/or infectious disease." Consequently, accepting Homeland's position would violate the principle that "[a]n insurance policy cannot grant rights in one paragraph and then retract the very same right in another paragraph called 'exclusion'." *Tire Kingdom, Inc. v. First Southern Ins. Co.,* 573 So. 2d 885, 887 (Fla. 3d DCA 1990); *Dickson v. Economy Premier Assurance Co.,* 36 So. 3d 789, 792 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D1106b] (same).[3]

The Court therefore enters summary judgment against Homeland with respect to its Thirteenth Affirmative Defense, insofar as it asserts that the coverage for "Cancellation of Bookings" is subject to the Fungus, Wet Rot, Dry Rot, Virus and Bacteria Exclusion.

IV. CONCLUSION

Homeland forcefully insists that it had no intention of writing $90 million of "Cancellation of Bookings" coverage, and that it did not charge MDM a premium commensurate with this level of risk. That may (or may not) be true. But the terms of a contract are not dictated by either parties' subjective intent. What matters is what the contract actually says (or fails to say). *See, e.g., Shoma Coral Gables, LLC v. Gables Inv. Holdings, LLC,* 307 So. 3d 153 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1755a]. And Homeland's contract, which provides $90 million in excess coverage, nowhere says that its obligation for loss resulting from "Cancellation of Bookings" is subject to any sub-limit or geographical limitation. The contract, as plainly written, also forecloses Homeland's remaining "interpretive" defenses. So if Homeland is now forced to provide coverage it did not intend to offer, it has no one to blame but itself. Insurance companies should draft their policies in plain English. And if they persist in refusing to do so, they should not be heard to complain about having to indemnify against a risk they claim not to have underwritten.

The Court has carefully reviewed the polices at issue in this case as a whole and has endeavored to give all provisions their full meaning and operative effect. It has also endeavored to interpret the policies in accordance with the plain meaning of the language used, as it would be understood by the "man-on-the-street." *Castillo,* 829 So. 2d at 244. Based upon the relevant provisions of the policy, and for the reasons discussed *supra,* the Court concludes that:

1. Under the terms of the Westchester, Great Lakes, and Homeland policies, the "collective liability" of the Insurers is not restricted by Westchester's *policy-specific sub-limit* for "Cancellation of Bookings."

2. The Homeland Excess Policy does not require complete exhaustion of all underlying limits—*i.e.,* $5,000,000 per layer—in order for coverage to be triggered. Under the provision in the shared Property Policy Form titled "Aggregate Exhaustion," once an aggregate limit in an underlying layer is either "reduced" or "exhausted," the next layer drops down and becomes "Primary Insurance." Here the aggregate limits for "Cancellation of Bookings" coverage of both the Westchester and Great Lakes policy were "reduced" and thereafter "exhausted."

3. The provision in the shared policy form titled "Priority of Payment" does not preclude a payment under "disputed coverage" from counting towards exhaustion of an underlying limit for such coverage.

4. Under the Hotel Enhancement Endorsement provision relating to "Cancellation of Bookings," the sub-provision explicitly referencing "contagious and/or infectious disease" does not require that losses be tied to cases of disease "at an insured location," and

5. The coverage for "Cancellation of Bookings" expressly applies "[n]otwithstanding" the existence of potentially applicable "exclu[sions]" and thus is not subject to the "Fungus, Wet Rot, Dry Rot, Virus and Bacteria Exclusion."

For the foregoing reasons, it is hereby **ORDERED** that Plaintiffs' Motion is **GRANTED** in its entirety.

---

[1]While neither side claims ambiguity here, Homeland argues in a footnote that the caselaw requiring ambiguities to be liberally construed in favor of coverage "has no application" here because "the policy was drafted by brokers acting for the insured." Opp'n n. 4 (citing, *inter alia, RTG Furniture Corp. v. Industrial Risk Insurers,* 616 F. Supp. 2d 1258, 1264 (S.D. Fla. 2008) ("[t]his principle, which flows under the doctrine of *contra preferentum,* is sensibly applied in the insurance contract context where the insurer has typically drafted the policy; however, it has no logical application where the insured is a sophisticated commercial entity which has participated in drafting of the policy") (referencing out-of-state decisions)). It is unclear whether the Homeland Excess Policy was in fact drafted by "brokers acting for the insured," as Homeland cites no evidence on the point and the policy itself provides no support for it. The Court need not resolve the issue, however, as it ultimately of no moment here. Under Florida law, as interpreted by the Florida Supreme Court:

> The norms of contractual interpretation . . . do not apply to insurance contracts, as ambiguities are *always* to be construed against the insurer and in favor of coverage.

In re Std. Jury Instr.—Contract & Bus. Cases, 116 So. 3d 284, 315 (Fla. 2013) [38 Fla. L. Weekly S384a] (emphasis added); *see also Washington Nat'l,* 117 So. 3d at 952 (recognizing that "[u]nder Florida law, [when an insurance] policy is ambiguous it must be construed against the insurer and in favor of coverage without resort to consideration of extrinsic evidence"). Thus, even if the Homeland Excess Policy was, in fact, drafted by others, any ambiguities therein would still have to be strictly construed against Homeland and in favor of coverage. *Id.*

[2]The absurdity doctrine is an extremely narrow exception to the general rule that courts must apply statutes as plainly written. *See. e.g., State v. Hackley,* 95 So.3d 92, 95 (Fla.2012) [37 Fla. L. Weekly S441a] ("the absurdity doctrine is not to be used as a freewheeling tool for courts to second-guess and supplant the policy judgments made by the Legislature. It has long been recognized that the absurdity doctrine 'is to be applied to override the literal terms of a statute only under rare and exceptional circumstances' " (quoting *Crooks v. Harrelson,* 282 U.S. 55, 60, 51 S.Ct. 49, 75 L.Ed. 156 (1930))); *see also Boatman v. Hardee,* 254 So. 3d 604 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D1956c] ("[e]ven though the absurd result doctrine may be applied under rare circumstances when a statute is unambiguous, the absurdity doctrine is not to be used as a freewheeling tool for courts to second-guess and supplant the policy judgments made by the Legislature"). The Court is not aware of precedent applying this doctrine in order to relieve a party from the plain and unambiguous terms of their own voluntary contract. But whether the "absurdity doctrine" has any application in contract cases is irrelevant here because there is nothing remotely "absurd" about the consequences of holding Homeland to its contractual bargain.

[3]Homeland contends that this principle is inapposite and irrelevant here, for "[s]imply because one provision gives a general grant of coverage and another provision limits this coverage does not mean [that] there is an ambiguity or inconsistency between the two [provisions]." Opp'n p. 19 (quoting *Ajax Building Corp. v. Hartford Fire Ins. Co.,* 358 F. 3d 795, 799 (11th Cir. 2004) [17 Fla. L. Weekly Fed. C198a]). In this case, however, the endorsement in question does not provide a "general" grant of coverage, it provides a series of very *specific* coverages, including coverage for "Cancellation of Bookings" resulting from "contagious and/or infectious disease." Likewise, the exclusion asserted here does not merely "limit" that coverage, it purports to *preclude* coverage for any losses resulting from "fungus," "virus," and "bacteria"—*i.e.,* the *causes* of contagious and/or infectious disease. Thus, there is plainly an inconsistency between the two provisions which prohibits enforcement of the exclusion in this case. *See Tire Kingdom,* 573 So. 2d at 887; *Dickson,* 36 So. 3d at 792.

* * *

Insurance—Automobile—Rescission of policy—Misrepresentation on application— Materiality—Fraud— Evidence—Hearsay— Exceptions—Failure to disclose family member living in insured's house at time of insurance application was a material misrepresentation sufficient to support a rescission of the policy because insurer would not have issued the policy on the same terms had family member been disclosed—It is irrelevant that undisclosed household member was not involved in subject motor vehicle accident because materiality of risk regarding failure to disclose a household member on an application for insurance is determined at the time of inception and/or application, not at the time of a subsequent loss—Subject policy was rescinded as void *ab initio* pursuant to section 627.409 and terms and conditions of the policy—PIP statute does not govern policy rescissions, or the amount of time to rescind an insurance policy—Additionally, court finds that defendants committed insurance fraud by collaborating in a scheme of staging multiple motor vehicle accidents—Accordingly, there is no insurance coverage for any claims arising out of any motor vehicle accident involving defendants—Statements provided by insured during his recorded statement to insurer are admissible as summary judgment evidence under exception to hearsay rule as a party admission

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. JORGE RAVELO ANTONIO ROUSSEAUX, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-016947-CA-01, Section CA15. March 24, 2021. Jose Rodriguez, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Jorge Antonio Ravelo Rousseaux, Claudia Velazquez Molina, Roger Oscar Batista Batista, Chabeli Ohallaorans Rodriguez, and Noelvys Padron Ortiz, Pro se, Defendants.

ORDER ON PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AGAINST THE DEFENDANTS, JORGE ANTONIO RAVELO ROUSSEAUX, CLAUDIA VELAZQUEZ MOLINA, ROGER OSCAR BATISTA BATISTA, CHABELI OHALLAORANS RODRIGUEZ, AND NOELVYS PADRON ORTIZ

THIS CAUSE having come before this Court at the hearing on February 19, 2021, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendants, JORGE ANTONIO RAVELO ROUSSEAUX, CLAUDIA VELAZQUEZ MOLINA, ROGER OSCAR BATISTA BATISTA, CHABELI OHALLAORANS RODRIGUEZ, and NOELVYS PADRON ORTIZ, and the Court having considered the same, it is hereupon,

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

Factual Background

Plaintiff, Direct General Insurance Company brought the instant Action for Insurance Fraud, Declaratory Judgment and Breach of Insurance Contract against the named insured Defendant, Jorge Antonio Ravelo Rousseaux, and the Defendants, Claudia Velazquez Molina, Roger Oscar Batista Batista, Chabeli Ohallaorans Rodriguez and Noelvys Padron Ortiz, regarding the policy rescission as a result of the insured's material misrepresentation on the application for insurance dated November 21, 2019. Plaintiff rescinded the policy of insurance on the basis that Jorge Antonio Ravelo Rousseaux failed to disclose that his stepdaughter, Claudia Velazquez Molina, resided with him at the time of policy inception and had he disclosed this information the Plaintiff would not have issued the policy on the same terms; namely, Plaintiff would have charged a higher premium to issue the policy.

Mr. Jorge Antonio Ravelo Rousseaux initially completed an application for a policy of automobile insurance from Direct General Insurance Company on November 21, 2019. Mr. Jorge Antonio Ravelo Rousseaux failed to list his stepdaughter, Claudia Velazquez Molina, as a household member/resident when completing the application for insurance. Mr. Jorge Antonio Ravelo Rousseaux answered "NO" to the following application question, which provides:

> Have you failed to disclose any household residents, age 15 or older, whether licensed or not, including but not limited to children away from home or in college?

In addition, the insured, Mr. Jorge Antonio Ravelo Rousseaux, signed and initialed the Applicant's Statement on page 4 of the application for insurance, which provides in pertinent part as follows:

> "I agree all answers to all questions in this Application are true and correct. I understand, recognize, and agree said answers are given and made for the purpose of inducing the Company to issue the Policy for which I have applied. I further agree that ALL persons of eligible driving age or permit age or older who live with me, as well as ALL persons who regularly operate my vehicles and do not reside in my household, are shown above. I agree that my principal residence and place of vehicle garaging is correctly shown above and that the vehicle is in this state at least 10 months each year. I understand the Company may rescind this Policy or declare that no coverage will be provided or afforded if said answers on this Application are false or misleading, and materially affect the risk the Company assumes by issuing the Policy. In addition, I understand that I have a continuing duty to notify the Company within 30 days of any changes of: (1) address; (2) garaging location of vehicles; (3) number, type, and use of vehicles to be insured under this Policy. This includes the use of the vehicle to carry persons or property for compensation or a fee, ride sharing activity, TNC prearranged trips, personal vehicle sharing program, limousine, or taxi service, livery conveyance, including not-for-hire livery, or for retail or wholesale delivery, including but not limited to, the pickup, transport, or delivery of magazines, newspapers, mail, or food. (4) residents of my household of eligible driving age or permit age; (5) driver's license or permit status (new, revoked, suspended or reinstated) of any resident of my household; (6) operators using any vehicles to be insured under this Policy; or (7) the marital status of any resident or family member of my household. I understand the Company may declare that no coverage will be provided or afforded if I do not comply with my continuing duty of advising the Company of any changes as noted above."

On March 19, 2020, the named insured, Jorge Antonio Ravelo Rousseaux, provided a recorded statement to the Plaintiff, confirming that his stepdaughter, Claudia Velazquez Molina, lived with him at the policy garaging address at the time of application for insurance. Plaintiff determined that had Jorge Antonio Ravelo Rousseaux provided the proper information at the time of the insurance application then Plaintiff would have charged the insured a higher premium rate. Therefore, Direct General Insurance Company declared the policy void *ab initio* due to material misrepresentation and returned the paid premiums to Jorge Antonio Ravelo Rousseaux. Due to the policy being declared void *ab initio*, the Plaintiff denied coverage for the subject motor vehicle accident.

Pursuant to the policy of insurance issued to Jorge Antonio Ravelo Rousseaux, Direct General Insurance Company may void the insurance policy as follows:

MISREPRESENTATION AND FRAUD

A. This Policy was issued in reliance on the information provided on **your** written or verbal insurance application. **We** reserve the right, at **our** sole discretion, to void or rescind this Policy if **you** or a **relative**:

B. Made any false statements or representations to **us** with respect to any material fact or circumstance; or

C. Concealed, omitted or misrepresented any material fact or circumstance or engaged in any fraudulent conduct;

in any application for this insurance or when renewing this Policy. **We** will not be liable and will deny coverage for any **accident**, **loss** or claim occurring thereafter.

A fact or circumstance will be deemed material if **we** would not have:

1. Written this Policy;
2. Agreed to insure the risk assumed; or
3. Assumed the risk at the premium charged.

This includes, but is not limited to, failing to disclose in a verbal or written application all person residing in your household or regular operators of a covered auto.

Further, Florida Statute § 627.409(1) provides:

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

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

Analysis Regarding Whether the Undisclosed Person in Household was Material

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

The Court ruled that the materiality of the risk regarding the failure to disclose a household member on an application for insurance is determined at the time of inception and/or application, not at the time of a subsequent loss. Here, the insured failed to disclose his stepdaughter, Claudia Velazquez Molina, as a household member living at the policy garaging address at the time of the application. Therefore, it is irrelevant whether the undisclosed household member, Claudia Velazquez Molina, was involved in the subject motor vehicle accident(s) on March 3, 2020, and/or March 10, 2020 and/or March 11, 2020, for purposes of determining the materiality of the risk as to the policy premium at inception pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy.

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

Analysis Regarding the Florida Statute Governing Policy Rescissions

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

Analysis Regarding Insurance Fraud

The Court hereby finds that the Defendants, Jorge Antonio Ravelo Rousseaux, Claudia Velazquez Molina, Roger Oscar Batista Batista, Chabeli Ohallaorans Rodriguez and Noelvys Padron Ortiz, collaborated in a scheme of staging two motor vehicle accidents within three hours of each other involving the insured 2010 Nissan Altima (VIN: 1N4AL2AP0AN423755) on March 3, 2020. Additionally, a third and fourth motor vehicle accident involving the insured 2010 Nissan Altima (VIN: 1N4AL2AP0AN423755) were staged on March 10, 2020 and March 11, 2020.

The Arrest Affidavit for Noelvys Padron Ortiz provided sworn testimony which states in pertinent part as follows:

> AN INVESTIGATION CONDUCTED BY THE BUREAU OF INSURANCE FRAUD REVEALED THAT THE MOTOR VEHICLE CRASH THAT OCCURRED ON 3/3/2020 UNDER MIAMI DADE POLICE CASE NUMBER PD200303081047 WAS STAGED AND DONE SO FOR THE PURPOSE OF FILING A FRAUDULENT INSURANCE CLAIM AND THAT DEFENDANT NOELVYS PADRON-ORTIZ WILLING PARTICIPATED IN THIS STAGED CRASH.
>
> A SWORN STATEMENT WAS OBTAINED FROM DEFENDANT NOVELYS PADRON-ORTIZ, CONFESSING THAT THE CRASH LISTED ABOVE WAS STAGED, AND THAT DEFENDANT NOELVYS PADRON-ORTIZ WAS A WILLING PARTICIPANT IN THIS SCHEME TO DEFRAUD TRAVELERS INSURANCE COMPANY, UNDER CLAIM NUMBER FNT7182, KEMPER INSURANCE UNDER CLAIM NUMBER 2003723040 AND DIRECT GENERAL UNDER CLAIM NUMBER 200095251.
>
> DEFENDANT NOELVYS PADRON-ORTIZ STATED IN A RECORDED STATEMENT THAT HE WAS OFFERRED $800 BY AN ORGANIZER NAMED "EL MULATO", TO BE A PARTICIPANT IN A STAGED CRASH. DEFENDANT NOELVYS PADRON-ORTIZ DESCRIBED THE ORGANIZER "EL MULATO" AS A DARK SKINNED HISPANIC MALE WITH A MUSCULAR BUILD WHO ALWAYS DROVE A DARK COLORED NISSAN SEDAN.

In addition, the Plaintiff filed with the Court the Affidavit of the Defendant, Chabeli Ohallaorans Rodriguez, in which she provided sworn testimony admitting to the insurance fraud as follows:

> The representation I made in reference to this accident to National General Insurance Company/Imperial Fire Casualty Insurance Co. was false.

I understand that no payment will be made, and I ask that you no longer consider my claim.

Pursuant to Florida Statute § 817.234(1)(a)(1):

False and fraudulent insurance claims

A person commits insurance fraud punishable as provided in subsection (11) if that person, with the intent to injure, defraud, or deceive any insurer:

1. Presents or causes to be presented any written or oral statement as part of, or in support of, a claim for payment or other benefit pursuant to an insurance policy or a health maintenance organization subscriber or provider contract, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim.

Here, the Defendant, Noelvys Padron Ortiz, provided sworn testimony admitting that he was offered $800.00 by an organizer named "El Mulato", to be a participant in a staged crash. The Defendant admitted that he was a willing participant in this scheme to defraud Direct General Insurance Company and other insurers (Travelers Insurance Company and Kemper Insurance Company).

Therefore, it is clear that the Defendants, Jorge Antonio Ravelo Rousseaux, Claudia Velazquez Molina, Roger Oscar Batista Batista, Chabeli Ohallaorans Rodriguez and Noelvys Padron Ortiz, presented fradulent claims to the Carrier, Direct General Insurance Company, with the intent to injure, defraud, or deceive the Carrier, Direct General Insurance Company. As a result of the Defendants submitting mutiple claims for staged motor vehicle accidents, there is no insurance coverage for any claims arising from any motor vehicle accident involving the Defendants, Jorge Antonio Ravelo Rousseaux, Claudia Velazquez Molina, Roger Oscar Batista Batista, Chabeli Ohallaorans Rodriguez and Noelvys Padron Ortiz.

Analysis Regarding Whether the Recorded Statement of Jorge Antonio Ravelo Rousseaux is Admissible Evidence for Summary Judgment

The Court agreed with the Plaintiff, Direct General Insurance Company's position that the statements provided by Jorge Antonio Ravelo Rousseaux during his recorded statement on March 19, 2020 are admissible under the exception to the hearsay rule applicable to an admission by a party and as a statement by an opposing party.

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

Therefore, the Court finds that the transcript of the recorded statement of Jorge Antonio Ravelo Rousseaux is admissible and proper summary judgment evidence.

Conclusion

This Court finds that the Plaintiff, Direct General Insurance Company's application for insurance unambiguously required Defendant, Jorge Antonio Ravelo Rousseaux, to disclose his stepdaughter, Claudia Velazquez Molina, as a household member living at the policy garaging address, that Plaintiff provided the required testimony to establish said that Defendant, Jorge Antonio Ravelo Rousseaux's failure to disclose his stepdaughter, Claudia Velazquez Molina, as a person in the household was a material misrepresentation because Plaintiff would not have issued the policy on the same terms, and thus Plaintiff properly rescinded the subject policy of insurance. Consequently, Plaintiff properly denied coverage for the loss at issue.

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

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

b. This Court ***hereby enters final judgment*** for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendants, JORGE ANTONIO RAVELO ROUSSEAUX, CLAUDIA VELAZQUEZ MOLINA, ROGER OSCAR BATISTA BATISTA, CHABELI OHALLAORANS RODRIGUEZ, and NOELVYS PADRON ORTIZ.

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

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

e. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # XXXXXX7115, is rescinded and is void *ab initio;*

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

g. The Court hereby finds that the Defendants, Jorge Antonio Ravelo Rousseaux, Claudia Velazquez Molina, Roger Oscar Batista Batista, Chabeli Ohallaorans Rodriguez and Noelvys Padron Ortiz, collaborated in a scheme of staging two motor vehicle accidents within three hours of each other involving the insured 2010 Nissan Altima (VIN: 1N4AL2AP0AN423755) on March 3, 2020. Additionally, a third and fourth motor vehicle accident involving the insured 2010 Nissan Altima (VIN: 1N4AL2AP0AN423755) were staged on March 10, 2020 and March 11, 2020;

h. The Defendant, JORGE ANTONIO RAVELO ROUSSEAUX, failed to disclose that an additional resident over the age of 15 lived within his household at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # XXXXXX7115, issued by DIRECT GENERAL INSURANCE COMPANY;

i. The Defendant, JORGE ANTONIO RAVELO ROUSSEAUX breached the insurance policy contract and application for insurance, under the policy of insurance, bearing policy # XXXXXX7115, issued by DIRECT GENERAL INSURANCE COMPANY;

j. The material misrepresentation of Defendant, JORGE ANTONIO RAVELO ROUSSEAUX on the application for insurance dated November 21, 2019, occurred prior to any Assignment of any personal injury protection ("PIP") Benefits to any medical provider, doctor and/or medical entity, under the policy of insurance, bearing policy # XXXXXX7115, issued by DIRECT GENERAL INSURANCE COMPANY;

k. There is no insurance coverage for the named insured, JORGE ANTONIO RAVELO ROUSSEAUX for any bodily injury liability coverage, property damage liability coverage, or personal injury protection coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX7115;

l. There is no insurance coverage for the Defendant, CLAUDIA VELAZQUEZ MOLINA for any bodily injury liability coverage, property damage liability coverage, or personal injury protection coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX7115;

m. There is no insurance coverage for the Defendant, ROGER OSCAR BATISTA BATISTA for any bodily injury liability coverage, property damage liability coverage, or personal injury protection coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX7115;

n. There is no insurance coverage for the Defendant, CHABELI OHALLAORANS RODRIGUEZ for any bodily injury liability coverage, property damage liability coverage, or personal injury protection coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX7115;

o. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, JORGE ANTONIO RAVELO ROUSSEAUX, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX7115;

p. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the Defendant, CLAUDIA VELAZQUEZ MOLINA, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX7115;

q. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the Defendant, ROGER OSCAR BATISTA BATISTA, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX7115;

r. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the Defendant, CHABELI OHALLAORANS RODRIGUEZ, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX7115;

s. There is no insurance coverage for the motor vehicle accidents which occurred on March 3, 2020, March 10, 2020, and/or March 11, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX7115;

t. There is no insurance coverage for any motor vehicle accident(s), under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX7115;

u. There is no personal injury protection ("PIP") insurance coverage for the motor vehicle accidents which occurred on March 3, 2020, March 10, 2020, and/or March 11, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX7115;

v. There is no property damage liability coverage for the motor vehicle accidents which occurred on March 3, 2020, March 10, 2020, and/or March 11, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX7115;

w. There is no bodily injury liability coverage for the motor vehicle accidents which occurred on March 3, 2020, March 10, 2020, and/or March 11, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX7115;

x. Since the policy of insurance issued to the Defendant, JORGE ANTONIO RAVELO ROUSSEAUX, bearing policy # XXXXXX7115, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from any claimant to any medical provider, doctor and/or medical entity is void.

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose household residents over age 15

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. PATRICIA LEBLANC, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-026874-CA-01, Section CA23. April 19, 2021. Barbara Areces, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Patricia LeBlanc, Roland Raymond, and Ryan Pratt Raymond, Pro se, Miami, Defendants.

FINAL SUMMARY JUDGMENT AGAINST DEFENDANTS, PATRICIA LEBLANC, ROLAND RAYMOND AND RYAN PRATT RAYMOND

THIS CAUSE having come before this Court at the hearing on April 12, 2021, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendants, PATRICIA LEBLANC, ROLAND RAYMOND and RYAN PRATT RAYMOND, and the Court having considered the same, it is hereupon,

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

Factual Background

Plaintiff, Direct General Insurance Company brought the instant Action for Declaratory Judgment against the insured Defendant, Patricia LeBlanc, and Defendants, Roland Raymond and Ryan Pratt Raymond, regarding the policy rescission as a result of the insured's material misrepresentations on the application for insurance dated March 26, 2020. Plaintiff rescinded the policy of insurance on the basis that Patricia LeBlanc failed to disclose that her husband, Roland Raymond, and her son, Ryan Pratt Raymond, resided with her at the time of policy inception and had she disclosed this information the Plaintiff would not have issued the policy on the same terms; namely, Plaintiff would have charged a higher premium to issue the policy.

On the application for insurance dated March 26, 2020, Defendant, Patricia LeBlanc, answered "NO" to the following application question, which provides:

> Have you failed to disclose any household residents, age 15 or older, whether licensed or not, including but not limited to children away from home or in college?

In addition, on the application for insurance dated March 26, 2020, Defendant, Patricia LeBlanc signed the pertinent page of the Applicant's Statement, which provides:

> I agree all answers to all questions in this Application are true and correct. I understand, recognize, and agree said answers are given and made for the purpose of inducing the Company to issue the Policy for which I have applied. I further agree that ALL persons of eligible driving age or permit age or older who live with me, as well as ALL persons who regularly operate my vehicles and do not reside in my household, are shown above. I agree that my principal residence and place of vehicle garaging is correctly shown above and that the vehicle is in this state at least 10 months each year. I understand the Company may rescind this Policy or declare that no coverage will be provided or afforded if said answers on this Application are false or misleading, and materially affect the risk the Company assumes by issuing the Policy. In addition, I understand that I have a continuing duty to notify the Company within 30 days of any changes of: (1) address; (2) garaging location of vehicles; (3) number, type, and use of vehicles to be insured under this Policy. This includes the use of the vehicle to carry persons or property for compensation or a fee, ride sharing activity, TNC prearranged trips, personal vehicle sharing program, limousine, or taxi service, livery conveyance, including not-for-hire livery, or for retail or wholesale delivery, including but not limited to,

the pickup, transport, or delivery of magazines, newspapers, mail, or food. (4) residents of my household of eligible driving age or permit age; (5) driver's license or permit status (new, revoked, suspended or reinstated) of any resident of my household; (6) operators using any vehicles to be insured under this Policy; or (7) the marital status of any resident or family member of my household. I understand the Company may declare that no coverage will be provided or afforded if I do not comply with my continuing duty of advising the Company of any changes as noted above.

On July 8, 2020, the Defendant, Ryan Pratt Raymond, provided a recorded statement confirming that he lived at the policy garaging address at the time of application for insurance, and specifically, that he has lived at the policy garaging address for the past 20 years. Plaintiff determined that had Patricia LeBlanc provided the proper information at the time of the insurance application dated March 26, 2020, then Plaintiff would have charged the insured a higher premium rate. Therefore, Direct General Insurance Company declared the policy void *ab initio* due to a material misrepresentation and returned the paid premiums to Patricia LeBlanc. Due to the policy being declared void *ab initio*, the Plaintiff denied coverage for the subject motor vehicle accident.

Pursuant to the policy of insurance issued to Patricia LeBlanc, Direct General Insurance Company may void the insurance policy as follows:

MISREPRESENTATION AND FRAUD

This Policy was issued in reliance on the information provided on **your** written or verbal insurance application. **We** reserve the right, at **our** sole discretion, to void or rescind this Policy if **you** or a **relative**:

1. Made any false statements or representations to **us** with respect to any material fact or circumstance; or

2. Concealed, omitted or misrepresented any material fact or circumstance or engaged in any fraudulent conduct;

in any application for this insurance or when renewing this Policy. **We** will not be liable and will deny coverage for any **accident**, **loss** or claim occurring thereafter.

A fact or circumstance will be deemed material if **we** would not have:

1. Written this Policy;

2. Agreed to insure the risk assumed; or

3. Assumed the risk at the premium charged.

This includes, but is not limited to, failing to disclose in a verbal or written application all person residing in your household or regular operators of a covered auto.

Further, Florida Statute § 627.409(1) provides:

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

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

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

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

Analysis Regarding Whether the Undisclosed Person(s) in Household was Material

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

The Court ruled that the materiality of the risk regarding the failure to disclose a household member on an application for insurance is determined at the time of inception and/or application, not at the time of a subsequent loss. Here, the insured failed to disclose her husband, Roland Raymond, and her son, Ryan Pratt Raymond, as household members living at the policy garaging address at the time of the application for insurance. Therefore, it is irrelevant whether the undisclosed household members, Roland Raymond and/or Ryan Pratt Raymond, were involved in the subject motor vehicle accident on June 27, 2020, for purposes of determining the materiality of the risk as to the policy premium at inception pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy.

Additionally, the Court found that the affiant, Kimberly Willcox, provided sworn testimony to knowledge of the application for insurance and administration of the underwriting guidelines for the insurance policy issued to Patricia LeBlanc, and could claim personal knowledge from a review of the records, therefore, Plaintiff's affiant, Ms. Willcox, satisfied the threshold to satisfy the business records exception. *See Nationstar Mortg., LLC v. Berdecia*, 169 So. 3d 209, 213. Consequently, Plaintiff established without contrary evidence

that the misrepresentation was material, as set forth in the Affidavit of Kimberly Willcox.

Analysis Regarding the Carrier's Application for Insurance being Clear and Unambiguous

Florida case law dictates that a party who signs a contract is bound by the contents of that contract whether he/she read its contents or not, unless that party can prove some form of coercion, duress, fraud in the inducement. See *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Benton,* 467 So.2d 311, 312 (Fla. 5th DCA 1985) ("As a matter of law a party who voluntarily executes a document knowing it is intended to establish contractual relationships between the parties but without reading it is bound by its terms in the absence of coercion, duress, fraud in the inducement or some other independent ground justifying rescission."). *See also New York Life Ins. Co. v. Tedder*, 113 Fla. 649, 153 So. 145 (Fla. 1933) ("The rule is too well settled to admit of controversy that one who affixes his signature to a written instrument will be prima facie presumed, in the absence of proof of fraud, to have intended thereby to authenticate and become bound by the contents of the instrument so signed.").

An applicant's failure to read an application for insurance prior to signing does not prevent an insurer from rescinding the policy on the basis of nondisclosure of material information. *See Nationwide Mut. Fire. Ins. Co. v. Kramer,* 725 So.2d 1141, 1143 (Fla.2d DCA 1998) [23 Fla. L. Weekly D2326a]. Florida Courts have consistently held that a party's failure to read a contract does not invalidate the contract. See *Allied Van Lines, Inc. v. Bratton,* 351 So. 2d 344, 347 (Fla. 1977) ("No party to a written contract in this State can defend against its enforcement on the sole ground that he signed it without reading it.").

The Court hereby finds that the Plaintiff's application for insurance is clear and unambiguous regarding the applicant's obligation to disclose pertinent information at the time of the policy inception on the application. The Court hereby finds that the Plaintiff's application for insurance clearly and unambiguously required the applicant (Patricia LeBlanc) to disclose Roland Raymond and Ryan Pratt Raymond as household members living at the policy garaging address at the time of the policy inception. In addition to providing a "NO" response to application question #2, the applicant (Patricia LeBlanc) initialed the Applicant's Statement and signed the application for insurance, which provided the following acknowledgment:

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

The Carrier, Direct General Insurance Company has a right to rely on the information provided by Patricia LeBlanc on the application for insurance. Since the Carrier relied on the representations by Patricia LeBlanc on the application to its detriment, the Carrier is entitled to rescind the policy due to the material misrepresentation. The Court hereby finds that since the questions and terms of the Carrier's application are clear and unambiguous, it is irrelevant whether Patricia LeBlanc subsequently claimed that the "agent did not ask" the questions on the application since Patricia LeBlanc signed the application which is a legal contract and thus, Patricia LeBlanc is bound by the terms and conditions of the contract. Further, the Defendant, Patricia LeBlanc, did not establish any proof of coercion, duress, and/or fraud in the inducement during the application process.

In addition, since Patricia LeBlanc signed the application and acknowledged the above terms, she cannot later claim that she did not understand the application or that the agent did not ask her and/or explain to her the questions on the application.

Analysis Regarding the Florida Statute Governing Policy Rescissions

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

Analysis Regarding Whether the Statements from the Recorded Statement of Ryan Pratt Raymond is Admissible Evidence for Summary Judgment

The Court agreed with the Plaintiff, Direct General Insurance Company's position that the statements provided by Ryan Pratt Raymond during his recorded statement provided on July 8, 2020 are admissible under the exception to the hearsay rule applicable to an admission by a party and as a statement by an opposing party.

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

Therefore, the Court finds that the transcript of the recorded statement of Ryan Pratt Raymond is admissible and proper summary judgment evidence.

Conclusion

This Court finds that the Plaintiff, Direct General Insurance Company's application for insurance unambiguously required Defendant, Patricia LeBlanc, to disclose her husband, Roland Raymond, and her son, Ryan Pratt Raymond, as household members living at the policy garaging address, that Plaintiff provided the required testimony to establish said that Defendant, Patricia LeBlanc's failure to disclose Roland Raymond and Ryan Pratt Raymond as persons in the household was a material misrepresentation because Plaintiff would not have issued the policy on the same terms, and thus Plaintiff properly rescinded the subject policy of insurance. Consequently, Plaintiff properly denied coverage for the loss at issue.

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

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

b. This Court ***hereby enters final judgment*** for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendants, PATRICIA LEBLANC, ROLAND RAYMOND and RYAN PRATT RAYMOND.

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

d. The Court finds that the facts alleged by the Plaintiff, DIRECT GENERAL INSURANCE COMPANY, in its Complaint for Declaratory Judgment, the transcript of the recorded statement of RYAN PRATT RAYMOND, Plaintiff's Motion for Final Summary Judgment, and in the Affidavit of Kimberly Willcox, are not in dispute, which are as follows:

e. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # XXXXXX9695, is rescinded and is void *ab initio;*

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

g. The Defendant, PATRICIA LEBLANC, failed to disclose her husband, ROLAND RAYMOND, and ROLAND RAYMOND's son, RYAN PRATT RAYMOND, as additional household residents over the age of 15 at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # XXXXXX9695, issued by DIRECT GENERAL INSURANCE COMPANY;

h. The Defendant, PATRICIA LEBLANC breached the insurance policy contract and application for insurance, under the policy of insurance, bearing policy # XXXXXX9695, issued by DIRECT GENERAL INSURANCE COMPANY;

i. The material misrepresentation of Defendant, PATRICIA LEBLANC on the application dated March 26, 2020 for insurance, occurred prior to any Assignment of any personal injury protection ("PIP") Benefits to any medical provider, doctor and/or medical entity, under the policy of insurance, bearing policy # XXXXXX9695, issued by DIRECT GENERAL INSURANCE COMPANY;

j. There is no insurance coverage for PATRICIA LEBLANC for any bodily injury liability coverage, property damage liability coverage, and personal injury protection coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

k. There is no insurance coverage for RYAN PRATT RAYMOND for any bodily injury liability coverage, property damage liability coverage, and personal injury protection coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

l. There is no insurance coverage for ROLAND RAYMOND for any bodily injury liability coverage, property damage liability coverage, and personal injury protection coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

m. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, PATRICIA LEBLANC, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

n. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify RYAN PRATT RAYMOND, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

o. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify ROLAND RAYMOND, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

p. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify PATRICIA LEBLANC for any bodily injury liability claim for Nima Rocio Nemati arising from the accident of June 27, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

q. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify RYAN PRATT RAYMOND for any bodily injury liability claim for Nima Rocio Nemati arising from the accident of June 27, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

r. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ROLAND RAYMOND for any bodily injury liability claim for Nima Rocio Nemati arising from the accident of June 27, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

s. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify PATRICIA LEBLANC for any property damage liability claim for Nima Rocio Nemati arising from the accident of June 27, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

t. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify RYAN PRATT RAYMOND for any property damage liability claim for Nima Rocio Nemati arising from the accident of June 27, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

u. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ROLAND RAYMOND for any property damage liability claim for Nima Rocio Nemati arising from the accident of June 27, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

v. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify PATRICIA LEBLANC for any bodily injury liability claim for Herold Louis arising from the accident of June 27, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

w. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify RYAN PRATT RAYMOND for any bodily injury liability claim for Herold Louis arising from the accident of June 27, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

x. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ROLAND RAYMOND for any bodily injury liability claim for Herold Louis arising from the accident of June 27, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

y. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify PATRICIA LEBLANC for any property damage liability claim for Herold Louis arising from the accident of June 27, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy

XXXXXX9695;

z. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify RYAN PRATT RAYMOND for any property damage liability claim for Herold Louis arising from the accident of June 27, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

aa. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ROLAND RAYMOND for any property damage liability claim for Herold Louis arising from the accident of June 27, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

ab. There is no personal injury protection ("PIP") insurance coverage for RYAN PRATT RAYMOND for the accident which occurred on June 27, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

ac. There is no bodily injury liability coverage for Nima Rocio Nemati for the accident which occurred on June 27, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

ad. There is no property damage liability coverage for Nima Rocio Nemati for the accident which occurred on June 27, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

ae. There is no bodily injury liability coverage for Herold Louis for the accident which occurred on June 27, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

af. There is no property damage liability coverage for Herold Louis for the accident which occurred on June 27, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

ag. The Defendant, PATRICIA LEBLANC, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695, for the June 27, 2020 accident;

ah. The Defendant, RYAN PRATT RAYMOND, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695, for the June 27, 2020 accident;

ai. The Defendant, ROLAND RAYMOND, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695, for the June 27, 2020 accident;

aj. Nima Rocio Nemati is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695, for the June 27, 2020 accident;

ak. Herold Louis is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695, for the June 27, 2020 accident;

al. There is no insurance coverage for the motor vehicle accident which occurred on June 27, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

am. There is no personal injury protection ("PIP") insurance coverage for the accident which occurred on June 27, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

an. There is no property damage liability coverage for the accident which occurred on June 27, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

ao. There is no bodily injury liability coverage for the accident which occurred on June 27, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX9695;

ap. Since the policy of insurance issued to the Defendant, PATRICIA LEBLANC, bearing policy # XXXXXX9695, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from RYAN PRATT RAYMOND to any medical provider, doctor and/or medical entity is void;

aq. Plaintiff shall serve a copy of this Order, by regular mail, to all parties not receiving service of court filings through the Florida Court's E-Filing Portal, and shall file a certificate of service in the court file.

* * *

Insurance—Commercial property—Coverage—Loss resulting from restaurant closure due to COVID-19 pandemic—Policy's business interruption coverage that applies only if suspension of operations is "caused by direct physical loss of or damage to property" does not cover economic losses due to pandemic-related restaurant closure—Satisfaction of requirement for "direct physical loss of or damage to property" necessitates some tangible alteration to insured property

COMMODORE, INC., Plaintiff, v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-010334-CA-01, Section CA43. March 2, 2021. Michael Hanzman, Judge. Counsel: Richard H. Lumpkin, Nicole Langesfeld, and Noah Goldberg, for Plaintiff. Raquel Ramirez Jefferson, Jason A. Pill, John D. Mullen, and Sarah Van Schoyck, for Defendant.

FINAL JUDGMENT OF DISMISSAL

Defendants, Certain Underwriters at Lloyd's, London and related syndicates ("Defendants" or "Lloyd's"), move to dismiss Plaintiff Commodore, Inc.'s ("Plaintiff" or "Commodore") Petition for Declaratory Relief and Damages (Docket Entry "DE" 29).[1] The Complaint seeks a declaration that a commercial property insurance policy issued by Lloyd's indemnities against loss resulting from the suspension of Commodore's restaurant operations due to the COVID-19 pandemic.[2]

Defendants insist: (a) that Commodore's Complaint "does not plausibly allege any facts that would establish coverage" because its property was not "physically damaged or destroyed"; (b) because Commodore was not "prohibited from accessing (or allowing customers to access) its premises . . ." any loss resulting from its "voluntary" decision to "shut down its operation" was self-inflicted; and (c) that even if coverage otherwise exists, Plaintiff's loss would fall within the policy's "pollution exclusion . . . ." Mot. at 2.

In Plaintiff's view, the Complaint alleges a "bona fide dispute between the parties" and "a justiciable question as to the existence or non-existence" of a contract right. Because Plaintiff alleges it is in "doubt as to [that] right," it claims "an actual present need for declaration" and—for that reason alone—argues dismissal is not warranted. DE 37, Resp. to Mot. "Resp." at 3. Plaintiff then, "for purposes of preservation and completeness of the record," goes on to forcibly demonstrate that whatever "doubt" it may harbor on the coverage issue is slight because, in its view, the policy undeniably covers the alleged loss of business it has suffered. Resp. at 4-31.

The Court has carefully considered the parties' thorough briefing and entertained oral argument on February 26, 2021. The Motion is now ripe for disposition.

I. FACTS[3]

For almost three decades Plaintiff has owned and operated

GreenStreet Café, a bar and restaurant located in Coconut Grove. Plaintiff purchased from Defendant an all-risk commercial property policy insuring against, among other things, losses resulting from business interruption.[4] The policy, bearing number PRP 000345/2000 ("Policy"), covered the period from February 15, 2020 through February 15, 2021. A copy of the Policy is attached to the Complaint.

While the Policy is an "all-risk" contract, coverage for loss of "Business Income" is afforded ***only*** if a suspension of operations is "caused by direct physical loss of or damage to property" at the insured premises. Policy at CP 00 30 10 12 at 1 of 9. Assuming an insured suffers a "direct physical loss of or damage to property," thereby implicating this coverage, the Policy also insures against "Extra Expense" incurred during any "period of restoration," and against loss sustained if "access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage . . . ." *Id.*

During the policy term "a novel coronavirus ("COVID-19") originated in China, spread to Europe, and quickly came to the United States." Compl. ¶ 28. The virus, which is highly contagious, has wreaked global havoc, and to date over 500,000 Americans have perished after contracting it. Needless to say, in an effort to stave off the spread of the virus, the World Health Organization declared the COVID-19 outbreak a global pandemic, and state and local governments responded by ordering that " 'non-essential' or 'high risk' businesses . . . close [including] restaurants and bars such as GreenStreet." *Id.* ¶ 35-36. Plaintiff alleges that the pandemic and resulting closure orders have "caused and continues to cause direct physical loss of or damage to GreenStreet, because the restaurant is unusable for its intended purpose or unsafe for normal human occupancy or continued use." *Id.* ¶ 48. Plaintiff also alleges that "the imminent threat of the presence of COVID-19 in and around the area immediately surrounding GreenStreet resulted in a direct physical loss of or damage to property . . ." *Id.* ¶ 49.

In sum, Plaintiff has alleged that the pandemic, and resulting governmental closure orders, forced it to shut down its business, and that while "there is no method to test for the presence of COVID-19 on property," Compl. ¶ 50, the pandemic (and the closure orders) caused "direct physical loss of or damage to property" at its premises, thus triggering the Policy's "Business Income Coverage." And that is precisely what Plaintiff asks this Court to "declare." *Id*. ¶ 73. (GreenStreet seeks entry of an order declaring that it "has suffered and continues to suffer a covered loss under the Policy").

II. **GOVERNING LAW**

The interpretation of a contract, including one of insurance, presents a pure question of law, and is an exercise that rarely requires more than an examination of the policy itself. *Smith v. State Farm Mut. Auto. Ins. Co.*, 231 So. 2d 193 (Fla. 1970) (". . . the construction and interpretation of a contract is to be decided by the Court and not by the jury"); *Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000 (Fla. 2010) [35 Fla. L. Weekly S73a] (insurance policy interpretation is a question of law); *Jones v. Utica Mut. Ins. Co.*, 463 So. 2d 1153, 1157 (Fla. 1985) ("It is well settled that the construction of an insurance policy is a question of law for the court."); *Friedman v. Virginia Metal Products Corp.*, 56 So. 2d 515, 517 (Fla. 1952) (in interpretating an insurance contract, "[c]onsideration of extrinsic evidence is a rare matter of last resort to be employed only when an ambiguity cannot be resolved without 'outside aid' "); *Stuyvesant Ins. Co. v. Butler*, 314 So. 2d 567, 570 (Fla. 1975) (". . . if the language of the policy is plain and unambiguous, the words must be given their commonly accepted meaning; and when the meaning of the policy provision is clear and free from doubt, it will be enforced as written and resort will not be made to extrinsic evidence for the purpose of arriving at a proper construction of the language used").

Like any contract, an insurance agreement is "construed in accordance with the plain language of the policy as bargained for by the parties." *Fayad v. Clarendon Nat. Ins. Co.*, 899 So. 2d 1082, 1086 (Fla. 2005) [30 Fla. L. Weekly S203a] internal citations omitted). The terms of the policy "should be taken and understood in their ordinary sense," *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 736 (Fla. 2002) [27 Fla. L. Weekly S492a], and must be read "as a whole, endeavoring to give every provision its full meaning and operative effect." *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000) [25 Fla. L. Weekly S211a]. The contract should receive a construction that is "reasonable, practical, sensible, and just," and the Court must apply the terms of the policy as they would be understood by "ordinary people." *Gen. Star Indem. Co. v. W. Florida Vill. Inn, Inc.*, 874 So. 2d 26, 29 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1070b]; *State Farm Fire & Cas. Co. v. Castillo*, 829 So. 2d 242, 244 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D1845a] (". . . terms utilized in an insurance policy should be given their plain and unambiguous meaning as understood by the 'man-on-the-street' ").

"If the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the [other] limiting coverage, the "insurance policy is considered ambiguous," *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005) [30 Fla. L. Weekly S633a], and "any ambiguity which remains after reading each policy as a whole and endeavoring to give every provision its full meaning and operative effect must be liberally construed in favor of coverage and strictly against the insurer." *Washington Nat. Ins. Corp. v. Ruderman*, 117 So. 3d 943, 949-50 (Fla. 2013) [38 Fla. L. Weekly S511a]. But a court should not search for an ambiguity when none truly exists or, through interpretive gymnastics, give the contract a ". . . strained, forced or unrealistic construction." *Siegle,* 819 So. 2d at 736. Rather a court must apply the parties' contract as written, not "rewrite" it under the guise of judicial construction. *Gulliver Sch., Inc. v. Snay*, 137 So. 3d 1045 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D457a] ("Where contracts are clear and unambiguous, they should be construed as written, and the court can give them no other meaning."); *Pol v. Pol*, 705 So. 2d 51, 53 (Fla. 3d DCA 1997) [23 Fla. L. Weekly D75a] ("It is well established that a court cannot rewrite the clear and unambiguous terms of a voluntary contract.").

III. **ANALYSIS**

As a threshold matter, the Court concludes that Plaintiff has properly pled an action for declaratory relief, the preferred vehicle to adjudicate disputes over the meaning of an insurance policy. *See, e.g., Saunders v. Florida Peninsula Ins. Co.*, No. 3D19-1049, 2020 WL 7635823 (Fla. 3d DCA Dec. 23, 2020) [46 Fla. L. Weekly D25a]; *Spielberg v. Progressive Select Ins. Co.*, No. 4D19-3081, 2021 WL 509611 (Fla. 4th DCA Feb. 10, 2021) [46 Fla. L. Weekly D336a]; *People's Tr. Ins. Co. v. Franco*, 305 So. 3d 579 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D879b]. And generally speaking, "[a] motion to dismiss a complaint for declaratory judgment is not a motion on the merits. Rather, it is a motion only to determine whether the plaintiff is entitled to a declaration of rights, not to whether it is entitled to a declaration in its favor." *Franco,* 305 So. 3d at 583, quoting *Romo v. Amedex Ins. Co.*, 930 So. 2d 643, 648 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D571a].

This does not mean that an action for declaratory relief is immune from dismissal. To the contrary, where an exhibit attached to a complaint (here the Policy) contradicts the allegations in the complaint, the exhibits control and may form the basis for a motion to dismiss. *See Fladell v. Palm Beach Cty. Canvassing Bd.*, 772 So. 2d 1240, 1242 (Fla. 2000) [25 Fla. L. Weekly S1102b] (upholding the

trial court's dismissal of the action *with prejudice* because, even accepting the allegations in the complaint as true, they were fully negated by the exhibits attached to the complaint); *Franz Tractor Co. v. J.I. Case Co.*, 566 So. 2d 524, 526 (Fla. 2d DCA 1990) ("[a]ny exhibit attached to a pleading is part of the pleading for all purposes, and if an attached document negates a pleader's cause of action, the plain language of the document will control and may be the basis for a motion to dismiss"); *Zodiac Group, Inc. v. Axis Surplus Ins. Co.*, 542 Fed. Appx. 844, 848 (11th Cir. 2013) (affirming dismissal of complaint because the "plain language of the Policy precluded coverage"); *Super Cars of Miami, LLC v. Webster*, 300 So. 3d 752, 754-55 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D556a] ("[t]he interpretation of a contract, including whether the contract or one of its terms is ambiguous, is a matter of law. . .") quoting *Real Estate Value Co., Inc. v. Carnival Corp.,* 92 So. 3d 255, 260 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1461a].

There is no dispute here over what the operative contract is or what it says. The dispute is over what the undefined phrase "direct physical loss of or damage to property" means, as the parties debate one question: has Commodore suffered a "direct physical loss of or damage to" its property if, as alleged, "it is statistically certain that the virus was in and on the Property and was and continues to be on surrounding properties," (Compl. ¶ 50) and the threat and/or presence of the virus forced Plaintiff to cease operations?

Given the devastating impact COVID-19 has had on businesses throughout the country, it is not surprising that this Court is far from the first to address this question. Thus far, every federal district court that has confronted the issue, and which was required to apply Florida law, has found "that economic losses resulting from . . . COVID-19 are not covered . . . because such losses were not caused by direct physical loss of or damage to the insured property." *Carrot Love, LLC v. Aspen Specialty Insurance Company*, No. 20-23586-CIV, 2021 WL 124416, at *2 (S.D. Fla. Jan. 12, 2021); *see also Emerald Coast Restaurants, Inc. v. Aspen Specialty Ins. Co.*, 2020 WL 7889061, at * 2 (N.D. Fla. Dec. 18, 2020) (same) ; *Mena Catering, Inc. v. Scottsdale Ins. Co.*, No. 20-CV-23661, 2021 WL 86777, at *7 (S.D. Fla. Jan. 11, 2021) (same); *Sun Cuisine, LLC v. Certain Underwriters at Lloyd's London*, No. 20-CV-21827, 2020 WL 7699672, at *4 (S.D. Fla. Dec. 28, 2020) (same); *El Novillo Restaurant v. Certain Underwriters at Lloyd's London*, 20-CV-21525, 2020 WL 7251362, at *6 (S.D. Fla. Dec. 7, 2020) (same); *Malaube, LLC v. Greenwich Ins. Co.*, 20-22615-CIV, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020) (same); *Island Hotel Properties, Inc. v. Fireman Fund Insurance Co.*, No. 4:20-CV-10056-KMM, 2021 WL 117898, at *3 (S.D. Fla. Jan. 11, 2021) (same); *Digital Age Marketing Group, Inc., v. Sentinel Insurance Co. Ltd.*, No. 20-61577-CIV, 2021 WL 80535, at *5 (S.D. Fla. Jan. 8, 2021) (same); and *Town Kitchen, LLC v. Certain Underwriters at Lloyd's of London*, Case No. 20-2283-CIV (S.D. Fla. Feb. 26, 2021) (same). The majority of Florida State courts, as well as courts outside of Florida, concur.[5,6]

These decisions have applied precedent holding that *physical* loss or damage to tangible property is the *sine qua non* to establishing business interruption coverage under a commercial insurance policy that, like this one, requires "direct physical loss of or damage to property." *See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Texpak Group, N.V.*, 906 So. 2d 300, 302 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D750a] (". . . business interruption and extra expense losses are covered only if 'resulting from' damage or destruction of real or personal property caused by a covered peril"); *Homeowners Choice Prop. & Cas. v. Maspons*, 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D203a] (" 'Direct' and 'physical' modify loss and impose the requirement that the damage be actual."); *Ramada Inn Ramogreen, Inc. v. Travelers Indem. Co. of Am.*, 835 F. 2d 812, 814 (11th Cir. 1988) (applying Florida law and explaining that "recovery is intended when the loss is due to inability to use the premises where the damage occurs"); *Mama Jo's, Inc. v. Sparta Ins. Co.*, 17-CV-23362-KMM, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018) aff'd No. 18-12887, 2020 WL 4782369, at *8 (11th Cir. Aug. 18, 2020) (holding that increased cleaning due to dust and debris does not constitute "direct physical loss" because there was no actual change in the insured property and the property did not become "uninhabitable" or "substantially unusable"); *Dictiomatic Inc. v. U.S. Fid. & Guar. Co.*, 958 F. Supp. 594, 603 (S.D. Fla. 1997) (the insured must prove there was a direct physical loss of or damage to covered property).

Decisions involving COVID-19 related claims acknowledge, as they must, that any ambiguity in an insurance contract must be construed against the carrier, and that the undefined phrase "direct physical loss of or damage to" must be "given its common meaning," *Rockhill Ins. Co. v. Northfield Ins. Co.*, 297 F. Supp. 3d 1279, 1286 (M.D. Fla. 2017)—*i.e.*, as it would be understood by the "man-on-the-street." *Castillo,* 829 So. 2d at 244. But most courts have (at least implicitly) concluded that the average "man-on-the-street" would not say that the presence of a contagious virus causes "physical" loss or damage to property. *See also* 10A Couch on Ins. § 148:46 (3d. ed. 1998)) ("The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.").

Undaunted by this sea of adverse precedent, Plaintiff insists that these courts have erred, and that this policy language is at the very least ambiguous and can be reasonably interpreted as covering economic losses caused by the COVID-19 pandemic or, put another way, that the "clause is ambiguous." *Auto-Owners Ins.*, 756 So. 2d at 35-36 (". . . because the . . . clause is susceptible to differing interpretations, that clause is ambiguous. Therefore, we are obligated to construe the ambiguity against the drafter and in favor of the insured."). Plaintiff first points out that an "all risk" policy "creates a special type of coverage that extends to risks not usually covered under other insurance," thereby affording broad protection. *LaMadrid v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 567 Fed. Appx. 695, 700 (11th Cir. 2014); *see also Fayad,* 899 So. 2d at 1085 ("Unless the policy expressly excludes the loss from coverage, this type of policy provides coverage for all fortuitous loss or damage other than that resulting from willful misconduct or fraudulent acts."). This is true, but irrelevant, as the issue here is not whether a particular "peril" is covered, but rather whether the facts, as alleged, could permit a trier of fact to conclude that Plaintiff has suffered a "direct physical loss of or damage to property." *See, e.g., Sebo v. Am. Home Assurance Co., Inc.*, 208 So. 3d 694, 696-97 (Fla. 2016) [41 Fla. L. Weekly S582a] (". . . an 'all-risk' policy is not an 'all loss' policy, and this does not extend coverage for every conceivable loss") (internal citations omitted).

Plaintiff next reminds the Court that the operative phrase here—"direct physical loss of or damage to property"—is undefined, and urges as broad an "interpretation" of this language as possible. *See, e.g., State Farm Fire & Cas. Co. v. CTC Dev. Corp.,* 720 So. 2d 1072, 1076 (Fla. 1998) [23 Fla. L. Weekly S527a] (when terms of a policy are undefined, "the insurer cannot take the position that there should be a 'narrow, restrictive interpretation of the coverage provided"). The Court agrees that undefined terms are to be given a meaning consistent with ordinary usage. But courts applying Florida law have generally found that this phrase, given its *ordinary* meaning, requires some actual physical harm or loss to tangible property.

Plaintiff also emphasizes that the phrase "direct physical loss of or damage to" reads in the "disjunctive," and that the occurrence of either a "loss of" *or* "damage to" property triggers coverage. Thus, Plaintiff argues it suffered a "loss" even if its property was never "damaged." Plaintiff is again correct, but the problem here is not that it has suffered no "loss." It clearly has. The problem is that the neither the "loss" nor "damage" suffered was "direct" and "physical," as these words have been interpreted by precedent. *See Maspons*, 211 So. 3d at 1069 (" 'Direct' and 'physical' modify loss and impose the requirement that the damage be actual."); *Rose's 1, LLC,* Case No. 2020-CA002424 ("Under a natural reading of the term 'direct physical loss,' the words 'direct' and 'physical' modify the word 'loss.' As such, pursuant to Plaintiffs' dictionary definitions, any 'loss of use' must be caused, without the intervention of other persons or conditions, by something pertaining to matter—in other words, a direct physical intrusion on to the insured property.").[7]

While Plaintiff's arguments have been rejected by most courts applying Florida law, not all jurisdictions interpret this undefined phrase so restrictively, and many courts—applying the law of those jurisdictions - have found business interruption coverage for losses resulting from COVID-19 and other imperceptible contaminates. *See, e.g., Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020) (discussing dictionary definitions of "direct" ("characterized by a close logical, causal, or consequential relationship"), "physical" ("having material existence: perceptive especially through the senses and subject to the laws of nature"), and "loss" ("the act of losing possession" and "deprivation") in determining the plain and ordinary meaning of the phrase "direct physical loss"); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 20-CV-00383-SRB, 2020 WL 5637963 (W.D. Mo. Sept. 21, 2020) (same); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) ("Direct physical loss also may exist in the absence of structural damage to the insured property."); *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, 800 N.Y.S.2d 356 (N.Y. sup. Ct. 2005) (noxious particles present in the insured property constituted property damage under the terms of the policy); *Am. All. Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957) (property was impacted with radioactive dust and radon gas thereby causing physical loss and damage); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014) (finding release of ammonia into building constituted "physical loss" even though no structural damage to building); *Port Auth. v. Affiliated FM Ins. Co.*, 311 F. 3d 226, 235 (3d Cir. 2002) ("physical loss or damage" triggered where release of asbestos "nearly eliminated or destroyed" the property's function, rendering the structure "useless or uninhabitable"); *Matzner v. Seaco Ins. Co.*, No. Civ. A. 96-0498-B, 1998 WL 566658 at *3 (Mass. Super. Aug. 12, 1998) (carbon monoxide infiltration without structural damage to building constituted "physical loss of or damage to property"); *Farmers Ins. Co. v. Trutanich*, 858 P. 2d 1332, 1336 (Or. Ct. App. 1993) (odor from methamphetamine that infiltrated property constituted "direct physical loss" even though structure of property not affected); *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F. 3d 226, 236 (3d Cir. 2002) (physical loss or damage results "if an actual release of asbestos fibers from asbestos containing materials has resulted in contamination of the property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable, or if there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such a loss of utility"); *In Re: Society Insurance Co. Covid-19 Business Interruption Protection Ins. Litigation*, No. 20-C-5965, MDL No. 2964 (N.D. Ill. Feb. 22, 2021) (finding that the disjunctive "or" in the phrase "direct physical loss of or damage to covered property" means that "physical loss" must cover something different than "physical damage" and, therefore, the plaintiff need not show any physical change to the property for coverage to extend where there is a "loss of" the property).

As this considerable precedent amply illustrates, the question presented here is reasonably debatable, and many jurists have concluded that businesses forced to close due to COVID-19 and analogous perils have suffered a "direct physical loss of or damage to property" and are thus entitled to business interruption coverage. In fact, there is perhaps no more compelling anecdotal evidence of "ambiguity" than the ***exhaustive*** judicial debate this phrase has engendered, as truly unambiguous contract language would never require so much analysis or spawn so much conflicting precedent.

IV. CONCLUSION

As other courts have observed, "there is no doubt that the COVID-19 crisis" has "severely affected" businesses throughout the country, including GreenStreet Café. *Diesel Barbershop,* 2020 WL 4724305 at *7. And like other courts, I am sympathetic to those businesses, particularly small businesses, that have suffered financially as a consequence of this pandemic. But Florida precedent strongly suggests that "direct physical loss of or damage to property" requires some tangible alteration to insured property, something Plaintiff has not—and cannot—allege. As Judge Moreno succinctly put it, "coronavirus particles damage lungs, they do not damage buildings," and Plaintiff's property "did not change" as a result of the COVID-19 pandemic. *Town Kitchen,* Case No. 20-2283-CIV.

This Court, however, believes that this contest is *much* closer than the judicial scoreboard suggests. Defendants, as drafters of this policy, could have put this issue to rest, and foreclosed any arguable "ambiguity," by either defining the phrase "direct physical loss of or damage to property" with precision, *or* specifically excluding losses caused by virus, as many policies do. Had these insurers done either, Plaintiff and similarly situated insureds would have been warned, in plain English, that they would not be protected against this peril, a proverbial black swan event. And courts throughout the country would not have been forced to debate the meaning of this undefined phrase. But insurers have yet to heed the warning given by our Supreme Court over fifty (50) years ago, when it observed that:

> There is no reason why such [insurance] policies cannot be phrased so that the average person can clearly understand what he is buying. And so long as these contracts are drawn in such a manner that it requires the proverbial Philadelphia lawyer to comprehend the terms embodied in it, the courts should and will consture [sic] them liberally in favor of the insured and strictly against the insurer to protect the buying public who rely upon the companies and agencies in such transactions.

Hartnett v. S. Ins. Co., 181 So. 2d 524, 528 (Fla. 1965).

Defendants chose not to close the door on this issue through clear and precise drafting, thereby advising their insureds "what [they were] buying." *Id.* Instead, and as they often do, they have elected to "litigate" the meaning of this cryptic phrase over and over again, thereby unnecessarily taxing the judiciary. For this reason, had it been writing on a clean slate, this Court would likely have done exactly what it has done many times before: find this policy language ambiguous and resolve that ambiguity in favor of coverage. *See, e.g., Sky Bell Asset Management, LLC And Sky Bell Select, L.P., vs. National Union Fire Insurance Co. Of Pittsburgh, Pa, And Federal Insurance Co.,* 23 Fla. L. Weekly Supp. 535a (Fla. 11th Jud. Cir., Dec. 17, 2015); *Suarez v. State Farm*, 24 Fla. L. Weekly Supp. 27c (Fla. 11th Jud. Cir., Apr. 14, 2016); *Sharon Urscheler v. Coastal Construction,* 24 Fla. L. Weekly Supp. 31a (Fla. 11th Jud. Cir., Apr. 22, 2016).

But this Court is not writing on a clean slate.

In any event, while all trial courts—including this one—like to think that their "opinion" matters, this issue of pure law will be decided by our intermediate appellate courts, and possibly our Supreme Court. The sooner that happens the better. So consistent with the majority of courts applying Florida law, and in the interest of judicial economy, this Court reluctantly grants Defendants' Motion to Dismiss, finding that the Policy does not afford coverage for the economic losses Plaintiff sustained when forced to close due to the COVID-19 pandemic.[8] The Court will not, however, be the least bit surprised (or disappointed) if this Final Judgment is reversed on appeal. Insurance companies should draft their policies in plain English. And if they persist in refusing to do so, they should not be heard to complain about having to indemnify against a risk they ***claim*** not to have underwritten.

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

1. Defendants' Motion to Dismiss (DE 29) is **GRANTED**.

2. Plaintiff's Complaint is dismissed **with prejudice**.[9]

3. Plaintiff shall take nothing from this action and Defendants shall go hence without day.

4. The Court retains jurisdiction to entertain all timely and authorized post-judgment motions.

---

[1]Commodore commenced this action through a "Petition" but does not specify any statute or rule authorizing such a pleading. *See Blackboard Specialty Ins. Co. v. YTech-1428 Brickell, LLC*, 45 Fla. L. Weekly D2754a (Fla. 3d DCA Dec. 9, 2020) ("Florida Rule of Civil Procedure 1.100(a) allows the filing of petitions only to the extent that they are specifically 'designated by a statute or rule.' "). The Court will therefore treat Commodore's filing as a "Complaint" and designate Commodore as "Plaintiff." The Defendants are a number of Lloyds syndicates and participating carriers. They will be referred to collectively as "Defendants."

[2]Plaintiff owns, and insured, the GreenStreet Café in Coconut Grove.

[3]The facts as alleged must be taken as true. *The Fla. Bar v. Greene,* 926 So. 2d 1195, 1199 (Fla. 2006) [31 Fla. L. Weekly S171a] ("A motion to dismiss is designed to test the legal sufficiency of the complaint, not to determine factual issues, and the allegations of the complaint must be taken as true and all reasonable inferences therefrom construed in favor of the nonmoving party.")

[4]Referred to as "time-element" coverage because the quantum of loss is tied to how long it takes to replace or repair the damaged property to its normal and intended use.

[5]*See, e.g., Catlin Dental, P.A. v. Cincinnati Indem. Co.*, Case No. 20-CA-4555 (Fla. Cir. Ct. Lee Cnty. Dec. 11, 2020) ("The Coronavirus does not physically alter the appearance, style, color, structure or other material dimension of property. Even if Catlin had alleged the virus to be present at the Insured's premises, this would be insufficient."); *Dime Fitness, LLC v. Markel Ins. Co.*, 2020 WL 6691467, at *3 (Fla. Cir. Ct. Hillsborough Cnty. Nov. 10, 2020) (". . . this purely economic loss, as well as a lack of access, would not qualify as a covered cause of loss because no direct physical loss has been alleged"); *Horizon Dive Adventures v. Tokio Marine Ins.*, Case No. 20-CA-000159-P (Fla. Cir. Ct. Monroe Cnty. Oct. 8, 2020) (" 'Direct' and 'physical' modify loss and impose the requirement that the damage be actual.") (internal citations omitted); *10E, LLC v. Travelers Indem. Co. of Connecticut*, 2:20-CV-04418-SVW-AS, 2020 WL 5359653, at *4 (C.D. Cal. Sept. 2, 2020) ("Physical loss or damage occurs only when property undergoes a "distinct, demonstrable, physical alteration."); *Diesel Barbershop, LLC v. State Farm Lloyds*, 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020) (direct physical loss requires "tangible injury to [physical] property," and rejecting claim based upon closure caused by COVID-19); *Rose's 1, LLC v. Erie Ins. Exch.*, Case No. 2020-CA002424 (D.C. Supreme Court Aug. 6, 2020) (government shut down resulting from COVID-19 pandemic did not cause "direct physical loss or damage to" insured property); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 2:20-CV-00401, 2020 WL 6436948, at *5 (S.D.W. Va. Nov. 2, 2020) (". . . even when present, COVID-19 does not threaten the inanimate structures covered by property insurance policies . . ."). *Edison Kennedy, LLC v. Scottsdale Ins. Co.*, 8:20-CV-1416-T-02SPF, 2021 WL 22314 (M.D. Fla. Jan. 4, 2021) (where COVID-19 was found to be actually present, "the necessity of cleaning the property to remove particles resting on the property does not mean the property suffered direct physical damage or loss").

[6]Because courts continue to rule on this issue at a rapid pace, the parties have filed Notices of Supplemental Authority on an almost daily basis. *See, e.g.,* D.E. 51, 53-56. The Court has considered—but does not find it necessary to specifically address—*all* of the recent decisions provided. Suffice it to say, the majority of courts that have analyzed the issue have found that the policy language employed here does not provide business interruption coverage for losses sustained due to COVID-19.

[7]*Azalea, Ltd. v. Am. States Ins. Co.*, 656 So. 2d 600 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D1501a]—a case heavily relied upon by Plaintiff - does not hold otherwise. In *Azalea* an unknown substance was released by a sewage treatment plant and it "actually covered and adhered to the interior of the structure," thereby causing physical damage. *Id.* at 602.

[8]Because the court finds that the Policy does not afford coverage in the first instance, it need not address the insurer's reliance on its "Pollution Exclusion."

[9]In cases where it is apparent that a pleading cannot be amended to state a cause of action, or where an amendment would be futile, dismissal *with prejudice* is appropriate. *Central Florida Investments, Inc. v. Charles Levin Timeshares*, 659 So. 2d 492 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D2010a]; *Fladell*, 772 So. 2d at 1242 (upholding the trial court's dismissal of the action *with prejudice* because, even accepting the allegations in the complaint as true, they were fully negated by the exhibits attached to the complaint).

* * *

Criminal law—Pretrial release—Where defendant waited until expiration of forty-day time limit set by Rule 3.134 to file motion for release on own recognizance, and state cured error by filing formal charges by time of hearing on motion, defendant is not entitled to release

STATE OF FLORIDA, Plaintiff, v. RAUL PEREZ, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F21-5165, Section 09. April 17, 2021. Joseph Perkins, Judge. Counsel: Marbely Hernandez, for Plaintiff. Alexander J. Michaels, for Defendant.

ORDER DENYING MOTION FOR IMMEDIATE RELEASE PURSUANT TO RULE 3.134 OF FLORIDA RULES OF CRIMINAL PROCEDURE

Sixty-two days after arrest,[1] Raul Perez moved for release pursuant to Rule 3.134 of the Florida Rules of Criminal Procedure because the State had not yet charged him. The Court gave Perez a hearing on the motion a few hours later, but before the hearing the State filed formal charges. Where, as here, a defendant waits more than forty days to file a motion for release under Rule 3.134 and, before the hearing on the motion, the State files formal charges, the defendant is not entitled to release. *Ford v. Campbell*, 697 So. 2d 1301, 1302-03 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D2004a];[2] *see Bowens v. Tyson*, 578 So. 2d 696, 697 (Fla. 1991) (holding, under materially identical predecessor to Rule 3.134, that where, after the filing of a motion for release but before hearing on the motion the State files charges, the defendant is not entitled to release). The Court therefore denies Perez's motion.

DONE AND ORDERED at Miami-Dade County, Florida, this April 17, 2021, *nunc pro tunc* to April 15, 2021.[3]

---

[1]The arrest affidavit alleges that on February 11, 2021, after carjacking the victim at gunpoint, Perez got into the victim's car and started shooting at the victim, who was running away. Shortly thereafter, it alleges, Perez crashed the victim's car and suffered serious injuries. The arresting officer testified that Perez was brought to the hospital, handcuffed to the bed with an officer standing outside, and not free to leave. At this point, Perez was "arrested," even though he was not booked in jail until he was discharged from the hospital on March 24, 2021. *See Perry v. State*, 968 So. 2d 70, 75 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2630a] ("[T]he . . . concept of an arrest as 'the apprehension or taking into custody of an alleged offender' does not extend to post-arrest intake procedures, such as booking.").

[2]The parties did not present, and the Court's own research did not reveal, any other on point district court or Supreme Court opinion. As a result, *Ford* is currently binding on all trial courts in Florida. *See Link v. State*, 273 So. 3d 1115, 1116 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1226b].

[3]The Court denied Perez's motion in open court on April 14, 2021. On April 15, 2021, the Court *sua sponte* vacated its denial and then denied Perez's motion in open court again on different grounds. This written order memorializes the Court's April 15th order.

* * *

Municipal corporations—Annexation—Petition for contraction—Injunctions—Motion for summary judgment on count of developers' complaint seeking to enjoin city and contraction proponents from proceeding further with statutory contraction process is denied—No merit to argument that signors of contraction petition are estopped from utilizing process because they moved to area knowing that homes were within city limits and have accepted city benefits—Section 171.051(2), which requires that 15% of voters in pertinent area sign contraction petition, does not exclude voters who moved to area knowing that residences were within city limits

WELLEN PARK, LLLP, MATTAMY TAMPA SARASOTA, LLC, et al., Plaintiffs, v. WEST VILLAGERS FOR RESPONSIBLE GOVERNMENT, INC., et al., Defendants. Circuit Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2020-CA-3838-SC. March 25, 2021. Hunter W. Carroll, Judge. Counsel: David Smolker and McLane E. Evans, Tampa; and Jeff Boone, Boone Law Firm, P.A., Venice, for Wellen Park, LLP, Mattamy Tampa/Sarasota, LLC, Neal Communities of Southwest Florida, LLC, and GB WV, LLC, Plaintiffs. Luke Lirot, Luke Charles Lirot, P.A., Clearwater, for West Villagers for Responsible Government, Inc., John Meisel, and David Fernstrum; and Nikki C. Day and Alan S. Zimmet, Bryant Miller Olive, P.A., Tampa, for City of North Port, Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNT 9 OF THE THIRD AMENDED COMPLAINT

BEFORE THE COURT is Developers' Motion for Final Summary Judgment as to Count 9 of the Third Amended Complaint [DIN 82]. The Contraction Proponents opposed the motion [DIN 97]. The City of North Port took no position. On March 24, 2021, the Court conducted oral argument on the motion.

The Court denies Developers' motion because the Developers did not demonstrate an entitlement to judgment in their favor as to Count 9. The case law Developers cite primarily concern challenges to an *initial* determination to annex property into a municipality, not a later in time request to deannex land from a municipality that adhere to Florida's contraction statutes. Developers' cited case law did not address, and is not directly applicable to, Florida's existing statutes governing the contraction process.

Because the plain meaning of section 171.051(2), Florida Statutes permits "qualified voters in an area desiring to be excluded from the municipal boundaries" to sign a contraction petition, the Court rejects Developers' implicit request to write into that statute a limitation the Legislature did not include.

The Court reminds all that nothing in this Order expressly or implicitly addresses the feasibility of the contraction petition that is pending before the City of North Port.

The parties, operative pleading, and partial summary judgment motion

Plaintiffs are Wellen Park, LLLP; Mattamy Tampa/Sarasota, LLC; Neal Communities of Southwest Florida, LLC; and GB WV, LLC (collectively, "Developers"). Defendants are West Villagers For Responsible Government, Inc. ("West Villagers") and the City of North Port ("City"). The Court permitted John Meisel and David Fernstrum to become intervention defendants. The Court will refer to West Villagers, Mr. Meisel, and Mr. Fernstrum collectively as "Contraction Proponents." The terms "contraction" and "deannexation" mean the same thing and are used interchangeably in this Order.

Developers' operative complaint is their eight-count Third Amended Complaint [DIN 80], although there is no Count 5, so Developers labeled the eighth count as Count 9. In brief, the Developers seek to prevent the deannexation of the Wellen Park area from the City of North Port. In this lawsuit, they seek to accomplish this goal by seeking equitable, injunctive, and declaratory relief. The Court previously denied the Developers' efforts to seek a temporary injunction as to Count 1 under a former complaint [DIN 76]. *Wellen Park, LLLP v. West Villagers for Responsible Government, Inc.*, 2020-CA-3838-SC, 2021 WL 277433 (Fla. 12th Cir. Ct. Sarasota Jan. 25, 2021) [28 Fla. L. Weekly Supp. 1098a].

In Count 9—the only count applicable to Developers' motion—the Developers seek to enjoin both the City and the Contraction Proponents from proceeding further with the statutory contraction process by attacking the ability of the signors of the contraction petition to sign the petition. Developers contended in their motion that every verified signor of the Contraction Petition moved to Wellen Park knowing their home was within the City limits and has accepted City benefits. Having this knowledge and accepting municipal benefits, according to the Developers, they are now estopped from utilizing the statutory contraction process.

Specifically, Developers' wherefore clause for Count 9 sought for the Court to—

> (i) declare the Contraction Petition null and void on the grounds that the Signatories' and the Intervenors' acceptance of the privileges and benefits provided by the City and their acquiescence to their property's location within City renders contraction unreasonable and inequitable; (ii) declare that the Signatories' and the Intervenors' acceptance of the privileges and benefits provided by the City and their acquiescence to their property's location within City estops them from petitioning to contract the Annexed Area from the City's municipal boundaries' (iii) enjoin the City, the Intervenors and WVFRG from proceeding further under section 171.051 and 171.052, Florida Statutes, with determining the feasibility of, and from initiating an ordinance de-annexing the Annexed Area from the City's municipal boundaries pursuant to the Contraction Petition; (iv) award Wellen Park, Neal, Sembler and Mattamy their attorney's fees and costs; and (v) grant such other relief as is just and equitable under the circumstances.

Motion at pp. 32-33.

At oral argument, the Developers sought to limit its request by not seeking entry of an injunction as part of the motion (but reserving the right to seek one later). Developers also suggested a change to their position—that they did not want to stop the feasibility study required by section 171.051(2), but instead simply sought a declaration of their rights, reserving the ability to obtain full relief later. Despite their last minute suggested alteration during oral argument, what Developers pled in Count 9—and what they specifically requested in their wherefore clause—directly challenged the ability of the voters living in Wellen Park to sign the contraction petition. The Court, therefore, will address what Developers pled and noticed for hearing.

Facts

The facts necessary to address this motion are few, and they are undisputed.

The City of North Port is entirely within Sarasota County. The City primarily lies to the east of the Myakka River, both in terms of land size and population. In a series of 9 separate annexations in 2002, the City of North Port annexed into the City approximately 8,488.6 acres of mostly undeveloped land that lay on the west-side of the Myakka River ("the Annexed Area"). The Annexed Area is entirely within the West Villages Improvement District ("District"), an independent special district. *See* ch. 2004-456, Laws of Fla. This area also is known as Wellen Park.

Since at least 2006, the City in coordination with the District have provided, and to this day continue to provide, either directly or by interlocal agreement, various public facilities and services to the Annexed Area. Among those facilities and services are fire rescue; police; emergency medical services; solid waste collection, recycling, and disposal; water and wastewater services; and park and recreational facilities and services.

Utilizing a provision of Florida law, the Contraction Proponents circulated a contraction petition that could lead to the deannexation of Wellen Park, including the Annexed Area, from the City. At least 1,315 individuals signed the contraction petition. The City submitted those signatures to Sarasota's elected Supervisor of Elections for verification. On November 16, 2020, Ron Turner, Sarasota's Supervisor of Elections, determined 1,260 signatures were valid for individuals living in that part of the City lying west of the Myakka River. This number was sufficient to proceed to the next step in the statutory contraction process.

Each of the 1,260 individuals whose signatures were verified by the Supervisor of Elections has a home address within five separate subdivisions within the Annexed Area. This includes Mr. Meisel and Mr. Fernstrum. The first—and earliest—date of sale of any platted lot or home within those five subdivisions occurred on June 20, 2006. Accordingly, each of the 1,260 verified signors of the contraction petition initially moved to their home in the Annexed Area knowing the home was in the City of North Port. Since moving to the Annexed Area, those individuals have received various City services.

Analysis

The Florida Supreme Court recently changed Florida's summary judgment standard effective May 1, 2021. *In re Amendments to Florida Rule of Civil Procedure 1.510*, 309 So. 3d 192 (Fla. 2020) [46 Fla. L. Weekly S6a]. Even though it is in the twilight of its existence, the Court applies the existing summary judgment standard. *Acevedo v. R.J. Reynolds Tobacco Company*, 2021 WL 475257, *1, n.1 (Fla. 3d DCA Feb. 10, 2021) [46 Fla. L. Weekly D329a] (declining to apply the new summary judgment standard because the effective date is May 1, 2021). The parties unanimously agreed the Court is to apply the current standard, even though that standard changes in a little more than a month.

Under the current summary judgment standard, it is the movant's burden to prove the nonexistence of any genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *E.g. Estate of Githens ex rel. Seaman v. Bon Secours—Maria Manor Nursing Care Center, Inc.*, 928 So. 2d 1272, 1274 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1482a]. Once met, the burden shifts to the nonmovant to come forward with summary judgment evidence to establish a disputed issued of material fact. The merest possibility of the existence of a disputed issue of fact—with every possible inference viewed in favor of the nonmovant—will defeat summary judgment.

Where a defendant has asserted an affirmative defense, the moving plaintiff must either disprove those defenses by evidence or establish their legal insufficiency. *Peterson v. Lundin*, 148 So. 3d 784, 786 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D1506a]. "Additionally, when, as [is] the case here, a plaintiff moves for summary judgment before the defendant files an answer to the complaint, the burden is on the plaintiff to establish that no answer the defendant might serve or affirmative defense [the defendant] might raise could present a genuine issue of material fact. *Ioannides v. Alonzo*, 65 So. 3d 1202, 1202-03 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1601a].

* * *

Developers' partial summary judgment motion is simple and straightforward. Developers contend that each signor to the contraction petition moved to their home knowing it was within the City of North Port, and since moving to the City they have been receiving City services. This means, according to the Developers, that the signors are estopped from seeking deannexation. In other words, each of the signors of the contraction petition legally was ineligible from signing the contraction petition.

The Court disagrees.

In support of their position, Developers cite several equitable estoppel cases, which they contend stand for the following principle: "One who acquiesces in inclusion of their property within the municipal boundaries of a city and accepts the benefits and privileges afforded by the city is estopped to seek exclusion of their property from within those same municipal boundaries." Motion at p.5, 18. Notably, these cases all involved a judicial challenge to the *original annexation* into the municipality. None of those cases addressed Florida's statutory contraction process to remove land from the municipality. This factual distinction makes Developers' cases inapplicable to the statutory contraction process.

The Developers principally rely on *State ex rel. Bower v. City of Tampa*, 316 So. 2d 570 (Fla. 2d DCA 1975). *Bower* involved a quo warranto challenge to a 1953 special act of the Legislature that annexed land into the City of Tampa, including uninhabited tidal shores near the Courtney-Campbell Causeway. The plaintiffs that sued in 1971 seeking to have the 1953 special act declared unconstitutional purchased those tidal shore lands near the Causeway in 1969. The plaintiffs purchased those tidal shores land knowing they had been annexed into the City many years prior. Under the facts of that case, the Second District held the plaintiff landowners were "estopped to deny the extension of the corporate limits of the City of Tampa" due to the passage of time. *Id.* at 573-574. In other words, the subsequent landowners could not challenge the decision to annex the land into the municipality because they bought knowing of its inclusion within Tampa's city limits. Nothing in that case addressed the then existing statutory contraction process. And that is not unexpected, as *Bower* involved a constitutional challenge to the *original* annexation.

The Developers also rely heavily on *State ex rel. Davis v. City of Clearwater*, 139 So. 377 (Fla. 1932). *Davis* is similar to *Bower* in that it involved a challenge to the *original annexation* into the municipality. In *Davis*, Florida's Attorney General and affected landowners via quo warranto challenged a 1925 special act that annexed land into the City of Clearwater. The plaintiffs made a direct challenge to the constitutionality of the initial annexation: "the question to be decided is whether the act of the Legislature . . . constitutes a palpably arbitrary, unnecessary and flagrant invasion of the personal and property rights' of the complainants[.]" *Id.* at 381 (quotations omitted). In rejecting the challenge, the Florida Supreme Court explained that no one objected to the special act, that municipal funds were expended to benefit the newly annexed area, that at least one year elapsed before suit was filed, and the residents received municipal services. Against that factual situation, the *Davis* court held that the affected landowners could not challenge the *original* annexation of the affected land into the City of Clearwater. Like *Bower*, nothing in *Davis* addressed the then existing statutory contraction process.

The other cases Developers cite also involved challenges to the *original annexation* determination: *State ex rel. Landis v. Town of Boca Raton*, 177 So. 293 (Fla. 1937) (allowing landowners "to question the validity of their inclusion within the municipality" where such land is "wild, unoccupied, unimproved [ ] so remote from a municipality that they can receive no benefit therefrom"); *City of Coral Gables v. State ex rel. Gibbs*, 5 So. 2d 241 (Fla. 1941) (*Coral Gables I*) (rejecting challenge to legislative act that included land within the City of Coral Gables); *City of Coral Gables v. State ex rel. Gibbs*, 5 So. 2d 244 (Fla. 1941) (reversing trial court decision and direction to follow *Coral Gables I*); *City of Auburndale v. State ex rel. Landis*, 184 So. 787 (Fla. 1938) (allowing a challenge to proceed that sought to exclude land from original inclusion within the City of Auburndale).

The Court believes there is a significant difference between a challenge to an original annexation of land into a municipality and the

application of a statutory process the Legislature designed that could lead to the deannexation of land from a municipality. This is because an attack to the *original annexation* either questioned the legislative power to annex the property or questioned whether the annexed land was so "wild, unoccupied, unimproved [and] so remote from a municipality" that the annexation was legally invalid. In contract.

Developers do not challenge the legislative power to permit deannexation; instead, they attack the credentials of the qualified voters who signed the contraction petition. As seen, then, none of Developers' cases are directly applicable to the situation here—where qualified voters residing in the City seek to exclude themselves from the City by utilizing the statutory contraction process.

Florida law establishes a statutory process that could result in the contraction of a municipality's boundary. Section 171.051, Florida Statutes (2020), contains the present-day statutory requirements. Contraction—also known as deannexation—is not a new concept. More than 150 years ago, the Florida Legislature established a process to contract the boundaries of a municipality. *See* ch. 1688, §29, Laws of Fla. (1869), approved Feb. 4, 1869. Over the years, the Legislature has amended the deannexation process. While the details of the process have changed, the potential for deannexation has been a constant since at least 1869, if not prior. *See* ch. 3163, §2, Laws of Fla. (1874); ch. 3024, Laws of Fla. (1877), approved March 8, 1877; ch. 4601, Laws of Fla. (1897), approved June 5, 1897; ch. 5197, Laws of Fla. (1903), approved June 4, 1903; recodified as section 171.01, Florida Statutes through 1973; substantial reworking of chapter 171 by ch. 74-190, Laws of Fla. (1974); and ch. 90-279, §17, Laws of Fla. (1974) (Note, this listing may not be complete but includes those references the Court could verify given the Court's limited access to older statute books.).

The *Bower* court provides good insight into the Legislature's role involving municipalities that is applicable here. The *Bower* court cited with approval the long-standing rule of law "that the Legislature has life and death powers over municipalities[.]" *Bower*, 316 So. 2d at 571. And under that legislative power, the Legislature adopted via general law the statutory deannexation process. Developers do not contend that the Legislature is without authority to adopt the contraction statutes.

Section 171.051(2), Florida Statutes, authorizes members of the electorate to begin the contraction process by obtaining a certain number of signatures from qualified voters that live in the affected area. That subsection provides:

> (2) A petition of 15 percent of the qualified voters in an area desiring to be excluded from the municipal boundaries, filed with the clerk of the municipal governing body, may propose such an ordinance. The municipality to which such petition is directed shall immediately undertake a study of the feasibility of such proposal and shall, within 6 months, either initiate proceedings under subsection (1) or reject the petition, specifically stating the facts upon which the rejection is based.

Developers would have the Court write into the statute a restriction that those qualified voters who began their residence knowing that such residence was in a municipality are ineligible to sign a contraction petition. The Court declines to do so, as no such restriction exists in the statute.

"The first place we look when construing a statute is to its plain language—if the meaning of the statute is clear and unambiguous, we look no further." *Braine v. State*, 255 So. 3d 470, 471 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2143a] (internal quotation and citation omitted). Courts may not rewrite statutes to provide language that is not present. *Heine v. Lee County*, 221 So. 3d 1254, 1258 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D1473a].

Here, section 171.051(2) plainly requires "15 percent of the qualified voters in an area desiring to be exclude from the municipal boundaries" sign a contraction petition. There is no prohibition in the statute excluding qualified voters who began residence knowing their residences were within a municipality from signing a contraction petition. Developers' position is contrary to the plain meaning of the statute. Further, Developers' position would lead to a questionable result by limiting those who could validly sign a contraction petition to only those individuals who lived within an unincorporated area that had been annexed into a municipality over the individual's objection. Developers' proposed statutory contraction would render section 171.051(2) meaningless.

Developers have not demonstrated in the first instance that they are entitled to judgment as a matter of law as to Court 9. The Court must therefore deny the motion.

IT IS THEREFORE ORDERED:

1. Developers' Motion for Final Summary Judgment as to Count 9 of the Third Amended Complaint [DIN 82] is denied.

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose use of insured vehicle for delivery services

AVENTUS INSURANCE COMPANY, Plaintiff, v. IPHIGENIE AUGUSTE, BLACK MANDO ESTIME, CLEVENS N. LHERISSE and WOOBENS MICHEL, Defendants. Circuit Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 2020-CA-007693. April 6, 2021. Donald Hafele, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Iphigenie Auguste and Black Mando Estime, Pro se, Greenacres, Defendants.

FINAL SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF, AVENTUS INSURANCE COMPANY, AND AGAINST THE DEFENDANTS, IPHIGENIE AUGUSTE AND BLACK MANDO ESTIME

THIS CAUSE having come before the court on February 8, 2021, on the Plaintiff, AVENTUS INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendants, IPHIGENIE AUGUSTE and BLACK MANDO ESTIME, and the court, having considered same, it is hereupon,

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

Factual Background

Plaintiff, Aventus Insurance Company brought the instant Action for Declaratory Judgment against the named insured Defendant, Iphigenie Auguste, and the Defendants, Black Mando Estime, Clevens N. Lherisse and Michel Woobens, regarding the policy rescission as a result of the insured's material misrepresentation on the application for insurance dated November 6, 2019. Plaintiff rescinded the policy of insurance on the basis that Iphigenie Auguste failed to disclose on the application for insurance that the insured vehicle (2015 Chrysler 200) was used for business purposes, and had she disclosed this information the Plaintiff would not have assumed the risk nor issued the policy; namely, the undisclosed information regarding business use was an unacceptable risk at inception.

Ms. Iphigenie Auguste initially completed an application for a policy of automobile insurance from Aventus Insurance Company on November 6, 2019. Ms. Iphigenie Auguste failed to disclose that the insured vehicle (2015 Chrysler 200) was being used for business purposes to provide delivery services on behalf of Delivery Dudes when completing the application for insurance. Ms. Iphigenie Auguste answered "No" to application question #11 on page 3 of the application, which read:

> "*Are any vehicles listed on this application ever used for business purposes including, but not limited to making sales calls, driving to job sites or visiting residences or businesses?*"

In addition, Ms. Iphigenie Auguste answered "No" to application question #9 on page 3 of the application, which asked:

"*Will any vehicle listed on this application be used to transport people for compensation or to deliver food, pizza, newspapers, or any other products?*"

On the application for insurance, the insured, Ms. Iphigenie Auguste, signed and initialed the pertinent portion of the Representation of Applicant on page 7 of the application, which stated as follows:

"I hereby apply to Aventus Insurance Company for a policy of insurance as set forth in this application on the basis of statements contained herein. I understand and agree that a misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy if (a) the misrepresentation, omission, concealment, or statement is fraudulent or is material either to the acceptance of the risk or to the hazard assumed by Aventus Insurance Company; or (b) If the true facts had been known by Aventus Insurance Company pursuant to a policy requirement or other requirement, Aventus Insurance Company would not have issued the policy, would not have issued it at the same premium rate, would not have issued a policy in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss."

Plaintiff determined that had Iphigenie Auguste provided the proper information at the time of the insurance application then Plaintiff would not have assumed the risk nor issued the insurance policy. Therefore, Aventus Insurance Company declared the policy void *ab initio* due to material misrepresentation and returned the paid premiums to Iphigenie Auguste. Due to the policy being declared void *ab initio,* the Plaintiff denied coverage for the subject motor vehicle accidents.

Plaintiff, Aventus Insurance Company, argued in their summary judgment motion that, as both the statute and the binding appellate decisions state, materiality of the risk is determined by the insurer, not the insured. *See Fla. Stat. 627.409.* As the Florida Supreme Court has ruled "[t]he statute recognizes the principals of law that a contract issued on a mutual mistake of fact is subject to being voided and defines the circumstances for the application of this principle. This Court cannot grant [**10] an exception to a statute nor can we construe an unambiguous statute different from its plain meaning."*Continental Assurance Co. v. Carroll,* 485 So. 2d 406, 409, (Fla. 1986). Thus, the insurer determines materiality. Hence, to ensure both parties enter the contract with full understanding, the Plaintiff insurer is entitled to all information that Plaintiff deems necessary to determine the risk. Additionally, the Legislature allows an insurer to rescind for a material misrepresentation, regardless of the insured's intent, and thus the Legislature clearly burdened the applicant with the duty to fully disclose all requested information. *See United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (Fla. 3rd DCA 2009) [34 Fla. L. Weekly D1578a]. The Plaintiff's position was that it properly rescinded the subject policy based on the undisclosed business use for the insured vehicle as the terms were unambiguous within the application.

Analysis Regarding Whether the Undisclosed Use of the Insured Vehicle for Business Purposes was Material to the Risk at Inception

The court finds, consistent with the above well-settled Florida law, that in fact the question of materiality is considered from the perspective of the insurer. The court finds that "[a] material misrepresentation in an application for insurance, whether or not made with knowledge of its correctness or untruth, will nullify *any policy* issued and is an absolute defense to enforcement of the policy." *United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (3rd DCA 2009) [34 Fla. L. Weekly D1578a]. The court further finds that the failure to disclose the business or commercial use of the insured vehicle (Delivery Dudes) would have resulted in a denial of the application due to the unacceptable risk which is sufficient to support a rescission. *See Privilege Underwriters Reciprocal Exch. v. Clark,* 174 So. 3d 1028, 1031 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1810a]. Additionally, the court finds that as Defendants failed to provide testimony or other evidence to contradict Plaintiff's claim that the disclosure would have caused Plaintiff to not accept the risk nor issue the policy, then Plaintiff was entitled to rescind. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen*, 999 F.2d 1532 (1993).

Additionally, the court has carefully reviewed the affidavit of the Plaintiff's representative, Maribel Lopez, who provided testimony regarding the application for insurance and administration of the underwriting guidelines for the insurance policy issued to Iphigenie Auguste, and possesses personal knowledge from a review of the insurer's business records. *See Nationstar Mortg., LLC v. Berdecia*, 169 So. 3d 209, 213. Consequently, Plaintiff established without contrary evidence that the misrepresentation was material, as set forth in the Affidavit of Ms. Lopez.

Analysis Regarding the Florida Statute Governing Policy Rescissions

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

Conclusion

This court finds that the Plaintiff, Aventus Insurance Company's, application for insurance unambiguously required Defendant, Iphigenie Auguste, to disclose that the insured vehicle was being used for business purposes to provide delivery services through Delivery Dudes, that Plaintiff provided the required testimony to establish said that Defendant, Iphigenie Auguste's failure to disclose that the insured vehicle was being used for business purposes was a material misrepresentation because Plaintiff would not have assumed the risk nor issued the insurance policy due to the unacceptable risk, and thus Plaintiff properly rescinded the subject policy of insurance. Consequently, Plaintiff properly denied coverage for the loss at issue.

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

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

b. This court ***hereby enters final judgment*** for Plaintiff, AVENTUS INSURANCE COMPANY, and against the Defendants, IPHIGENIE AUGUSTE and BLACK MANDO ESTIME.

c. This court reserves jurisdiction to consider any claim for attorney's fees and costs. Any such motion shall be filed within thirty (30) days.

d. The court finds that the facts alleged by the Plaintiff, AVENTUS INSURANCE COMPANY, in its Complaint for Declaratory Judgment, Motion for Final Summary Judgment, and in the Affidavit of Maribel Lopez are not in dispute, which are as follows:

i. The Defendant, IPHIGENIE AUGUSTE, failed to disclose the business use of the insured vehicle at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # PFC024906-00, issued by AVENTUS INSURANCE COMPANY;

ii. The AVENTUS INSURANCE COMPANY Policy of Insurance, bearing policy # PFC024906-00, is rescinded and is void *ab initio*;

iii. There is no insurance coverage for the named insured, IPHIGENIE AUGUSTE for any bodily injury liability coverage, property damage liability coverage, personal injury protection coverage, collision coverage, or comprehensive coverage, under the policy of insurance issued by AVENTUS INSURANCE COMPANY, under policy # PFC024906-00;

iv. There is no insurance coverage for the named insured, BLACK MANDO ESTIME for any bodily injury liability coverage, property damage liability coverage, personal injury protection coverage, collision coverage, or comprehensive coverage, under the policy of insurance issued by AVENTUS INSURANCE COMPANY, under policy # PFC024906-00;

v. The Plaintiff, AVENTUS INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, IPHIGENIE AUGUSTE, for any claims made under the policy of insurance issued by AVENTUS INSURANCE COMPANY, under policy # PFC024906-00;

vi. The Plaintiff, AVENTUS INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, BLACK MANDO ESTIME, for any claims made under the policy of insurance issued by AVENTUS INSURANCE COMPANY, under policy # PFC024906-00;

vii. There is no obligation to provide Personal Injury Protection benefits coverage to any medical provider, doctor and/or medical facility for treatment of injuries alleged to be a result of the motor vehicle accidents which occurred on February 13, 2020 and February 16, 2020, under the policy of insurance issued by Plaintiff, AVENTUS INSURANCE COMPANY, bearing policy # PFC024906-00;

viii. The material misrepresentation of Defendant, IPHIGENIE AUGUSTE on the application for insurance dated November 6, 2019, occurred prior to any Assignment of any personal injury protection ("PIP") Benefits to any medical provider, doctor and/or medical entity, under the policy of insurance, bearing policy # PFC024906-00, issued by AVENTUS INSURANCE COMPANY;

ix. The Defendant, IPHIGENIE AUGUSTE, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, AVENTUS INSURANCE COMPANY, under policy # PFC024906-00, for the motor vehicle accidents which occurred on February 13, 2020 and February 16, 2020;

x. The Defendant, BLACK MANDO ESTIME, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, AVENTUS INSURANCE COMPANY, under policy # PFC024906-00, for the motor vehicle accidents which occurred on February 13, 2020 and February 16, 2020;

xi. There is no insurance coverage for the motor vehicle accidents which occurred on February 13, 2020 and February 16, 2020, under the policy of insurance issued by Plaintiff, AVENTUS INSURANCE COMPANY, under policy # PFC024906-00;

xii. There is no personal injury protection ("PIP") insurance coverage for the motor vehicle accidents which occurred on February 13, 2020 and February 16, 2020, under the policy of insurance issued by Plaintiff, AVENTUS INSURANCE COMPANY, under policy # PFC024906-00;

xiii. There is no property damage liability coverage for the motor vehicle accidents which occurred on February 13, 2020 and February 16, 2020, under the policy of insurance issued by Plaintiff, AVENTUS INSURANCE COMPANY, under policy # PFC024906-00;

xiv. There is no bodily injury liability coverage for the motor vehicle accidents which occurred on February 13, 2020 and February 16, 2020, under the policy of insurance issued by Plaintiff, AVENTUS INSURANCE COMPANY, under policy # PFC024906-00;

xv. There is no collision insurance coverage for the motor vehicle accidents which occurred on February 13, 2020 and February 16, 2020, under the policy of insurance issued by Plaintiff, AVENTUS INSURANCE COMPANY, under policy # PFC024906-00;

xvi. There is no comprehensive insurance coverage for the motor vehicle accidents which occurred on February 13, 2020 and February 16, 2020, under the policy of insurance issued by Plaintiff, AVENTUS INSURANCE COMPANY, under policy # PFC024906-00;

xvii. Since the policy of insurance issued to the Defendant, IPHIGENIE AUGUSTE, bearing policy # PFC024906-00, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from BLACK MANDO ESTIME and/or CLEVENS N. LHERISSE and/or WOOBENS MICHEL to any medical provider, doctor and/or medical entity is void;

* * *

Dissolution of marriage—Child custody—Relocation with child—Time-sharing—Based on factors set forth in section 61.13001(7), former wife's petition to relocate with child to foreign state is denied—Because former wife did not prove by a preponderance of the evidence that relocation was in the best interests of the child. burden did not shift to the former husband to prove that proposed relocation was not in the best interest of the child

IN RE: THE FORMER MARRIAGE OF PATRICK TOMA, Petitioner/Former Husband, and CAROLINE TOMA, n/k/a CAROLINE SESI, Respondent/Former Wife. Circuit Court, 17th Judicial Circuit in and for Broward County, Family Division. Case No. 09-004063 (35). March 22, 2021. Susan F. Greenhawt, Senior Judge. Counsel: Harry M. Hipler, Dania Beach, for Petitioner. Alan R. Burton, Boca Raton, for Respondent.

FINAL JUDGMENT DENYING FORMER WIFE'S SUPPLEMENTAL PETITION TO RELOCATE WITH MINOR CHILD

THIS CAUSE having come on for final hearing before the undersigned judge, on the 5th day of March, 2021, upon the Respondent/Former Wife, CAROLINE TOMA n/k/a CAROLINE SESI, (hereinafter referred to as "Former Wife"), Supplemental Petition to Relocate with Minor Child filed July 29, 2020, and after considering the evidence and hearing the testimony presented, reviewing the pleadings, hearing the argument of counsel and being otherwise fully advises in the premises, this Court,

FINDS as follows:

1. On January 13, 2010, the Court entered a Final Judgment of Dissolution of Marriage, incorporating an Agreed Parenting Plan.

2. There has been one (1) child that was born of this former marriage, to wit: FRANK PATRICK TOMA, born December 30, 2008.

3. The State of Florida is the minor child's home state for the purposes of the Uniform Child Custody Jurisdiction and Enforcement Act and the Parental Kidnapping and Prevention Act.

4. Venue is proper in Broward County, Florida.

5. Pursuant to the Agreed Parenting Plan, the parents agreed that they shall have shared parental responsibility of the minor child and Father would share time with the minor child every other weekend, from Friday evening until Sunday evening, Tuesday overnight until Wednesday morning and Thursday from 5:30pm until 8:00pm. The parties agreed to split holidays and school breaks.

6. In 2012, Former Wife filed a Supplemental Petition with Minor Child seeking to relocate to Michigan. In February 2013, the Court denied Former Wife's Supplemental Petition to Relocate. Subse-

quently, Former Husband filed a Supplemental Petition seeking equal timesharing, and the Former Wife sought ultimate decision making, the court denied both requests, however, the court did modify Former Husband's time-sharing schedule. Father's new schedule deleted Thursday non-overnight timesharing and extended his every other weekend schedule from Friday evening until Monday morning (instead of Sunday evening).

7. In 2017, the Former Wife and minor child moved from her home in Hollywood (close to the Former Husband's home) approximately 30 miles north to Boca Raton, Florida. The Former Husband testified he reluctantly agreed to the move. Due to the distance, Father soon stopped exercising his Tuesday overnight timesharing.

8. At the beginning of the summer of 2020, the Former Wife in violation of the parties' Agreed Parenting Plan, surreptitiously took the minor child and moved to Michigan, something she sought to do since at least 2012. The GAL testified that the minor child was under the impression he was moving to Michigan with his mother.

9. In July 2020, after the Former Wife and minor child moved to Michigan, she again filed a Supplemental Petition to Relocate with Minor Child. The Former Wife testified that she terminated her lease in Boca Raton and put her furniture in storage before driving to Michigan with the minor child. Further, she testified that the COVID pandemic had caused a downturn in her Amazon based hand soap business.

10. Although the parties discussed the dates that they each planned to exercise their two weeks of vacation time with the minor child, Father testified that Mother did not tell him of her plan to relocate to Michigan with the child.

11. The Court was presented with evidence and heard testimony from the Former Husband, Former Wife and Guardian Ad Litem.

12. On July 9, 2020, the Court appointed Gary S. Maisel, Esquire as the Guardian Ad Litem.

13. On February 1, 2021, the Guardian Ad Litem filed a Report.

14. The Court finds that the Guardian Ad Litem's testimony was credible. The Guardian Ad Litem, as evidenced by his Report, has done a thorough job.

15. Mother testified that she secured a job in Michigan with Loan Depot, however, she quit that job shortly after relocating to Michigan. Mother testified she has a real estate license in both Michigan and in Florida. Mother has a hand soap/lotion online business she can operate from either Michigan or Florida. The Guardian Ad Litem stated in his Report that he does not believe Mother has made substantial efforts to see if she can find suitable employment in South Florida.

16. Father owns a mobile home park and rental properties in Broward County, Florida. He testified he is a "hands on owner" and his presence in South Florida is required on a full-time basis.

17. The Mother expressed to the Guardian ad Litem that it is very likely that she will move to Michigan, with or without the minor child. Mother did not testify otherwise at final hearing.

18. The Court makes the following findings based upon the factors set forth in Florida Statute §61.13001 (7)

(a) The nature, quality, extent of involvement, and duration of the child's relationship with the parent or other person proposing to relocate with the child and with the nonrelocating parent, other persons, siblings, half-siblings, and other significant persons in the child's life.

The Former Wife and the minor child have a close relationship. She has been the primary care giver for the minor child and has spent the most time with him since the parties separated many years ago. She helps him with his schoolwork, if necessary, takes him to the doctor, dentist, etc. The Former Wife and Former Husband initially lived in close proximity to each other in Hollywood. The Former Wife chose to sell her home in Hollywood and rented a place in Boca Raton making weekday overnight time sharing very difficult. This is the Former Wife's second attempt to relocate to Michigan.

The Former Husband and the minor child have a close relationship as well. The Former Husband cooks for the child and oversees his schoolwork when the child is at his home in Hollywood.

Neither parent mentioned any significant others. The minor child enjoys a close relationship with paternal cousins and a half-brother in South Florida.

(b) The age and developmental stage of the child, the needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.

The minor child is twelve (12) years old and in the 6th grade. The minor child is smart and attends virtual school in Florida. Father testified he has offered a number of times to enroll and pay for the minor child to attend private school in South Florida (Nativity, University School, American Heritage). After the COVID pandemic subsides, social interaction at school with his peers would benefit the minor child.

Ideally, the child needs both parents in his life, however, Mother apparently has chosen to relocate to Michigan, with or without the minor child. Frequent time sharing with Mother may alleviate the impact of her move.

(c) The feasibility of preserving the relationship between the nonrelocating parent or other person and the child through substitute arrangements that take into consideration the logistics of contact, access, and time-sharing, as well as the financial circumstances of the parties; whether those factors are sufficient to foster a continuing meaningful relationship between the child and the nonrelocating parent or other person; and the likelihood of compliance with the substitute arrangements by the relocating parent or other person once he or she is out of the jurisdiction of the court.

The timesharing schedule proposed by Mother, for Father and the minor child, is inadequate to foster a continuing and meaningful relationship between Father and child, as Father testified he is unable to leave his business to travel to Michigan on a frequent basis. It appears that both parents will comply with a substitute timesharing schedule for Mother should she carry out her plan to relocate. Father has adequate funds to pay for his share of the child's travel costs and Mother testified her financial situation will improve in Michigan.

(d) The child's preference, taking into consideration the age and maturity of the child.

The minor child wants to be with his Mother, therefore, he wants to relocate to Michigan. He is 12 years old, mature and bright according to the GAL. Although the child prefers to relocate to Michigan with his Mother, he did not provide the GAL with "any real cogent reason not to be with his Father." The GAL testified the child loves both of his parents, but, he is more comfortable with Mother.

(e) Whether the relocation will enhance the general quality of life for both the parent or other person seeking the relocation and the child, including, but not limited to, financial or emotional benefits or educational opportunities.

Mother's reasons for the relocation to Michigan lack merit. There is no evidence Mother will have any better job opportunities in Michigan than she has in Florida. In fact, the additional costs of travel will negatively impact the parties' financial situation. There was no compelling testimony as to financial, emotional or educational benefits in Michigan.

(f) The reasons each parent or other person is seeking or opposing the relocation.

Father opposes the relocation because he would have less contact with the minor child.

The GAL states "It is believed that the reason the Mother wants to relocate is to get farther away from the Father." She states she will have a better quality of life and family members to help her watch and care for the child while she works in Michigan.

(g) The current employment and economic circumstances of each parent or other person and whether the proposed relocation is necessary to improve the economic circumstances of the parent or other person seeking relocation of the child.

The Former Wife had a job at Loan Depot in Michigan, however, she quit the job shortly after arriving in Michigan. She testified she has a real estate license in both Michigan and Florida. In addition, she has a hand soap/lotion online business that she can operate from either Michigan or Florida.

The Former Husband owns a mobile home park and rental properties in Broward County, Florida.

There was no compelling testimony that the proposed relocation is necessary to improve Mother's economic circumstances.

(h) That the relocation is sought in good faith and the extent to which the objecting parent has fulfilled his or her financial obligations to the parent or other person seeking relocation, including child support, spousal support, and marital property and marital debt obligations.

Father has fulfilled his financial obligations.

(i) The career and other opportunities available to the objecting parent or other person if the relocation occurs.

The Former Husband's mobile home park and rental properties are located in Broward County, Florida.

(j) A history of substance abuse or domestic violence as defined in s. 741.28 or which meets the criteria of s. 39.806(1)(d) by either parent, including a consideration of the severity of such conduct and the failure or success of any attempts at rehabilitation.

There is no history of substance abuse or domestic violence by either party.

(k) Any other factor affecting the best interest of the child or as set forth in s. 61.13.

Relocation will not enhance the quality of the minor child's life if he moves to Michigan. Relocation is not in the best interest of the child.

19. While there is no presumption in favor or against relocation of a minor child, the party seeking to relocate has the burden to prove that the relocation is in the best interest of the minor child. ***Ness v. Martinez,*** 249 So.2d 754 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D1356b].

20. Section 61.13001(8), Florida Statutes (2019), governs the burden of proof for petitions to relocate and provides as follows: (8) Burden of proof. —The parent or other person wishing to relocate has the burden of proving by a preponderance of the evidence that relocation is in the best interest of the child. If that burden of proof is met, the burden shifts to the non-relocating parent or other person to show by a preponderance of the evidence that the proposed relocation is not in the best interest of the minor child."

21. The Court finds that the Former Wife has not proven by a preponderance of the evidence that relocation is in the best interest of the minor child. Therefore, the Court finds that the burden did not shift to the Former Husband to prove by a preponderance of the evidence that the proposed relocation is not in the best interest of the minor child.

IT IS, THEREUPON, ORDERED AND ADJUDGED as follows:

A. This Court has jurisdiction of the parties hereto and of the subject matter hereof.

B. The Former Wife's Supplemental Petition to Relocate With Minor Child dated July 29, 2020 is DENIED

C. If Mother remains in Florida with the minor child, the current Parenting Plan schedule will remain in place with the child residing in Broward County until further order of the Court after Former Husband's Supplemental Petition for Modification of Time Sharing is heard (or further agreement of the parties).

D. If Mother carries out her plan to relocate to Michigan, with or without the minor child, the Mother's timesharing will be the same as she proposed for the Father in the event the minor child had relocated to Michigan.

E. If the Former Wife relocates to Michigan without the child, the Former Husband shall pay fifty percent (50%) and the Former Wife shall pay fifty percent (50%) of the minor child's round trip plane tickets between Michigan and South Florida (either Miami or Fort Lauderdale airports). The Former Wife shall purchase the minor child's round trip plane ticket and provide the itinerary to the Former Husband at least thirty (30) days in advance of the minor child's travel. The Former Wife's failure to do so shall result in the forfeiture of the Former Wife's time-sharing with the minor child. Within ten (10) days of the Former Husband's receipt of the itinerary and documentation establishing the travel costs of the minor child's plane ticket, the Former Husband shall reimburse the Former Wife his 50% share for the cost of the minor child's plane ticket.

F. The Court shall retain jurisdiction of the parties hereto, the subject matter hereof and to enforce and/or modify this Final Judgment.

G. The Court reserves and retains jurisdiction over requests for child support, attorney's fees and costs and Former Husband's Supplemental Petition for Modification of Time Sharing.

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose household resident over age 15

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. MARIE CARMELIE CAJUSTE FILS, et al., Defendants. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE20017220, Division 25. March 30, 2021. Carol-lisa Phillips, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Marie Carmelie Cajuste Fils, Pro se, Coral Springs, Defendant.

FINAL ORDER ON PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AGAINST DEFENDANTS, MARIE CARMELIE CAJUSTE FILS AND MARIE CARMELIE CAJUSTE FILS AS THE PARENT, NATURAL AND LEGAL GUARDIAN OF JONATHON JONAS FILS, A MINOR

THIS CAUSE having come before this Court at the hearing on March 30, 2021, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendants, MARIE CARMELIE CAJUSTE FILS and MARIE CARMELIE CAJUSTE FILS as the Parent, Natural and Legal Guardian of JONATHON JONAS FILS, a minor, and the Court having considered the same, it is hereupon,

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

Factual Background

Plaintiff, Direct General Insurance Company brought the instant Action for Declaratory Judgment against the insured Defendant, Marie Carmelie Cajuste Fils, and the Defendant, Jonathon Jonas Fils, a minor, regarding the policy rescission as a result of the insured's material misrepresentations on the application for insurance dated February 14, 2020. Plaintiff rescinded the policy of insurance on the basis that Marie Carmelie Cajuste Fils failed to disclose that her son, Jonathon Jonas Fils, resided with her at the time of policy inception and had she disclosed this information the Plaintiff would not have issued the policy on the same terms; namely, Plaintiff would have

charged a higher premium to issue the policy.

On the application for insurance dated February 14, 2020, Defendant, Marie Carmelie Cajuste Fils, answered "NO" to the following application question, which provides:

> Have you failed to disclose any household residents, age 15 or older, whether licensed or not, including but not limited to children away from home or in college?

In addition, on the application for insurance dated February 14, 2020, Defendant, Marie Carmelie Cajuste Fils signed the pertinent page of the Applicant's Statement, which provides:

> I agree all answers to all questions in this Application are true and correct. I understand, recognize, and agree said answers are given and made for the purpose of inducing the Company to issue the Policy for which I have applied. I further agree that ALL persons of eligible driving age or permit age or older who live with me, as well as ALL persons who regularly operate my vehicles and do not reside in my household, are shown above. I agree that my principal residence and place of vehicle garaging is correctly shown above and that the vehicle is in this state at least 10 months each year. I understand the Company may rescind this Policy or declare that no coverage will be provided or afforded if said answers on this Application are false or misleading, and materially affect the risk the Company assumes by issuing the Policy. In addition, I understand that I have a continuing duty to notify the Company within 30 days of any changes of: (1) address; (2) garaging location of vehicles; (3) number, type, and use of vehicles to be insured under this Policy. This includes the use of the vehicle to carry persons or property for compensation or a fee, ride sharing activity, TNC prearranged trips, personal vehicle sharing program, limousine, or taxi service, livery conveyance, including not-for-hire livery, or for retail or wholesale delivery, including but not limited to, the pickup, transport, or delivery of magazines, newspapers, mail, or food. (4) residents of my household of eligible driving age or permit age; (5) driver's license or permit status (new, revoked, suspended or reinstated) of any resident of my household; (6) operators using any vehicles to be insured under this Policy; or (7) the marital status of any resident or family member of my household. I understand the Company may declare that no coverage will be provided or afforded if I do not comply with my continuing duty of advising the Company of any changes as noted above.

On August 11, 2020, the named insured, Marie Carmelie Cajuste Fils, provided sworn testimony at her Examination Under Oath (EUO), confirming that her son lived with her at the time of application for insurance, and still does live with her at the policy garaging address. Plaintiff determined that had Marie Carmelie Cajuste Fils provided the proper information at the time of the insurance application dated February 14, 2020, then Plaintiff would have charged the insured a higher premium rate. Therefore, Direct General Insurance Company declared the policy void *ab initio* due to a material misrepresentation and returned the paid premiums to Marie Carmelie Cajuste Fils. Due to the policy being declared void *ab initio*, the Plaintiff denied coverage for the subject motor vehicle accident.

Pursuant to the policy of insurance issued to Marie Carmelie Cajuste Fils, Direct General Insurance Company may void the insurance policy as follows:

> **MISREPRESENTATION AND FRAUD**
>
> A. This Policy was issued in reliance on the information provided on **your** written or verbal insurance application. **We** reserve the right, at **our** sole discretion, to void or rescind this Policy if **you** or a **relative**:
>
> 1. Made any false statements or representations to **us** with respect to any material fact or circumstance; or
>
> 2. Concealed, omitted or misrepresented any material fact or circumstance or engaged in any fraudulent conduct;
>
> in any application for this insurance or when renewing this Policy. **We** will not be liable and will deny coverage for any **accident**, **loss** or claim occurring thereafter.
>
> A fact or circumstance will be deemed material if **we** would not have:
>
> 1. Written this Policy;
> 2. Agreed to insure the risk assumed; or
> 3. Assumed the risk at the premium charged.
>
> This includes, but is not limited to, failing to disclose in a verbal or written application all person residing in your household or regular operators of a covered auto.

Further, Florida Statute § 627.409(1) provides:

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

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

Analysis Regarding Whether the Undisclosed Person in Household was Material

The Court ruled that the question of materiality is considered from the perspective of the insurer. Further, the Court found that "[a] material misrepresentation in an application for insurance, whether or not made with knowledge of its correctness or untruth, will nullify *any policy* issued and is an absolute defense to enforcement of the policy." *United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (3rd DCA 2009) [34 Fla. L. Weekly D1578a]. The Court ruled that the failure to disclose

a household member that would have caused the insurer to issue the policy at a higher rate is sufficient to support a rescission. *See Privilege Underwriters Reciprocal Exch. v. Clark,* 174 So. 3d 1028, 1031 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1810a]. Additionally, the Court found that as Defendants failed to provide testimony to contradict Plaintiff's claim that the disclosure would have caused Plaintiff to issue the policy at a higher premium rate, then Plaintiff was entitled to rescind. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen*, 999 F.2d 1532 (1993).

The Court ruled that the materiality of the risk regarding the failure to disclose a household member on an application for insurance is determined at the time of inception and/or application, not at the time of a subsequent loss. Here, the insured failed to disclose her son, Jonathon Jonas Fils, as a household member living at the policy garaging address at the time of the application. Therefore, it is irrelevant whether the undisclosed household member, Jonathon Jonas Fils, was involved in the subject motor vehicle accident on June 30, 2020, for purposes of determining the materiality of the risk as to the policy premium at inception pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy.

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

Analysis Regarding the Carrier's Application for Insurance being Clear and Unambiguous

Florida case law dictates that a party who signs a contract is bound by the contents of that contract whether he/she read its contents or not, unless that party can prove some form of coercion, duress, fraud in the inducement. See *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Benton,* 467 So.2d 311, 312 (Fla. 5th DCA 1985) ("As a matter of law a party who voluntarily executes a document knowing it is intended to establish contractual relationships between the parties but without reading it is bound by its terms in the absence of coercion, duress, fraud in the inducement or some other independent ground justifying rescission."). *See also New York Life Ins. Co. v. Tedder*, 113 Fla. 649, 153 So. 145 (Fla. 1933) ("The rule is too well settled to admit of controversy that one who affixes his signature to a written instrument will be prima facie presumed, in the absence of proof of fraud, to have intended thereby to authenticate and become bound by the contents of the instrument so signed.").

An applicant's failure to read an application for insurance prior to signing does not prevent an insurer from rescinding the policy on the basis of nondisclosure of material information. *See Nationwide Mut. Fire. Ins. Co. v. Kramer,* 725 So.2d 1141, 1143 (Fla.2d DCA 1998) [23 Fla. L. Weekly D2326a]. Florida Courts have consistently held that a party's failure to read a contract does not invalidate the contract. See *Allied Van Lines, Inc. v. Bratton,* 351 So. 2d 344, 347 (Fla. 1977) ("No party to a written contract in this State can defend against its enforcement on the sole ground that he signed it without reading it.").

The Court hereby finds that the Plaintiff's application for insurance is clear and unambiguous regarding the applicant's obligation to disclose pertinent information at the time of the policy inception on the application. The Court hereby finds that the Plaintiff's application for insurance clearly and unambiguously required the applicant (Marie Carmelie Cajuste Fils) to disclose her son as a household member living at the policy garaging address at the time of the policy inception. In addition to providing a "NO" response to application question #2, the applicant (Marie Carmelie Cajuste Fils) initialed the Applicant's Statement and signed the application for insurance, which provided the following acknowledgment:

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

The Carrier, Direct General Insurance Company has a right to rely on the information provided by Marie Carmelie Cajuste Fils on the application for insurance. Since the Carrier relied on the representations by Marie Carmelie Cajuste Fils on the application to its detriment, the Carrier is entitled to rescind the policy due to the material misrepresentation. The Court hereby finds that since the terms of the Carrier's application are clear and unambiguous, it is irrelevant whether Marie Carmelie Cajuste Fils subsequently claimed that the "agent did not ask" the questions on the application since Marie Carmelie Cajuste Fils signed the application which is a legal contract and thus, Marie Carmelie Cajuste Fils is bound by the terms and conditions of the contract. Further, the Defendant, Marie Carmelie Cajuste Fils, did not establish any proof of coercion, duress, and/or fraud in the inducement during the application process.

In addition, since Marie Carmelie Cajuste Fils signed the application and acknowledged the above terms, she cannot later claim that she did not understand the application or that the agent did not ask her and/or explain to her the questions on the application.

Analysis Regarding the Florida Statute Governing Policy Rescissions

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

Analysis Regarding Whether the Testimony from the Examination Under Oath (EUO) of Marie Carmelie Cajuste Fils is Admissible Evidence for Summary Judgment

The Court agreed with the Plaintiff, Direct General Insurance Company's position that the statements provided by Marie Carmelie Cajuste Fils during her Examination Under Oath (EUO) on August 11, 2020 are admissible under the exception to the hearsay rule applicable to an admission by a party and as a statement by an opposing party.

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

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

Therefore, the Court finds that the transcript of the Examination Under Oath (EUO) of Marie Carmelie Cajuste Fils is admissible and proper summary judgment evidence.

Conclusion

This Court finds that the Plaintiff, Direct General Insurance Company's application for insurance unambiguously required Defendant, Marie Carmelie Cajuste Fils, to disclose her son, Jonathon Jonas Fils, as a household member, that Plaintiff provided the required testimony to establish said that Defendant, Marie Carmelie Cajuste Fils' failure to disclose her son as a person in the household was a material misrepresentation because Plaintiff would not have issued the policy on the same terms, and thus Plaintiff properly rescinded the subject policy of insurance. Consequently, Plaintiff properly denied coverage for the loss at issue.

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

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

b. This Court ***hereby enters final judgment*** for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendant, MARIE CARMELIE CAJUSTE FILS.

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

d. This Court previously ruled that the First Request for Admissions served on the Defendant, MARIE CARMELIE CAJUSTE FILS, were deemed admitted. Specifically, it was deemed admitted that MARIE CARMELIE CAJUSTE FILS failed to disclose her son as a household resident on the application for insurance.

e. The Court finds that the facts alleged by the Plaintiff, DIRECT GENERAL INSURANCE COMPANY, in its Complaint for Declaratory Judgment, the transcript of the Examination Under Oath of MARIE CARMELIE CAJUSTE FILS, Plaintiff's Motion for Final Summary Judgment, and in the Affidavit of Rose Chrustic, are not in dispute, which are as follows:

f. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # XXXXXX5987, is rescinded and is void *ab initio;*

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

h. The Defendant, MARIE CARMELIE CAJUSTE FILS, failed to disclose that an additional resident over the age of 15 lived within her household at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # XXXXXX5987, issued by DIRECT GENERAL INSURANCE COMPANY;

i. The Defendant, MARIE CARMELIE CAJUSTE FILS breached the insurance policy contract and application for insurance, under the policy of insurance, bearing policy # XXXXXX5987, issued by DIRECT GENERAL INSURANCE COMPANY;

j. The material misrepresentation of Defendant, MARIE CARMELIE CAJUSTE FILS on the application for insurance dated February 14, 2020, occurred prior to any Assignment of any personal injury protection ("PIP") Benefits to any medical provider, doctor and/or medical entity, under the policy of insurance, bearing policy # XXXXXX5987, issued by DIRECT GENERAL INSURANCE COMPANY;

k. There is no insurance coverage for the named insured, MARIE CARMELIE CAJUSTE FILS for any bodily injury liability coverage, property damage liability coverage, personal injury protection benefits coverage, rental reimbursement coverage, towing and labor coverage, comprehensive coverage and collision coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

l. There is no insurance coverage for the Defendant, JONATHON JONAS FILS, a minor, for any bodily injury liability coverage, property damage liability coverage, personal injury protection benefits coverage, rental reimbursement coverage, towing and labor coverage, comprehensive coverage and collision coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

m. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, MARIE CARMELIE CAJUSTE FILS, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

n. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the Defendant, JONATHON JONAS FILS, a minor, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

o. There is no personal injury protection ("PIP") insurance coverage for JONATHON JONAS FILS, a minor, for the accident which occurred on June 30, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

p. There is no rental reimbursement insurance coverage for MARIE CARMELIE CAJUSTE FILS for the accident which occurred on June 30, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

q. There is no towing and labor insurance coverage for MARIE CARMELIE CAJUSTE FILS for the accident which occurred on June 30, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

r. There is no collision insurance coverage for MARIE CARMELIE CAJUSTE FILS for the accident which occurred on June 30, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

s. There is no comprehensive insurance coverage for MARIE CARMELIE CAJUSTE FILS for the accident which occurred on June 30, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

t. There is no collision insurance coverage for World Omni Financial, Corp. for the accident which occurred on June 30, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

u. There is no comprehensive insurance coverage for World Omni Financial, Corp. for the accident which occurred on June 30, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

v. There is no bodily injury insurance coverage for Wolgens David Desir for the accident which occurred on June 30, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

w. There is no bodily injury insurance coverage for Virginia Saldivar for the accident which occurred on June 30, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

x. There is no bodily injury insurance coverage for Steve Simpson for the accident which occurred on June 30, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

y. There is no property damage insurance coverage for Wolgens David Desir for the accident which occurred on June 30, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

z. There is no property damage insurance coverage for Eneyda Espinosa Saldivar for the accident which occurred on June 30, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

aa. There is no property damage insurance coverage for Steve Simpson for the accident which occurred on June 30, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

ab. There is no obligation to provide Personal Injury Protection benefits coverage to any medical provider, doctor and/or medical facility for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on June 30, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # XXXXXX5987;

ac. The Defendant, MARIE CARMELIE CAJUSTE FILS, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987, for the June 30, 2020 accident;

ad. The Defendant, JONATHON JONAS FILS, a minor, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987, for the June 30, 2020 accident;

ae. Wolgens David Desir, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987, for the June 30, 2020 accident;

af. Virginia Saldivar is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987, for the June 30, 2020 accident;

ag. Eneyda Espinosa Saldivar is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987, for the June 30, 2020 accident;

ah. Steve Simpson is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987, for the June 30, 2020 accident;

ai. Ocean Harbor Casualty Insurance Company is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987, for the June 30, 2020 accident;

aj. State Farm Mutual Automobile Insurance Company is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987, for the June 30, 2020 accident;

ak. Since DIRECT GENERAL INSURANCE COMPANY is not obligated to provide any coverages or indemnity to any of the potential claimants, Ocean Harbor Casualty Insurance Company, shall have no rights of subrogation against DIRECT GENERAL INSURANCE COMPANY under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # XXXXXX5987, for the June 30, 2020 motor vehicle accident;

al. Since DIRECT GENERAL INSURANCE COMPANY is not obligated to provide any coverages or indemnity to any of the potential claimants, State Farm Mutual Automobile Insurance Company, shall have no rights of subrogation against DIRECT GENERAL INSURANCE COMPANY under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # XXXXXX5987, for the June 30, 2020 motor vehicle accident;

am. There is no insurance coverage for the motor vehicle accident which occurred on June 30, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

an. There is no personal injury protection ("PIP") insurance coverage for the accident which occurred on June 30, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

ao. There is no bodily injury liability coverage for the accident which occurred on June 30, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

ap. There is no property damage liability coverage for the accident which occurred on June 30, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

aq. There is no comprehensive coverage for the accident which occurred on June 30, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

ar. There is no collision coverage for the accident which occurred on June 30, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

as. There is no rental reimbursement coverage for the accident which occurred on June 30, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

at. There is no towing and labor coverage for the accident which occurred on June 30, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX5987;

au. Since the policy of insurance issued to the Defendant, MARIE CARMELIE CAJUSTE FILS, bearing policy # XXXXXX5987, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from JONATHON JONAS FILS, a minor, to any medical provider, doctor and/or medical entity is void.

* * *

Volume 29, Number 2
June 30, 2021
Cite as 29 Fla. L. Weekly Supp. ____

COUNTY COURTS

Criminal law—Driving under influence—Search and seizure—Detention—Detention of defendant by officers responding to scene in which running vehicle was embedded in bushes beyond sidewalk adjacent to roadway was not justified by traffic accident exception to warrantless arrest rule where no crash investigation was conducted and there was no evidence of damage to vehicle or bushes—Detention for purpose of conducting DUI investigation was justified by observations of defendant's slow reactions, failure to respond appropriately to questioning, bloodshot watery eyes, slurred speech, and odor of alcohol—Length of detention prior to initiation of DUI investigation was reasonable where paramedics and deputies were actively investigating and treating defendant from time of initial contact until time DUI investigator arrived on scene, and DUI investigation began within 5 minutes of investigator's arrival—Motion to suppress is denied

STATE OF FLORIDA, v. TIMOTHY F. KEEFFE, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2019 CT 1076. April 22, 2021. D. Melissa Distler, Judge. Counsel: Adriana Laforest, Office of the State Attorney, for State. G. Kipling Miller, for Defendant.

ORDER ON DEFENDANT'S MOTIONS TO SUPPRESS

THIS MATTER came to be heard on the Defendant's Motion to Suppress. The Court, having heard testimony from Deputy Adam Gossett and Deputy Jennifer Prevatt, having reviewed the AXON video recordings admitted into evidence, and having heard argument from both Counsel for the State and for the Defendant, the Court makes the following findings of fact:

Findings of Fact:

On December 21, 2021, Deputy Adam Gossett was dispatched to a crash with injuries. Three separate deputies interacted with the Defendant TIMOTHY F. KEEFFE and their AXON recordings were submitted into evidence and reviewed by the Court.[1] The investigation ultimately led to the Defendant TIMOTHY F. KEEFFE being arrested for the charge of Driving under the influence by Deputy Prevatt.

According to the AXON recordings, Deputy Gossett arrives on scene and begins interacting with the Defendant at 2:46:28. The Defendant TIMOTHY F. KEEFFE is seated in the drivers' seat of a vehicle which is still in drive and impacting bushes. The recordings reflect that even though the vehicle is in drive, it is not moving, as the entire passenger front is embedded into and being stopped by the bushes. The bushes are beyond a sidewalk which runs adjacent to a roadway in Flagler County, Florida. Upon his approach, Deputy Gossett asks, "What happened?" The Defendant is verbally unresponsive but looks at the deputy and gestures with his hands. The deputy then asks if he can put the vehicle in park. The Defendant is still slow to respond and seems to not comprehend what the deputy is asking. The deputy opens the door and puts the car in park. He then asks the Defendant for his drivers' license. After searching for several seconds, the defendant pulls out a small wallet and hands it to the deputy. Deputy Gossett finds his drivers' license and hands back the remainder of the wallet with the Defendant's credit cards and personal items. During this first interaction with the Defendant, Deputy Gossett requests a "whiskey" unit, to which Deputy Prevatt was assigned on this evening. The testimony of all witnesses revealed that at certain times of the year, including holidays, additional deputies are assigned to handle DUI investigations so as to not tie up the road patrol deputies. At the time Deputy Gossett called for the whiskey unit, he noted the Defendant was reacting slowly, not responding to questioning appropriately, had bloodshot watery eyes, slurred speech, and a smell of alcohol.

At 2:49:10 the paramedics arrive on scene. The paramedics evaluate the Defendant for several minutes. At 2:55:09 when Deputy Gossett's camera stops, the paramedics are still actively using equipment on the Defendant as he remains seated in the drivers' side of his vehicle. Deputy Gossett's camera comes back on at 2:59:56 with him approaching the drivers' side of the vehicle. He asks Deputy Pierre to keep an eye on the Defendant, as the paramedics are no longer assessing the Defendant. At 3:02:30, Deputy Gossett confirms with Deputy Pierre that he is taking pictures all around the vehicle. The two of them discuss whether the vehicle hit the railing, and Deputy Gossett opines that "it does not look like a crash." This segment of Deputy Gossett's recording stops at 3:03:50. Deputy Gossett testified that one of the times he turned off his AXON recording was to call his supervisor to talk through what they had and whether it would constitute a crash.

At 3:04:04, Deputy Prevatt's AXON recording begins. She exits her vehicle at 3:05:05. She communicates with Deputy Gossett about what he has seen this far in the investigation. Deputy Prevatt explains that she is going to treat the incident as a crash at 3:07:50 and will read *Miranda* before doing the field sobriety exercises. She first interacts with the Defendant TIMOTHY F. KEEFFE at 3:09:45. Deputy Prevatt testified at the hearing that she went through the procedure to switch hats from a crash investigation to a DUI investigation because she thought the crash investigation had been completed by one of the other two deputies.

There was no testimony about any monetary damage caused by the incident, and there were no photographs of any alleged damage caused by the incident. The undisputed testimony was that a crash investigation was not conducted by either Deputy Gossett or Deputy Pierre, that a crash report was not completed, and that there were no citations issued other than the DUI citation issued by Deputy Prevatt.

It is this sequence of events on which the Defendant bases his Motion to Suppress. The Defendant's Motion to Suppress Evidence alleges an unlawful length of detention. The Defendant's main argument was that the deputies did nothing for 24 minutes while waiting for the whiskey unit to arrive when the deputies on scene were fully capable of completing a DUI investigation on their own without delay. At the hearing, the Defendant argued that Deputy Prevatt fabricated a crash investigation, to which she denied. The Defendant asserts that if there was not a crash investigation, then the 24-minute detention from initial encounter to the start of the DUI investigation was unreasonable. The State argued that Deputy Gossett was conducting a thorough investigation, that the paramedics were treating the Defendant to determine if there was some medical emergency, and that any delay after those processes concluded was not unreasonable.

Conclusions of Law:

The testimony at the hearing from the State's witness and the evidence from the AXON recordings reflects that the Defendant's vehicle impacted bushes located on the wood line, past a sidewalk adjacent to a road. The Defendant's vehicle was clearly in drive but not moving, which further indicates that it was directly connected to another thing preventing it from moving. Whether there was any damage as a result of this collision is unknown.

A "traffic crash" has been defined as requiring "some observable result of forceful contact with another vehicle, person, or object before an investigation can be commenced, or a warrantless arrest made." *Department of Highway Safety and Motor Vehicles v. Williams,* 937 So.2d 815, 817 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D2387a]. There is competent, substantial evidence that there was forceful

contact with an object. However, the term "traffic crash" also reasonably contemplates some degree of damage. *See Id.* at 817. There was no testimony whatsoever about damage to the Defendant's vehicle or the bushes; and there were no pictures submitted, specifically none which would have shown damage to the front passenger side of the Defendant's vehicle or the bushes. Additionally, there was no traffic crash investigation actually conducted in this case.

Based upon the lack of competent, substantial evidence that a traffic crash occurred, Florida Statute 316.645 is inapplicable. Therefore, the Court must now evaluate the length of detention and determine whether such was unreasonable, as alleged in the Motion. The Court finds that Deputy Gossett, Deputy Pierre, and the paramedics were actively investigating and treating the Defendant TIMOTHY F. KEEFFE from the time of the initial approach at 2:46:28 through 3:03:50. Immediately thereafter Deputy Prevatt arrives on scene and commences her investigation. While it takes her about 5 minutes to get together the necessary equipment for her DUI investigation, the Court finds that the length of detention after the paramedics left and after Deputies Gossett and Pierre finished their investigation to the time Deputy Prevatt first interacts with the Defendant is reasonable.

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

The Defendant's Motion to Suppress Evidence is DENIED.

---

[1]The time references herein are the timestamps located on the top right corner of all video recordings. The timestamps on each recording are consistent with each other.

* * *

Insurance—Personal injury protection— Coverage— Deductible—Spouse of insured—Declaratory action seeking determination that application of deductible to insured's wife is not permissible under statute providing that insured may elect deductible to be applied to insured and resident "dependent relatives" but may not elect deductible to apply to any other persons covered under policy—Where there is no claim that wife is not financially dependent under restrictive definition of "dependent relative" urged by medical provider, there is no need for declaration—There is no authority for provider's argument that "dependent relative" refers only to financial dependency—Motion to dismiss granted

SOUTH FLORIDA INJURY CENTERS INC., a/a/o Era Marshall, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE CO., Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2020-37038COCI. March 10, 2021. Belle B. Schumann, Judge. Counsel: Thomas Wenzel, Steinger, Greene and Feiner, Fort Lauderdale, for Plaintiff. Tiffany V. Colbert, Andrews Biernacki Davis, Orlando, for Defendant.

ORDER GRANTING MOTION FOR REHEARING/ ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

This case comes before the Court on the Plaintiff's Motion for Rehearing (Docket *24) of the Court's Order entered February 11, 2021 (Docket *23). For the reasons set forth herein, the Motion for Rehearing is Granted, the Court's prior order is set aside, and this Final Order Granting Defendant's Motion to Dismiss Amended Complaint is entered in its place.

This cause of action seeks a declaratory judgment to determine "whether it is permissible under the contract of insurance or under law to apply a deductable to Era Marshall." (Plaintif's Response in Opposition to Motion to Dismiss, Docket * 19 filed January 21, 2021). This in turn depends upon the notice provided by statute as to whom a deductable may be applied. Section 627.739(1), Florida Statutes (2020) states:

> The named insured may elect a deductible or modified coverage or combination thereof to apply to the named insured alone or to the named insured and dependent relatives residing in the same household, but may not elect a deductible or modified coverage to apply to any other person covered under the policy.

Plaintiff alleged that Defendant ". . .seems to have a policy in place to assume that all spouses are automatically applied to the deductible. . ." (Doc. 19 p. 7) Plaintiff feigns outrage that a wife is automatically assumed to be the dependent of her husband. Central to the cause of action is Plaintiff's insistence that "dependent" means only one thing: financially dependent.

Defendant moves to dismiss the complaint for failure to state a cause of action. In ruling on a motion to dismiss, the court is "required to accept the factual allegations of the complaint as true and to consider those allegations and any inferences to be drawn therefrom in the light most favorable to the non-moving party." *Siegle v. Progressive Consumers, Inc.* 819 So. 2d 732, 734 (Fla. 2002) [27 Fla. L. Weekly S492a]. The Court acknowledges that "questions of fact and disagreements concerning coverage under insurance policies are proper subjects for a declaratory judgment if necessary to a construction of legal rights." *Travelers Insurance Co. v. Emery,* 579 So. 2d 798, 801 (Fla. 1st DCA 1991). However, the Court concludes that the motion to dismiss is well-founded and the complaint has failed to allege the jurisdictiona prerequisites for obtaining a declaratory judgment.

Plaintiff seeks a declaratory judgment. As such, Plaintiff claims a bona fide doubt about their rights, status, immunities, powers or privileges. S. 86.021, Fla. Stat. (2020); *People's Trust Insurance Co. v. Valentin,* 305 So. 3d 324 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D754b]. The requisites for declaratory relief are: 1) a bona fide, actual, present and practical need for the declaration; 2) a present ascertained or ascertainable state of facts or a present controversy about a state of facts; 3) a power, privilege, immunity or right of the party seeking relief must be dependent on the facts or the law applicable to the facts; 4) another person or persons must have an actual, present and adverse interest in the subject matter; 5) the adverse interests must be before the court; and 6) the declaration must not be merely giving legal advice. *May v. Holley,* 59 So. 2d 636 (Fla. 1952). The pleading must alleged facts showing a bona fide, adverse interest between the parties concerning the power, privilege, immunity or right of the pleader, the pleader's doubt and a showing the pleader is entitled to have that doubt removed. *Treasure Chest Poker LLC v. Dept. of Business and Professional Regulation, etc.,* 238 So. 3d 338 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D1478a]. These requirements are jurisdictional. *Id.*

There is no dispute that Era Marshall is related to the policyholder by marriage. There is no claim that she does not reside in the same household as the insured. There is no contention that the Defendant failed to pay for injuries resulting from a collision, only that Era Marshall was required to pay the deductible. There is no contention by the Plaintiff that Era Marshall is not a dependent; in fact the application for insurance indicates she was a college student. Rather, the slender reed upon which Plaintiff supports this case is the claim that the Defendant presumes that spouses are "dependents" as stated in section 627.739(1) and that this term has the only meaning that Plaintiff seeks to ascribe to it. This argument must fail for several reasons.

First of all, there is no claim that Era Marshall is not a dependent within the meaning of the statute, or that she is not a dependent using the Plaintiff's definition of financial dependent. There is no bona fide need for a declaration based on present, ascertainable facts and therefore, the Court lacks jurisdiction to render declaratory relief. The adverse interests are not before the court, and so any declaratory judgment would be improperly giving legal advice. Dismissal is appropriate as the Plaintiff's ". . .allegations did not establish a present, bona fide dispute between him (and the Defendant) that places him in doubt regarding his rights." *Strickland v. Pinellas*

County, 261 So. 3d 700, 703 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2761c].

Secondly, there is more than one meaning of the word "dependent" other than the singular definition Plaintiff insists upon, namely, as someone who is provided financial support in whole or part. In the statute, "dependent" is an adjective describing persons in a household. They are interdependent upon each other for emotional, moral, financial, and every other kind of support. There is no authority for the singular definition Plaintiff thrusts upon this word. In fact, the clear, plain and longstanding meaning of this word is one who "depends or has to rely on something else for support, supply, or what is needed" or someone who "relies on or requires the aid of another for support." *See, Lumbermens Mutual Casualty Co. v. Acosta,* 452 So. 2d 1060, 1061 (Fla. 3d DCA 1984) ; *Lowe v. Broward County,* 766 So. 2d 1199, 1209 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2282a].

Additionally, the Court notes it is the insured who determines who is and who is not covered by the policy. It is the insured who determines which persons, if any, are ". . .dependent relatives residing in the same household. . ." and does so by listing them on the application for coverage under the policy. S. 627.739(1), Fla. Stat. (2020). This is an economic decision made by the person purchasing the insurance policy for themselves and their dependents. *Lumbermens, supra.* There is no claim that Mr. Marshall, the insured, was confused as to this issue and what it would mean in the event that Mrs. Marshall was in an automobile accident.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED, that the Motion for Rehearing is GRANTED and this order is substituted in its place. The Defendant's Motion to Dismiss is hereby GRANTED and this case is dismissed with prejudice.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Where deputy observed defendant cross onto wrong side of roadway twice and drive on bike path, stop for traffic infractions was lawful—After stop, deputy developed reasonable suspicion to request that defendant exit vehicle and perform field sobriety exercises based of observations of defendant's driving pattern, bloodshot eyes, and odor of alcohol and defendant's admission to drinking 3 glasses of wine—Motion to suppress is denied

STATE OF FLORIDA, v. STACY SIMPSON CAICEDO, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2019-000490-CT. April 21, 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 UNLAWFULLY OBTAINED EVIDENCE

THIS MATTER came before the Court on April 14, 2021 on the Defendant's Motion to Suppress Unlawfully Obtained Evidence. The Court, having heard testimony from Deputy Kyle Gaddie, having reviewed the recordings admitted into evidence, and having heard argument from Counsel for the State and the Defendant, this Court makes the following findings of fact:

Findings of fact:

Deputy Kyle Gaddie testified that on June 10, 2019, he was on duty in a marked patrol vehicle driving northbound in the Hammock Dunes area. Both the dash camera and body AXON recordings captured by Deputy Gaddie and his vehicle were admitted into evidence and reviewed by the Court. Deputy Gaddie ultimately arrested the Defendant STACY SIMPSON CAICEDO for Driving under the influence .15 or higher BAC.

Deputy Gaddie testified that as he was traveling northbound, he noticed the Defendant's vehicle immediately in front of his cross over the center line into oncoming traffic two separate times. The vehicle suddenly stopped in the middle of the roadway for no reason. When the vehicle began traveling again, it entered into the bike lane. At that time, Deputy Gaddie conducted a traffic stop of the vehicle. The dash camera recording reflects the driving pattern as described by the deputy, including drifting over the center yellow divided line into the oncoming lane of travel two times and stopping briefly in the roadway upon the second drift over, then swerving into the bike lane on the right side of the road. During the 2 minutes leading up to the traffic stop, when the vehicle drifted into the oncoming lane of travel, approximately half of the vehicle was in the oncoming lane of travel. There was no traffic coming in the opposite direction during those instances. However, the deputy initiated the traffic stop as 2 vehicles approached from the opposite lane of travel.

Deputy Gaddie testified that he approached the driver's side and asked what's going on tonight. From review of the AXON recording and the deputy's testimony, the Defendant explained that the passenger accidentally bumped the gear shift into neutral and then she realized it and put it back into drive. She then immediately volunteered that she had one drink earlier. The Defendant was cooperative in responding to the deputies' questions. She had trouble locating the registration for the vehicle because she explained it was her husband's primary vehicle. Deputy Gaddie noticed a strong odor of alcohol coming from the vehicle prior to the Defendant's admission of drinking and also noted that her eyes were bloodshot and watery. When asked where she was coming from, she stated Flagler Beach at a restaurant where she had 3 glasses of wine. As Deputy Gaddie starts to explain his concerns and the indicators of impairment that he has observed, including her driving pattern, the Defendant STACY SIMPSON CAICEDO interrupts and asks, "You want me to take a test? Let's do it."

It is this sequence of events on which the Defendant bases her Motion to Suppress. The Defendant argues that there was no legal basis to conduct a traffic stop and no reasonable suspicion to detain the Defendant. The State argued there was reasonable suspicion for traffic violations, including a violation of Florida Statutes 316.081, driving on the right side of the roadway, and 316.1995, driving upon a sidewalk or bicycle path, each of which would justify the traffic stop for the unusual operation of the vehicle. The State further argued that there were sufficient indicators of impairment to request field sobriety.

Conclusions of Law

The undisputed testimony of Deputy Gaddie and the recordings reflect that the Defendant violated Florida Statutes 316.081, driving on the right side of the roadway, and 316.1995, driving upon a sidewalk or bicycle path. As a result, the Court holds that Deputy Gaddie had a reasonable basis for the traffic stop for the civil traffic violations. Thereafter, through his interactions with the Defendant STACY SIMPSON CAICEDO, Deputy Gaddie developed reasonable suspicion to request the Defendant to step out of her vehicle and perform field sobriety exercises. The reasonable suspicion is developed through the driving pattern observed, including crossing into the oncoming lane of travel two separate times, stopping in the roadway, drifting back towards the oncoming lane of travel then into the bike lane, through the Defendant's admissions of drinking multiple times, and the observations of Deputy Gaddie.

Based upon the foregoing, the Motion to Suppress is hereby **DENIED.**

* * *

Criminal law—Driving under influence—Evidence—Breath test—Substantial compliance with administrative rules—Twenty-minute observation period—Where breath test operator did not communicate delegation of duty to observe defendant to fellow officer to whom he allegedly delegated that duty, and video recording reveals that fellow officer was not concerned with watching defendant and that operator was occupied with tasks that took his attention away from defendant during time that he was in room with defendant, state has not established substantial compliance with twenty-minute observation period—Motion to exclude breath test results is granted

STATE OF FLORIDA, v. CHRISTOPHER CHAYA, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2018 CT 821. October 28, 2019. D. Melissa Distler, Judge. Counsel: RJ Larizza, State Attorney, and Jason Lewis, Assistant State Attorney, Bunnell, for State. Jeffery Higgins, DaytonaDefense.com, Daytona Beach, for Defendant.

ORDER ON DEFENDANT IN LIMINE TO EXCLUDE THE BREATH TEST RESULTS

THIS MATTER came to be heard on the Defendant's Motion in Limine, requesting exclusion of the Breath Test results as a result of violations of Florida Administrative Code 11D-8.007 and Florida Statute 316.1932(1)(b)(2). The Court, having heard testimony from Dr. Patrick Murphy from FDLE, Deputy Carl Parker, and having heard argument from both Counsel for the State and the Defendant, the Court makes the following findings of fact:

Findings of Fact:

The Defendant CHRISTOPHER CHAYA was arrested for DUI and DUI with property damage on October 20, 2018 arising from a traffic accident that occurred in Flagler Beach, Florida. The Defendant CHRISTOPHER CHAYA submitted to a breath test almost three hours after the incident in question. The validity of this breath test due to alleged violations of Florida Administrative Code 11D-8.007 and Florida Statute 316.1932(1)(b)(2) are the subject of this motion.

The Defendant's interaction with law enforcement on the night in question is recorded on both the breath test operators' body camera as well as the security footage at the Flagler County Inmate facility, both of which were admitted into evidence at the hearing. According to the Breath Alcohol Test Affidavit, also admitted into evidence at the hearing as State's Exhibit 3, and according to his testimony at the hearing, Deputy Parker's observation of the Defendant began at 17:45.[1] During Deputy Parker's testimony, he explained that he began his twenty (20) minute observation when the Defendant was still in the sally port of the jail and awaiting entry into booking, immediately upon asking him whether he would submit to a breath test. While there was no testimony from the arresting officer at the hearing, the parties stipulated that had Officer Cozzone testified, he would have testified that he had custody of the Defendant CHRISTOPHER CHAYA from the time of leaving the accident (located in Flagler Beach) to the time of arriving at the jail, with no regurgitation or injection of foreign objects into his mouth. Deputy Parker confirmed that the Defendant was seated in the back of Officer Cozzone's vehicle, handcuffed in the front, when he first saw him.

Next, Deputy Parker testified that he is a certified Breath Test Operator and held such certification prior to administration of the breath test on the Defendant CHRISTOPHER CHAYA. He explained that he followed and observed the Defendant CHRISTOPHER CHAYA at the jail for more than twenty (20) minutes prior to the administration of the Breath Test, even though the video recording of the breath testing room does not reflect such. The video recording of the testing room was admitted into evidence as State's Exhibit 4.

Chronologically, Deputy Parker is out of range or not in a position to observe the Defendant CHRISTOPHER CHAYA for over 9 minutes of the 23-minute stated observation period. In particular, after the Defendant is contacted by Deputy Parker in the Flagler County Jail sally port and agrees to provide a breath sample at the 21:46 mark of the body-cam footage, the deputy leaves Defendant and enters the intake area of the jail. The Defendant does not come within visual contact of the deputy again until the 21:49:23 mark of the body-cam video. This is a 4 minute, 23 second lapse in the observation of the Defendant, the first lapse and first error in this case. There is a second lapse in observation of the Defendant (for a period of18 seconds) while the deputy searches for jail crocs for the Defendant to wear. Following the deputy's search for crocs, he witnesses the Defendant CHRISTOPHER CHAYA place his fingers into his mouth at the 21:51:29 mark of the body-cam video. While the still photos admitted into evidence as State's Exhibit 2 attempt to show only the tips of the Defendant's fingers into the corners of his mouth, the administrative rule does not specify what area of the mouth or how deeply into the mouth a foreign object must be inserted in order to invalidate the twenty minute observation.

A third lapse in observation occurs for a 10-second period beginning at the 21:52:15 mark of the body-cam video, when the deputy conducts an examination of the shoes the Defendant wore into the jail. At the 21:53:04 mark of the body-cam video, the Defendant is seated next to a large cabinet that contains the Flagler County lntoxilyzer 8000.

The intoxilyzer room video reflects the Defendant walking into the room with Deputy Parker at 17:51:03; Officer Cozzone is already in the room seated at a desk adjacent to the locked intoxilyzer cabinet. The first breath sample is obtained at 18:09 per the Breath Test Affidavit. Almost immediately upon entry, Deputy Parker unlocks the cabinet to the intoxilyzer and walks out of the room, without communicating to either the Defendant (whose view is now blocked by the open cabinet doors) or Officer Cozzone, who is engrossed in his computer. While essentially unattended, the video reflects the Defendant placing his hands up his mouth. Additionally Deputy Parker testified at the hearing that he would have been able to hear any regurgitation by the Defendant when he was out of the room; he denied that a door shut during this time, closing him off from the Defendant. However, the video recording reflects the door clearly shutting behind him until he and two others return from the room off camera.

At 17:52:15 Deputy Parker comes back into the room and begins talking to the Defendant CHRISTOPHER CHAYA. This is the beginning of what the Court would consider a true observation period, because this is the first time that the Breath Test Operator, Deputy Parker, is capable of fully viewing the Defendant continuously. Even during this sixteen (16) minute window of time from his return to the room to the first breath sample, there are several instances wherein the deputy is not paying any attention to the Defendant. Deputy Parker is not observing or interacting with the Defendant during the entire sixteen (16) minutes. Deputy Parker turns his back on him several times, and Deputy Parker's entire head is within the cabinet on several occasions, wherein he has no view of anything outside of the cabinet. Officer Cozzone barely looks up from his computer, paperwork, and cellphone during the entire recording.

Deputy Parker testified that Officer Cozzone was observing the Defendant CHRISTOPHER CHAYA during the earlier portions of the video recordings when he was not physically in his presence. This simply is not supported by the video recordings in this case. Furthermore, Deputy Parker testified that Officer Cozzone would have told him had the Defendant regurgitated or ingested anything, but Officer Cozzone did not tell Deputy Parker about the times reflected on video when the Defendant puts his hands to his mouth. Deputy Parker testified that he did not explicitly ask Officer Cozzone to monitor the Defendant during the times he left the room but that the understanding

was implied after their two years of working on cases together. Deputy Parker did not make any notation of another person observing the Defendant CHRISTOPHER CHAYA, as recommended by their training if they are relying upon another person to conduct a portion of the observation period. Furthermore, Deputy Parker acknowledged that he did not ask if the Defendant had any braces, dentures, or other dental partials, which are considered foreign objects under the breath test instructor manual and can impact the breath test.

The State also called Dr. Patrick Murphy, an FDLE Alcohol Testing Program Department Inspector. In addition to explaining the more technical processes of the Intoxilyzer 8000, Dr. Murphy also testified to the requirements of Florida Administrative Rule 11D-008.007. Dr. Murphy did explain the intent behind the rule, that the insertion of an object into the mouth could contaminate results. While Dr. Murphy tried to downplay the probability of contamination after two hours and forty five minutes (as was the time lapse in this case from arrest to breath test), he ultimately acknowledged that FDLE opted for a bright line rule with respect to observations, and that Breath Test Operators are either in compliance or not in compliance.

The Defendant's Motion in Limine to exclude admission of the Breath Test alleges an improper administration of the breath test under Florida Administrative Code 11D-008.007(3) due to a violation of the twenty (20) minute observation requirement. The Defendant cited and argued several county court cases, including *State v. Alain*, 27 Fla. L. Weekly Supp. 388a (Fla. 7th Cir. Volusia 2019); *State v. Petty,* 22 Fla. L. Weekly Supp. 264b (Fla. 4th Cir. Nassau 2014); *State v. Trippany,* 21 Fla. L. Weekly Supp. 353a (Fla. 12th Cir. Sarasota 2013); *State v. Miller,* 19 Fla. L. Weekly Supp. 593a (Fla. 12th Cir. Sarasota 2010); *State v. Fisher,* 14 Fla. L. Weekly Supp. 471a (Fla. 2nd Cir. Leon 2007); and *State v. Kozlak,* 22 Fla. L. Weekly Supp. 607b (Fla. 7th Cir. Volusia 2013). The State cited *DHSMV v. Farley,* 633 So. 2d 69 (Fla. 5th DCA 1994) and *Kaiser v. State,* 609 So. 2d 768 (Fla. 2d DCA 1992).

Conclusions of Law:

The Breath Test Operator was consistently lax in his responsibilities in this case. The observation period cannot begin at a time when the breath test operator does not have the capability of visually seeing the Defendant. Furthermore, if the duty to observe the Defendant for the twenty minute observation is to be delegated to another officer, said information should be communicated to that officer and noted. Not only was it not notated or explicitly communicated in this case, it is clear from the video recording that the other officer was not concerned with watching the Defendant for the purposes set forth in Florida Administrative Code 11D-008.007(3). Even during the sixteen minutes that the breath test operator is in the room with the Defendant CHRISTOPHER CHAYA, he continues to occupy himself with other tasks that take his attention away from the Defendant. The Court finds that the video recordings in this case reflect how NOT to conduct a twenty minute observation and that the observation period was NOT in substantial compliance with Florida Administrative Code 11D-008.007(3) and Florida Statute 316.1932(1)(b)(2).

The Defendant's Motion in Limine to exclude the breath test result is GRANTED. The State is precluded from admitting any evidence related to the breath test conducted on the Defendant CHRISTOPHER CHAYA in this matter.

[1]*When viewed on his body-cam video, this period begins at 21:45. Thus, there is a four-hour clerical discrepancy between the test affidavit and the time-stamped body-cam footage.*

* * *

Criminal law—Driving under influence—Evidence—Breath test—Where breath test operator's non-compliance with twenty-minute observation period rendered test results unreliable, and evidence on meaning of test was sparse, state's motion to allow admission of test results through traditional scientific predicate is denied

STATE OF FLORIDA, v. CHRISTOPHER CHAYA, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2018 CT 821. December 12, 2019. D. Melissa Distler, Judge. Counsel: RJ Larizza, State Attorney, and Jason Lewis, Assistant State Attorney, Bunnell, for State. Jeffrey Higgins, DaytonaDefense.com, Daytona Beach, for Defendant.

ORDER ON STATE'S MOTION IN LIMINE TO ALLOW BREATH TEST RESULTS THROUGH THE BENDER SCIENTIFIC PREDICATE

THIS MATTER came to be heard on the State's Motion in Limine, requesting admission of the Breath Test results through the traditional *Bender* predicate. The Court previously entered an Order excluding the Breath Test results as a result of violations of Florida Administrative Code 11D-8.007 and Florida Statute 316.1932(1)(b)(2). Having heard testimony from Officer Cozzone, Sergeant Daniel Weaver, Deputy Carl Parker, and Dr. Patrick Murphy from FDLE for the State, and Dr. Lawrence Masten for the Defense, and having heard argument from both Counsel for the State and the Defendant, the Court makes the following findings of fact:

Findings of Fact:

The Defendant CHRISTOPHER CHAYA was arrested for DUI and DUI with property damage on October 20, 2018 arising from a traffic accident that occurred in Flagler Beach, Florida. The Defendant CHRISTOPHER CHAYA submitted to a breath test almost three (3) hours after the incident in question. The validity and admissibility of this breath test due to alleged violations of Florida Administrative Code 11D-8.007 and Florida Statute 316.1932(1)(b)(2) are the subject of this Order.

The Court incorporates the findings previously made in the October 28, 2019 Order [29 Fla. L. Weekly Supp. 134a], arising from a hearing held October 22, 2019. Some of those findings, which were referenced during the second hearing, are set forth, in part, herein.

The Defendant's interaction with law enforcement on the night in question is recorded on both the Breath Test Operators' body camera as well as the security footage at the Flagler County Inmate facility, both of which were admitted into evidence at the hearing. According to the Breath Alcohol Test Affidavit, also admitted into evidence at the hearing, and according to his testimony at the first hearing, Deputy Parker's observation of the Defendant began at 17:45.[1] During Deputy Parker's testimony at the original hearing, he explained that he began his twenty (20) minute observation when the Defendant was still in the sally port of the jail and awaiting entry into booking, immediately upon asking him whether he would submit to a breath test. While there was no testimony from the arresting officer at the first hearing, the parties stipulated that had Officer Cozzone testified, he would have testified that he had custody of the Defendant CHRISTOPHER CHAYA from the time of leaving the accident (located in Flagler Beach) to the time of arriving at the jail, with no regurgitation or injection of foreign objects into his mouth. Deputy Parker confirmed that the Defendant was seated in the back of Officer Cozzone's vehicle, handcuffed in the front, when he first saw him.

Officer Cozzone did testify at the second hearing held December 11, 2019. Officer Cozzone testified, in relevant part for this motion, that the Defendant appeared to be intoxicated enough to be arrested. The Defendant was placed under arrest at 4:20 pm and taken to the Flagler County Inmate Facility. Officer Cozzone was unable to testify as to the exact time of arrival, as it was not noted in his report. He explained that it is normally a ten (10) to fifteen (15) minute drive

from Flagler Beach to the facility.

Sergeant Weaver testified as the Agency Inspector of the Intoxilyzer 8000 instruments housed at the Flagler County Inmate Facility. Sergeant Weaver testified to and laid the predicate for admission of the registration of as well as monthly agency inspections for the instrument utilized in this case: 80-006616. His testimony established that the instrument was in proper working order at the time of the breath sample in this case.

Deputy Parker testified that he is a certified Breath Test Operator and held such certification prior to administration of the breath test on the Defendant CHRISTOPHER CHAYA. He explained that he followed and observed the Defendant CHRISTOPHER CHAYA at the jail for more than twenty (20) minutes prior to the administration of the Breath Test, even though the video recording of the breath testing room does not reflect such. The video recording of the testing room was admitted into evidence as State's Exhibit 4.

Chronologically, Deputy Parker is out of range or not in a position to observe the Defendant CHRISTOPHER CHAYA for over 9 minutes of the 23-minute stated observation period. In particular, after the Defendant is contacted by Deputy Parker in the Flagler County Jail sally port and agrees to provide a breath sample at the 21:46 mark of the body-cam footage, the deputy leaves the Defendant and enters the intake area of the jail. The Defendant does not come within visual contact of the deputy again until the 21:49:23 mark of the body-cam video. This is a 4 minute, 23 second lapse in the observation of the Defendant, the first lapse and first error in this case. There is a second lapse in observation of the Defendant (for a period of 18 seconds) while the deputy searches for jail crocs for the Defendant to wear. Following the deputy's search for crocs, he witnesses the Defendant CHRISTOPHER CHAYA place his fingers into his mouth at the 21:51:29 mark of the body-cam video. While the still photos admitted into evidence as State's Exhibit 2 attempt to show only the tips of the Defendant's fingers into the corners of his mouth, the administrative rule does not specify what area of the mouth or how deeply into the mouth a foreign object must be inserted in order to invalidate the twenty-minute observation.

A third lapse in observation occurs for a 10-second period beginning at the 21:52:15 mark of the body-cam video, when the deputy conducts an examination of the shoes the Defendant wore into the jail. At the 21:53:04 mark of the body-cam video, the Defendant is seated next to a large cabinet that contains the Flagler County lntoxilyzer 8000.

The intoxilyzer room video reflects the Defendant walking into the room with Deputy Parker at 17:51:03; Officer Cozzone is already in the room seated at a desk adjacent to the locked intoxilyzer cabinet. The first breath sample is obtained at 18:09 per the Breath Test Affidavit. Almost immediately upon entry, Deputy Parker unlocks the cabinet to the intoxilyzer and walks out of the room, without communicating to either the Defendant (whose view is now blocked by the open cabinet doors) or Officer Cozzone, who is engrossed in his computer. While essentially unattended, the video reflects the Defendant placing his hands up to his mouth. Additionally Deputy Parker testified at the first hearing that he would have been able to hear any regurgitation by the Defendant when he was out of the room; he denied that a door shut during this time, closing him off from the Defendant. However, the video recording reflects the door clearly shutting behind him until he and two others return from the room off camera.

At 17:52:15 Deputy Parker comes back into the room and begins talking to the Defendant CHRISTOPHER CHAYA. This is the beginning of what the Court would consider a true observation period, because this is the first time that the Breath Test Operator, Deputy Parker, is capable of fully viewing the Defendant continuously. Even during this sixteen (16) minute window of time from his return to the room to the first breath sample, there are several instances wherein the deputy is not paying any attention to the Defendant. Deputy Parker is not observing or interacting with the Defendant during the entire sixteen (16) minutes. Deputy Parker turns his back on him several times, and Deputy Parker's entire head is within the cabinet on several occasions, wherein he has no view of anything outside of the cabinet. Officer Cozzone barely looks up from his computer, paperwork, and cellphone during the entire recording.

Deputy Parker testified at the first hearing that Officer Cozzone was observing the Defendant CHRISTOPHER CHAYA during the earlier portions of the video recordings when he was not physically in his presence. This simply is not supported by the video recordings in this case. Furthermore, Deputy Parker testified that Officer Cozzone would have told him had the Defendant regurgitated or ingested anything, but Officer Cozzone did not tell Deputy Parker about the times reflected on video when the Defendant puts his hands to his mouth. Deputy Parker testified at the first hearing that he did not explicitly ask Officer Cozzone to monitor the Defendant during the times he left the room but that the understanding was implied after their two years of working on cases together. Officer Cozzone was not asked any questions along this line at the hearing on the State's motion.

Deputy Parker did not make any notation of another person observing the Defendant CHRISTOPHER CHAYA, as recommended by their training if they are relying upon another person to conduct a portion of the observation period. Furthermore, Deputy Parker acknowledged that he did not ask if the Defendant had any braces, dentures, or other dental partials, which are considered foreign objects under the breath test instructor manual and can impact the breath test.

The State also called Dr. Patrick Murphy, an FDLE Alcohol Testing Program Department Inspector. In addition to explaining the more technical processes of the Intoxilyzer 8000, Dr. Murphy also testified at the first hearing to the requirements of Florida Administrative Rule 11D-08.007. Dr. Murphy did explain the intent behind the rule, that the insertion of an object into the mouth could contaminate results. While Dr. Murphy tried to downplay the probability of contamination after two hours and forty-five minutes (as was the time lapse in this case from arrest to breath test), he ultimately acknowledged that FDLE opted for a bright line rule with respect to observations, and that Breath Test Operators are either in compliance or not in compliance.

The Defendant's Motion in Limine to exclude admission of the breath test alleged an improper administration of the breath test under Florida Administrative Code 11D-008.007(3) due to a violation of the twenty (20) minute observation requirement. The Court previously entered an order granting said Motion and finding as follows:

> The Breath Test Operator was consistently lax in his responsibilities in this case. The observation period cannot begin at a time when the breath test operator does not have the capability of visually seeing the Defendant. Furthermore, if the duty to observe the Defendant for the twenty minute observation is to be delegated to another officer, said information should be communicated to that officer and noted. Not only was it not notated or explicitly communicated in this case, it is clear from the video recording that the other officer was not concerned with watching the Defendant for the purposes set forth in Florida Administrative Code 11D-008.007(3). Even during the sixteen minutes that the breath test operator is in the room with the Defendant CHRISTOPHER CHAYA, he continues to occupy himself with other tasks that take his attention away from the Defendant. The Court finds that the video recordings in this case reflect how NOT to conduct a twenty minute observation and that the observation period was NOT in substantial compliance with Florida Administrative Code 11D-

008.007(3) and Florida Statute 316.1932(1)(b)(2).

At the second hearing, Dr. Murphy slightly expounded upon his original testimony as to the scientific reliability and general acceptance in the scientific community of the infrared light absorption methods used by the Intoxilyzer 8000. Dr. Murphy explained the time, volume, and slope as part of any breath sample, as well as possible radio frequency interference and mouth alcohol. Essentially, Dr. Murphy went into detail as to the mechanical operation of the Intoxilyzer and the possible problems that can occur with the machine leading up to and during a breath test. He testified that FDLE requires a much longer time of observation than is generally accepted in the scientific community, which he opined to be less than fifteen minutes. When asked on cross-examination, Dr. Murphy acknowledged that in order to perform retrograde extrapolation to the time of driving, FDLE needs to know the time of the last drink, which is not known in this case. Dr. Murphy further testified that he cannot tell the Court what the test results in this case mean.

The Court notes that Dr. Murphy does have a Masters in Forensic Science with other degrees in journalism, general studies, divinity, and English. He has been working in the forensics field for eleven (11) years and only with FDLE. He is not Board Certified in the field, has never taught in the field, and has never performed any clinical research in the field. His only publications in the field have been for websites.

The Defendant called Dr. Lawrence Masten. Dr. Masten received a PhD in Toxicology from the University of Michigan in 1972 and has been employed in the forensic field since. He has been Board Certified in Toxicology since 1980, with multiple recertification exams throughout those thirty-nine years. He has fifty-five publications to date in the field of toxicology, and he was a professor for several years. Dr. Masten's qualifications in the toxicology field far surpass those of Dr. Murphy.

Dr. Masten, having reviewed the videos, arrest reports, and the pleadings in the case, agreed that the twenty-minute observation was not complied with in this case. He testified that the scientific community has determined the optimum time to be fifteen to twenty minutes with most people using twenty minutes as the standard for observation periods. He was unable to say with scientific certainty what a person's breath alcohol content is without a proper observation period. Due to the nature of the standardized testing, when those standards are not followed, the results cannot be interpreted. Dr. Masten is unable to speculate as to what any breath results would have been had the observation period been complied with.

The State argued that they had met the traditional *Bender* predicate. *State v. Bender,* 382 So. 2d 697 (Fla. 1980). Under *Bender,* in order for the breath test results to be admissible, the State must establish (1) the test was reliable; (2) the test was performed by a qualified operator with the proper equipment; and (3) expert testimony was presented concerning the meaning of the test. *Id.* at 700.

In the instant case, the Court has already made a finding tantamount to a factual finding that the test was not reliable based upon the Breath Test Operator's non-compliance with Florida Administrative Code 11D-008.007(3) and Florida Statute 316.1932(1)(b)(2). There was no substantive testimony that obviates the Court's previous ruling and findings, which would potentially resurrect reliability of the breath test in this case. There is no dispute that the test was performed by a qualified operator on proper equipment, so that is not at issue. The expert testimony presented by the State as to the meaning of the test was sparse.

The State additionally argued *Robertson v. State,* 604 So. 2d 783 (Fla. 1992); *State v. Mehl,* 602 So. 2d 1383 (Fla. 5th DCA 1992); and *Tyner v. State,* 805 So. 2d 862 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D2203a].

The State's Motion in Limine to permit the breath test results through the traditional *Bender* predicate is DENIED. The State is precluded from admitting any evidence related to the breath test conducted on the Defendant CHRISTOPHER CHAYA in this matter.

---

[1]*When viewed on his body-cam video, this period begins at 21:45. Thus, there is a four-hour clerical discrepancy between the test affidavit and the time-stamped body-cam footage.*

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Officer acting outside jurisdiction—Officer who stopped defendant for speeding outside of his jurisdiction was acting outside of scope of normal citizen when he asked defendant to submit to field sobriety exercises and breath test—Because there was no record of mutual aid agreement with law enforcement agencies of jurisdiction in which defendant was stopped—Motion to suppress granted

STATE OF FLORIDA, Plaintiff, v. DEREK TODD COWELL, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2019-CT-285-A-E. March 16, 2021. Eric DuBois, Judge. Counsel: William Joseph Guerilus, Office of the State Attorney, Orlando, for Plaintiff. Matthews R. Bark, Matthews R. Bark, P.A., Altamonte Springs, for Defendant.

ORDER ON MOTION TO SUPPRESS

THIS CAUSE, having come before the Court for an evidentiary hearing on February 28, 2020, in which the Court after hearing the evidence and argument of counsel made an oral announcement that granted the Defendants Motion to Suppress. This Order was entered at the request of the State at a Pre-Trial hearing held on March 2, 2021.

Officer Kevin Liebknecht of the City of Maitland Police Department was the sole witness called at the hearing by the State on February 16, 2021. Officer Liebknecht testified that he observed a vehicle driving at an excessive rate of speed on Howell Branch Road headed eastbound towards State Road 436 (a/k/a Semoran Blvd.) Officer Liebknecht testified that after he was able to obtain a speed on the vehicle he activated his lights and sirens and completed a traffic stop on State Road 436 and Howell Branch Road in the shopping center that has a Smokey Bones Restaurant in it. The Office testified that the Defendant, Derek Todd Cowell, was seated in the driver's seat and provided a valid Florida Drivers License. The officer was able to identify the Defendant who was seated in Court at the table with his defense attorney. Officer Liebknecht issued the Defendant a Uniform Traffic Citation for speeding and then proceeded to conduct a "criminal investigation" in which the Defendant was asked to perform an number of field sobriety exercises. Based on the Officers observations, the Defendant was placed under arrest and transported to the Seminole County Jail, however, charges were filed in Orange County for Driving Under the Influence.

At issue before this Court is whether the stop, search and seizure of the Defendant was lawfully performed by an sworn Law Enforcement Officer with jurisdiction to conduct said stop and search. Under cross examination, Officer Liebknecht testified that the initial traffic violation occurred within Orange County, Florida, but that by the time he was able to activate lights and sirens and stop the vehicle, the Officer was located in Seminole County. Further the Officer testified that at no time did he call out to the Casselberry Police Department or Seminole County Sherriff's Office for mutual aid or a relinquishment of jurisdiction to the Maitland Police Department to conduct such investigation.

"As a general principle, public officers of a county or municipality have no official power to arrest an offender outside the boundaries of their county or municipality." *State v. Phoenix,* 428 So. 2d 262, 265 (Fla. 4th DCA 1982). However, an officer may make an arrest outside of his or her jurisdiction when "two enforcement agencies have entered into a mutual aid agreement that permits extraterritorial

conduct by the outside police municipality." *Daniel v. State,* 20 So. 3d 1008, 1011 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2264a]. Under common law a private citizen may arrest a person who in the citizen's presence commits a felony or breach of the peace. *Edwards v. State,* 462 So.2d 581,582 (Fla. 4th DCA 1985). However, this power is not all encompassing nor does it allow law enforcement to act without a mutual aid agreement outside of their jurisdiction. "The 'Under Color of Office Doctrine' was created to prevent law enforcement officials from using the powers of their office to observe unlawful activity or gain access to evidence not available to a private citizen." *Phoenix v. State,* 455 So.2d 1025 (Fla. 1984).

In the instant case, Officer Liebknecht had the Defendant, Derek Todd Cowell, perform Field Sobriety Exercises and submit to a breath test, neither of which is readily available to the average citizen. The critical issue for the Court to consider is did the Defendant's actions arise to a Breach of the Peace which would have allowed the officer to make a citizens arrest.

The Court does find that Officer Liebknecht was acting outside the scope of a normal citizen when he asked the Defendant to submit to Field Sobriety exercises as well as a breath test. At no time did the State elicit testimony from the Officer of his knowledge of any mutual aid agreement with either Seminole County Sheriff's Office or Casselberry Police Department. Officer Liebknecht also failed to testify about any attempts to involved these agencies in the investigation of the suspected Driving Under the Influence of the Defendant.

THEREFORE IT IS DONE AND ORDERED AS FOLLOWS:

The Defendant's Motion to Suppress is **GRANTED.** The Court finds that as the stop occurred outside the jurisdiction of the Officer and there is no record evidence of any mutual aid agreement or agreement by another agency to allow Officer Liebknecht to conduct the criminal investigation under color of law which resulted in the Defendant's arrest for suspected Driving Under the Influence.

* * *

Contracts—Unjust enrichment—Plaintiff cannot pursue unjust enrichment claim where express contract exists between parties

VELOCITY INVESTMENTS, LLC, Plaintiff, v. JAVIER NARANJO, Defendant. County Court, 9th Judicial Circuit in and for Osceola County. Case No. 2019-SC-3529. April 14, 2021. Hal. C. Epperson, Jr., Judge. Counsel: Melissa Alvarez, Cooling & Winter, Plantation, for Plaintiff. Bryan A. Dangler, The Power Law Firm, Altamonte Springs, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COUNT II

THIS CAUSE came before the Court on March 22, 2021 on Defendant's Motion to Dismiss Count II, and the Court having reviewed the Motion and case law presented, heard argument from counsel, and being otherwise fully advised in the premises, finds as follows:

Plaintiff filed a two-count complaint for breach of contract and unjust enrichment and attached a copy of the subject contract between the parties as an exhibit to the complaint. Plaintiff cannot pursue a quasi-contract claim for unjust enrichment to prove entitlement to relief if an express contract exists concerning the same subject matter. *Ocean Communications, Inc. v. Bubeck,* 956 So. 2d 1222, 1225 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1344a]. Plaintiff has alleged that an express contract exists between the parties and has attached the contract to its complaint which enumerates the rights and responsibilities of each party as well as remedies for breach.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Defendant's Motion to Dismiss Count II is **GRANTED**.

* * *

Insurance—Assignment of benefits—Standing—Dismissal—Error to dismiss assignee's claim for lack of standing based on assignee's failure to comply with certain provisions of section 627.7152—Because the subject policy predates enactment of the statute, the statute cannot be applied retroactively as a basis for dismissal of the action

FATHER & SON RESTORATION & MITIGATION, Plaintiff, v. PEOPLES TRUST INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-014909-CC-23, Section ND06. March 16, 2021. Ayana Harris, Judge. Counsel: Nixon LaRoche, Font & Nelson, Ft. Lauderdale, for Plaintiff. Joshua Beck, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS COMPLAINT

This Cause came before the Court on January 26, 2021, on Defendant's Motion to Dismiss Complaint. The Court, having reviewed the pleadings, heard the arguments of counsel, reviewed the applicable law, and being otherwise fully advised in the premises, finds as follows:

LEGAL STANDARD

A motion to dismiss examines the legal sufficiency of the plaintiff's complaint. *Grove Isle Association, Inc. v. Grove Isle Associates*, LLLP, 137 So. 3d 1081, 1089 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D648a]. In order to rule on a motion to dismiss, a trial court must limit itself to the four corners of the plaintiff's complaint. *Id.* While examining the four corners of the complaint, the allegations are assumed to be true and must be construed using all reasonable inferences in favor of the non-moving party. *Id.* A motion to dismiss is designed to test the legal sufficiency of a complaint and not to determine any factual issues. *The Fla. Bar v. Greene,* 926 So.2d 1195, 1199 (Fla. 2006) [31 Fla. L. Weekly S212a].

ANALYSIS AND FINDINGS

This is an action for breach of contract stemming from Defendant's failure to pay homeowner's insurance benefitsfrom Plaintiff's claim based on an Assignment of Benefits ("AOB") dated March 10, 2020, related to a loss from 2017. At the time of the alleged loss, the Insured had a policy issued by Defendant that was in full force and effect. Defendant asserts that the case should be dismissed based on lack of standing for Plaintiff's failure to comply with certain provisions of Fla. Stat. 627.7152, which is applicable to any assignment agreement entered into after July 1, 2019.

> Under Florida law, a substantive statutory change cannot be applied retroactively to insurance policies issued before the effective date of change "because the statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract". *Menendez v. Progressive Express Ins. Co.*, 35 So. 3d 873, 875-80 (Fla. 2010) [35 Fla. L. Weekly S222b] (quoting *Hassen v. State Farm Mut. Auto. Ins. Co.,* 674 So.2d 106, 108 (Fla.1996) [21 Fla. L. Weekly S102c]); *see also Lumbermens Mut. Cas. Co. v. Ceballos,* 440 So.2d 612, 613 (Fla. 3d DCA 1983) (holding that a liability policy is governed by the law in effect at the time the policy is issued, not the law in effect at the time a claim arises).

Here, since the subject insurance policy predates the enactment of Fla. Stat. § 627.7152, which became effective on July 1, 2019, the statute cannot be applied retroactively as a basis for dismissal of this action.

CONCLUSION

For the reasons herein stated, it is hereby **ORDERED** and **ADJUDGED** that:

1. Defendant's Motion to Dismiss Complaint is **DENIED.**
2. Defendant shall respond to the Complaint within 20 days of the date of this Order.

* * *

Insurance—Personal injury protection—Discovery—Insurer's motion for protective order is granted—Further discovery is not warranted, and case is ready to proceed to final adjudication on merits of remaining legal issue

AFFILIATED HEALTHCARE CENTERS, INC., a/a/o Julio Paez, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2012-012544-SP-25, Section CG01. April 20, 2021. Linda Melendez, Judge. Counsel: George A. David, George A. David, P.A., Coral Gables, for Plaintiff. Mayte Peña, Shutts & Bowen, LLP, Miami, for Defendant.

ORDER GRANTING ALLSTATE'S MOTION FOR PROTECTIVE ORDER AND DENYING PLAINTIFF'S MOTION TO COMPEL RESPONSES TO DISCOVERY

This matter came before the Court on April 6, 2021, on Allstate's Motion for Protective Order regarding discovery and Plaintiff's Motion to Compel Responses to Initial Claim for Medical Bills and Pre-Suit Demand Letter Interrogatories and Plaintiff's Motion Compel Better Answers to Supplemental Request for Production, and the Court having reviewed the motions and supplemental authority, heard argument of the parties, and being otherwise fully advised in the premises, finds as follows:

Plaintiff filed this breach of contract action for personal injury protection benefits on June 14, 2012. Between June of 2012 and April of 2013, Plaintiff served upon the Defendant three sets of Interrogatories and seven Requests for Production. Thereafter, the Plaintiff filed its first Motion for Summary Final Judgment on November 10, 2014 and Allstate filed its Response and Cross-Motion for Summary Judgment on November 11, 2014.

Between August of 2017 and May of 2018, Plaintiff served its fourth set of Interrogatories and eighth and ninth Request for Production. On December 10, 2019, Allstate filed its Motion for Entry of Final Judgment seeking entry of Final Judgment on the parties' 2014 Cross-Motions for Summary Judgment on the issue of fee schedule election.[1]

On December 16, 2019, Plaintiff filed its second Motion for Summary Final Judgment on the issue of interest. On December 20, 2019, the Court heard argument of the parties on their December 2019 Motions. On January 21, 2020, the Court issued an Order Denying Allstate's Motion for Entry of Final Judgment and finding that the issue of interest remains pending before the Court. On the following day, January 22, 2020, at the Calendar Call set by the Court, this matter was removed from the trial docket as the case-dispositive issue before the Court is a question of law, Allstate was instructed to file its Response and Cross-Motion for Summary Judgment on the issue of interest within fifteen (15) days and the parties were directed to proceed with setting their respective dispositive motions on the issue of interest for hearing.

On February 14, 2020, Allstate filed its Response and Cross-Motion for Summary Final Judgment. Commencing in March of 2020, Allstate has made attempts to coordinate a hearing on the parties' Cross-Motions for Summary Judgment.

On December 16, 2020, this Court entered a Notice of Lack of Prosecution finding that there has been no record activity in this cause for more than six months. Following the Court's Notice, in January and February of 2021, Plaintiff served upon Allstate various forms of supplemental discovery, including two additional sets of Interrogatories and two additional Requests for Production.

Under Rule 1.280(c)(1), Florida Rules of Civil Procedure, for good cause shown, the Court may enter an order to protect a party from annoyance, undue burden or expense, including that the discovery not be had. Moreover, pursuant to Rule 1.200(a)(4), Florida Rules of Civil Procedure, this Court has the discretion to fashion orders to govern the conduct of discovery, including to schedule, order, expedite or limit discovery.

In the instant case, a protective order is warranted to protect Allstate from undue burden or expense because the Court must decide a purely legal issue; both parties' have already submitted to the Court their respective Motions for Summary Final Judgment on the issue and summary judgment evidence; and the Court already previously instructed the parties to set their respective dispositive motions for hearing.

Accordingly, this matter is ready to proceed to final adjudication on the merits via hearing on the parties' respective summary judgment motions and further discovery is not warranted. *See In re the Estate of Carlos Rumaldo Herrera v. Berlo Industries, Inc.*, 840 So. 2d 272 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D217b] (rejecting the argument that summary judgment was error because discovery was not completed because "future discovery would not yield any new information that the trial court either did not already know, or needed to make its ruling.).

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that Allstate's Motion for Protective Order is hereby **GRANTED**; and Plaintiff's Motions to Compel are hereby **DENIED**.

---

[1]The parties' 2014 Cross-Motions for Summary Judgment were heard on December 1, 2014 by the Court's predecessor, the Honorable Gloria Gonzalez-Meyer, but no ruling on the matter was had.

* * *

Insurance—Personal injury protection—Coverage—Rescinded policy—Default declaratory judgment obtained against insured declaring that PIP policy was void *ab initio* for material misrepresentations is not binding on medical provider's claim in this case—Insured who had assigned her benefits to provider was not proper party to declaratory judgment action, and provider who was real party in interest was not party to that action—Motion to dismiss is denied

ORLANDO INJURY CENTER, INC., a/a/o Arley Marrero Couzo, Plaintiff, v. IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-008769-SP-25, Section CG02. March 8, 2021. Elijah A. Levitt, Judge.

ORDER ON DEFENDANT'S MOTION TO DISMISS COMPLAINT

This matter having come before the Court on February 18, 2021, on Defendant's Motion to Dismiss, and the Court having considered the motion, having heard the arguments of counsel, having reviewed the pertinent law, and being otherwise fully advised in the premises, it is hereby **ORDERED AND ADJUDGED** that Defendant's Motion is DENIED. *See Indep. Fire Ins. Co. v. Paulekas,* 633 So.2d 1111 (Fla. 3d DCA 1994); *Citizens Prop. Ins. Corp. v. Ifergane,* 114 So.3d 190 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2205a].

In support of this Order, the Court provides the following:

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

This is an action filed pursuant to section 627.736, Florida Statutes, for alleged overdue personal injury protection ("PIP") benefits owed to Plaintiff for medical services that Plaintiff allegedly provided to Defendant's insured Arley Marrero Couzo ("AMC") resulting from a February 3, 2020, car accident. On February 4, 2020, Plaintiff obtained an assignment of benefits from AMC to be paid AMC's PIP benefits for the medical services rendered. Plaintiff submitted its claim to Defendant, but Defendant did not pay Plaintiff what it sought to be paid.

On April 24, 2020, Defendant filed a declaratory judgment action against AMC in Orange County, Florida. *See Imperial Fire and Cas. Ins Co. v. Couzo,* No. 2020-CC-004630-O (Orange Cty. Ct. Apr. 24, 2020). Defendant sought a declaration as to PIP coverage for the

February 3, 2020, accident due to an alleged material misrepresentation in AMC's insurance application. *See id.* On May 13, 2020, Plaintiff filed the present case against Defendant. On June 1, 2020, Defendant obtained a default against AMC for AMC's failure to respond to the Complaint. See *Couzo,* 2020- CC-004630-O.

On July 21, 2020, Defendant obtained a default judgment against AMC. *See id.* The default judgment provided that the subject insurance policy was void *ab initio* for AMC's material misrepresentation. *See* Order attached to Defendant's Motion to Dismiss. During the February 18, 2021 hearing, Plaintiff informed the Court that it was not notified of the Orange County action.

In support of its Motion, Defendant provided four (4) orders from county courts that granted similar motions to dismiss. [DE 23]. None of these orders were issued by a court in Florida's Third District Court of Appeal's jurisdiction.

ANALYSIS

Pursuant to the jurisprudence of the Third District Court of Appeal, the Orange County order is not *res judicata* or binding in this case. "A declaratory action obtained by an insurer against its insured is not binding on a third-party claimant who was not a party to the declaratory judgment action." *Indep. Fire Ins. Co. v. Paulekas,* 633 So.2d 1111, 1113 (Fla. 3d DCA 1994). As in the present case, the third-party claimant in *Paulekas* was not a party to an undefended declaratory judgment action. *See id.* On similar facts, the *Paulekas* Court found that the third-party's claim was not barred by *res judicata*. *Id.* Wherefore, Plaintiff's claim is not barred by the Orange County order.

Further, due to the assignment of benefits to Plaintiff, AMC was not a proper party to the declaratory judgment action. In *Citizens Property Insurance Corporation v. Ifergane,* 114 So.3d 190 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2205a], the Third District Court of Appeal dismissed a declaratory judgment action against an insured who assigned her benefits to another.[1] A plaintiff may obtain a declaratory judgment where: (1) there is "a bona fide, actual, present practical need" for the declaration; (2) the declaration sought deals with "a present, ascertained or ascertainable state of facts or present controversy as to a state of facts;" (3) an "immunity, power, privilege or right" of the plaintiff depends on the facts or the law that applies to the facts; (4) some persons have an "actual, present, adverse and antagonistic interest" in the subject matter; (5) all persons with an adverse and antagonistic interest are before the court; and (6) the declaration sought does not amount to mere legal advice. *Meadows Cmty. Ass'n v. Russell-Tutty*, 928 So.2d 1276, 1279 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1495a] (quoting *May v. Holley,* 59 So.2d 636, 639 (Fla. 1952)). Utilizing this precedent, the *Ifergane* court found that the insured assignor did not have an "'actual, present, adverse and antagonistic interest' in the subject matter of the amended complaint." *Id.* at 195. The insured had assigned her rights to another. *Id.* Thus, the Court found that Citizens could not sue the insured in its action for a coverage declaration. *Id*.

As in *Ifergane,* AMC did not have an actual, present, adverse, and antagonistic interest in the Orange County case. Approximately four (4) months earlier, AMC assigned her rights to post-loss PIP benefits to Plaintiff. *See* Assignment of Benefits attached to Complaint. Post-loss insurance claims are freely assignable. *See Lexington Ins. Co. v. Simkins Indus., Inc.*, 704 So.2d 1384 (Fla.1998) [23 Fla. L. Weekly S41a]. Defendant's Orange County Complaint specifically references the post-loss benefits resulting from the February 3, 2020, car accident. Thus, Plaintiff was the true party in interest for the Orange County case. Since Plaintiff was not a party to the Orange County case, the Orange County order is not binding on Plaintiff's claim. Accordingly, Defendant's Motion to Dismiss is denied.

[1]*Ifergane* distinguishes its holding from *Paulekas,* but the Court finds that they are not inapposite. Both cases hold that Plaintiff, an assignee and third-party claimant, is a necessary party for the declaratory action on insurance coverage.

* * *

Insurance—Personal injury protection—Coverage—Declaratory judgments—Court has jurisdiction to consider count in which medical provider seeks declaration regarding whether PIP statute precludes coverage for claim in which insurer requested examination under oath more than 30 days after receipt of bills and did not submit notice of reasonable belief of fraud before claim became overdue—Failure to send pre-suit demand letter stating exact amount due does not require dismissal or more definite statement—Complaint is legally sufficient, and insurer may use discovery to clear up any confusion as to exact amount claimed to be at issue

GR REHAB CENTER, INC., a/a/o Leslie Reyes, Plaintiff, v. METROPOLITAN CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-015078-CC-25, Section CG01. April 6, 2021. Linda Melendez, Judge. Counsel: Walter A. Arguelles, Arguelles Legal, P.L., Miami, for Plaintiff. Michael Chackman, Bernstein Chackman Liss, Hollywood, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT OR MOTION FOR MORE DEFINITE STATEMENT

THIS CAUSE, having come before the Court on March 30, 2021, upon Defendant's Motion to Dismiss Plaintiff's Complaint or Motion for More Definite Statement, and the Court having heard argument of counsel, reviewed the complaint, the motion, the Court file, and all relevant legal authorities, and otherwise having been fully advised in the premises, the Court finds as follows:

Count II of Plaintiff's complaint seeks declaratory relief pursuant to Chapter 86, Florida Statutes. Plaintiff contends that there is bonafide dispute or controversy concerning whether Fla. Stat. 627.736(6)(g) precludes coverage for the subject claim wherein the insurer requests an Examination Under Oath more than thirty (30) days after receipt of the medical provider's bills and did not submit notice in writing of a reasonable belief of fraud before the claim is overdue pursuant to Fla. Stat. 627.736(4)(i).

The Defendant alleges that a Declaratory Judgment is not the proper vehicle for the Plaintiff, that Plaintiff's Declaratory Action is better addressed by way of Count I for breach of contract. Moreover, the Defendant alleges, that Plaintiff is seeking an advisory opinion and that the Declaratory Count impermissibly incorporates the allegations from its breach of contract Count, including seeking the same relief.

This Court relies upon its previous ruling in *Professional Medical Building Group, Inc. a/a/o Niurka Zamora v. State Farm Mut. Auto. Ins. Co*., 2014-1868-SP-25-01 (February 27, 2018) [26 Fla. L. Weekly Supp. 33a] in which it declared that the Plaintiff has the right to choose its legal strategy and the right to pursue its chosen legal path. The mere existence of another remedy at law does not preclude a judgment for declaratory relief. *Maciejewski vs. Holland*, 441 So.2d 703 (1983).

The Court next addresses Defendant's notion that the Plaintiff's complaint fails to specify the exact amount at issue. The Defendant alleges that the Plaintiff has failed to comply with Fla. Stat. 627.736(10) by sending a Pre-Suit Demand Letter which states the exact amount at issue and therefore the subject action must be dismissed or amended to include a more definite statement of the claim at issue.

When reviewing a motion to dismiss, the Court must view the complaint in the light most favorable to the Plaintiff and the Court is only limited to the facts alleged within the four corners of the Complaint. *Minor v. Brunetti*, 43 So.3d 178, 179 (Fla. 3d DCA 2010)

[35 Fla. L. Weekly D2013a]; *Swerdlin v. Fla. Mun. Ins. Trust*, 162 So.3d 96, 97 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D2164c]. Moreover, [a] motion to dismiss is designed to test the legal sufficiency of a complaint, and not to determine issues of fact". *Bolz v. State Farm Mut. Auto Ins. Co.,* 679 So. 2d 836, 837 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D2010c]. A complaint would be legally sufficient if the pleading "... [contains] (1) a short and plain statement of the grounds upon which the court's jurisdiction depends,. . . (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which the pleader deems appropriate. Rule 1.110 (b) Fla. R. Civ. P.

Unlike special damages, which are required by Rule 1.120(g) to be plead with specificity, there is no requirement for the Plaintiff to indicate the exact amount at issue. In reviewing the Plaintiff's Complaint, this Court finds it to be legally sufficient pursuant to Rule 1.110(b). Moreover, the Defendant has the available avenue of discovery in order to clear up any confusion as to the amount claimed to be at issue.

Accordingly, it is therefore ORDERED AND ADJUDGED that Defendant's Motion to Dismiss Plaintiff's Complaint or Motion for More Definite Statement is hereby DENIED. Defendant shall respond to Plaintiff's Complaint within twenty (20) days of this Order.

* * *

Insurance—Personal injury protection—Affirmative defenses—Failure to seek treatment within 14 days of accident—Where insured did not receive initial treatment within 14 days of accident, insurer has no obligation to pay medical provider's claim—No merit to argument that insured's failure to receive treatment within 14 days of accident should be discharged under doctrine of impossibility or impracticability due to occurrence of hurricane 12 days after accident—Impossibility and impracticability are legally insufficient defenses to nonperformance of statutory requirement

QUALITY MEDICAL GROUP, INC., a/a/o Juan Reynoza, Plaintiff, v. PROGRESSIVE AMERICAN INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-010136-SP-23, Section ND01. December 18, 2020. Myriam Lehr, Judge. Counsel: Brion M. Ross, Brion Ross Law Group, LLC, Fort Lauderdale, for Plaintiff. Alexandra [Ali] Diaz de Arce, Progressive PIP House Counsel, Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT WITH MEMORANDUM OF LAW REGARDING 14 DAY APPLICATION OF LAW

THIS CAUSE having come on to be heard on November 16, 2020, and the Court having heard the argument of counsel, having reviewed the record evidence, pleadings, motions and discovery responses, and being otherwise advised in the premises, does hereby make the following findings of fact and conclusions of law:

FINDING OF FACTS

The Plaintiff filed the instant action against the Defendant for Personal Injury Protection (PIP) Benefits under a policy of insurance issued by the Defendant to the claimant, Juan Reynoza. The Plaintiff's assignor was involved in a motor vehicle accident on August 29, 2017.

It is undisputed that the Plaintiff's assignor did not obtain initial services and care within 14 days of the accident.

The Defendant denied the Plaintiff's bills for the claimant's failure to obtain initial services and care within 14 days as required by Fla. Stat. 627.736(1)(a).

Defendant's Answer and Affirmative Defenses asserted that Progressive denied Plaintiff's bills for failure to obtain initial treatment and care within 14 days as required by Fla. Stat. 627.736(1)(a).

The Defendant filed the Affidavit of Emily Carman in support of Defendant's Motion for Summary Judgment.

Plaintiff alleges in its Amended Reply to Defendant's Answer and Affirmative Defenses that Plaintiff's assignor's nonperformance should be discharged as a matter of law pursuant to the doctrine of impossibility and/or impracticability due to the occurrence of Hurricane Irma.

Hurricane Irma hit South Florida on September 10, 2020, twelve days after the motor vehicle accident at issue.

Plaintiff filed an Affidavit of Juan Reynoza in Opposition to Defendant's Motion for Summary Judgment which states that he attempted treatment within 14 days but could not do so because the Plaintiff clinic was closed. The same affidavit states that Mr. Reynoza could not go to the doctor before Hurricane Irma because he had to prepare for the hurricane and attend work duties. Mr. Reynoza also states in his affidavit that he was ordered to evacuate Miami-Dade County on September 7, 2017, nine days after the accident.

CONCLUSIONS OF LAW

The Florida No-Fault Law, Florida Statute §627.736(1)(a) provides that an insurance company complying with the security requirements of §627.733 must pay "[e]ighty percent of all reasonable expenses for medically necessary medical, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices and medically necessary ambulance, hospital, and nursing services if the individual receives initial services and care pursuant to subparagraph 1. within 14 days after the motor vehicle accident."

The 14 day requirement was added to the No Fault Law Statute in 2013. By adding this provision it is clear the legislature intended to make this a prerequisite to obtaining PIP benefits. "As always, legislative intent is the polestar that guides a court's inquiry under the No-Fault Law." *GEICO v. Virtual Imaging*, 141 So. 3d 147, 152 (Fla. 2013) [38 Fla. L. Weekly S517a]. "Where the wording of the Law is clear and amenable to a logical and reasonable interpretation, a court is without power to diverge from the intent of the Legislature as expressed in the plain language of the Law." *United Auto. Ins. Co. v. Rodriguez*, 808 So.2d 82, 85 (Fla. 2001) [26 Fla. L. Weekly S747a]. "The Legislature must be assumed to know the meaning of words and to have expressed its intent by the use of the words found in the statute." *Thayer v. State*, 335 So. 2d 815 (Fla. 1976).

This Court finds that the legislative intent is clear that receiving initial services and care within 14 days after the motor vehicle accident is a requirement that must be fulfilled in order to be eligible for medical benefits under the Florida No Fault Law.

Plaintiff argues that due to the occurrence of Hurricane Irma, its assignor's compliance with this statute should be discharged under the doctrine of impossibility or impracticability. However, the Court finds that these are legally insufficient defenses to nonperformance of a statute, as these are contract defenses. See *Marathon Sunsets, Inc. v. Coldiron*, 189 So. 3d 235 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D685a].

The Court finds it is the legislature's intent that the provisions of the No Fault Statute have full force and effect regardless of inclusion in the policy and shall control over policy provisions. See Fla. Stat. 627.7311.

Moreover, the legislature did not carve out any exceptions within the Florida No-Fault Law to the compliance of the 14 day requirement and this Court is unaware of any authority which grants this Court the ability to extend such requirement.

Where a litigated right depends upon action taken under a statute, a compliance with the statute should be shown. *Smitz v. Wright*, 60 So. 225, 226 (Fla. 1912) (citing to *Symmes v. Prairie Pebble Phosphate Co.*, 60 South. 223).

Furthermore, "[t]rial courts have no authority to extend statutory deadlines imposed by the Legislature for special statutory proceedings unless the Florida Rules of Civil Procedure provide otherwise."

Imperial, [21 Fla. L. Weekly Supp. 125b], referring to Fla. R. Civ. P. 1.010 ("time for pleading in all special statutory proceedings shall be as prescribed by the statutes governing the proceeding unless these rules specifically provide to the contrary."); *Dracon Const., Inc. v. Facility Const. Mgmt., Inc.*, 828 So. 2d 1069, 1071 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D2311a] ("In a special statutory proceeding, . . the trial court does not have the same discretion to bend time requirements that might be allowed under the rules of civil procedure.").

Although there is no specific definition of "special statutory proceedings," it would be unreasonable to understand that term as excluding actions under the Florida No-Fault Law. See *In re Commitment of Cartwright*, 870 So. 2d 152 (Fla. 2nd DCA 2004) [29 Fla. L. Weekly D259h].

The Court finds that there is no genuine issue of material fact and the Defendant is entitled to judgment as a matter of law as it is undisputed that the claimant did not receive treatment within 14 days and therefore Defendant has no obligation to pay Plaintiff's claim pursuant to Fla. Stat. 627.736(1)(a).

It is hereby ORDERED AND ADJUDGED:

Defendant's Motion for Final Summary Judgment is hereby GRANTED. Judgment entered in favor of the Defendant. Plaintiff shall take nothing by this action. FINAL SUMMARY JUDGMENT IS HEREBY ENTERED IN FAVOR OF THE DEFENDANT AND IT SHALL GO HENCE FORTH WITHOUT DELAY. The Court reserves jurisdiction to determine entitlement and amount of attorney's fees and costs to the Defendant, upon a timely motion.

* * *

Insurance—Discovery—Failure to respond—Sanctions

SOUTH BROWARD HOSPITAL DISTRICT, a/a/o Jasmin Johnson (2), Plaintiff, v. UNITED AUTO INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-022667-SP-23, Section ND03. March 29, 2021. Linda Singer Stein, Judge. Counsel: Robert B. Goldman, Florida Advocates, Dania Beach, for Plaintiff. Sean M. Sweeney, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO ENFORCE COURT ORDER COMPELLING DISCOVERY

THIS CAUSE came before the court on March 24, 2021, upon Plaintiff's Motion to Enforce the February 26, 2020 Court Order Granting Plaintiff's Ex Parte Motion to Compel and for Sanctions, and the Court having considered the motion, having heard argument of counsel and being otherwise fully advised, it is

ORDERED that Plaintiff's Motion to Enforce the February 26, 2020 Court Order is hereby GRANTED, as follows: (1) Defendant shall respond to the outstanding discovery, including the production of responsive documents, no later than Friday, March 26, 2021; (2) All objections other than privilege are deemed waived as a result of Defendant's failure to timely respond; (3) the Court awards sanctions in favor of the Plaintiff in the amount of $1,800.00, based upon 4 hours of time at $450 per hour; and (4) Defendant's Proposal for Settlement served November 13, 2019 without having provided discovery responses shall be deemed reinstated and shall remain open until May 25, 2021 (60 days from March 26, 2021).

* * *

Criminal law—Driving under influence with passenger under age 18—Possession of marijuana and drug paraphernalia—Search and seizure—Vehicle stop—Officer had probable cause to stop defendant based on her failure to use headlights after dark, driving with right side tires briefly touching or crossing white lane line, and abrupt braking—Further, based on totality of circumstances, officer had reasonable suspicion of DUI that justified stop—Motion to suppress is denied

STATE OF FLORIDA, v. TERESA DARLENE O'NEILL, Defendant. County Court, 12th Judicial Circuit in and for Manatee County. Case No. 2019-MM-001410. April 19, 2021. Jacqueline B. Steele, Judge. Counsel: Angela Greenwalt, Office of the State Attorney, for State. Michael A. Gold, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE came on to be heard initially on February 19, 2021 and, after continuance due to Zoom difficulties, again on March 12, 2021 upon Defendant's Motion to Suppress, and the Court having heard testimony of witnesses, and having heard argument of counsel, as well as review of video and being otherwise fully advised in the premises, the Court makes the following findings of Facts and Conclusion of Law:

FACTS

1. On April 11, 20019, at or between approximately 8:43 p.m. and 8:45 p.m. Officer Michael Van Horn, of the Holmes Beach Police Department, was on routine patrol when he observed a motor vehicle traveling on East Bay Drive without headlights utilizing only running lights in Manatee County, Florida.

2. Officer Van Horn pulled out and began to follow the motor vehicle after it stopped at a traffic signal and resumed travel once the signal turned green. The motor vehicle's right side front and rear tires crossed/touched briefly the white lane line.

3. Officer Van Horn, believing the driver of the motor vehicle was impaired and should not be driving, activated his emergency overhead lights. The driver was noted to have braked abruptly several seconds after the emergency overhead lights were activated and the right turn signal activated. The driver then released the brakes and slowly came to rest on the right shoulder again applying the brakes to come to a complete stop.

4. Officer Van Horn initiated contact with the driver asking about the headlights and driving irregularities and requesting the Defendant's driver's license. He testified that he noticed an odor of alcohol, that the Defendant had bloodshot, glassy eyes and slow responsive speech when being asked about her headlights and for her driver's license.

5. As a result of his subsequent investigation, Officer Van Horn arrested the Defendant for Driving Under the Influence with a Passenger Under 18 Years of Age in violation of Section 316.193(4), F.S.; Possession of Marijuana (not more than 20 grams) in violation of Section 893.13(6)(b), F.S.; and Possession of Drug Paraphernalia in violation of Section 893.147(1), F.S.

OPINION

CONCLUSIONS OF LAW

In her Motion to Suppress, the Defendant challenges the constitutionality and admissibility of the statements made after she was asked to exit her vehicle; the results of the field sobriety tests performed by Officer Van Horn; the blood alcohol results; and the results of the drug influence report performed by Manatee County Deputy William Coleman.

Stop of an Automobile—Probable Cause for a Traffic Infraction

In *Wren v. United States,* 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), the United States Supreme Court held that:

> "The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a "seizure" of "persons" within the meaning of this provision. See *Delaware v. Prose,* 440 U.S. 648, 653, 99 S.Ct. 1391, 1395, 59 L.Ed. 2d 660 (1979); *United States v. Martinez-Fuerte,* 428 U.S. 543, 556, 96 S.Ct. 3074, 3082, 49 L.Ed. 1116 (1976); *United States v. Brignoni-Ponce,* 422 U.S. 873, 878, 95 S.Ct. 2574, 2578, 45 L.Ed. 2d 607 (1975). An automobile stop is thus subject to the constitutional imperative that it not be "unreasonable" under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. See *Prose,* supra, at 659, 99 S.Ct., at 1399; *Pennsylvania v. Mimms,* 434 U.S. 106, 109, 998 S.Ct. 330, 332, 54 L. Ed. 2d 331 (1977) (per curiam)"

This test is objective. The subjective knowledge, motivation or intention of the officer making the stop is irrelevant. *Hurd v. State,* 958 So. 2d 600 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1594a] citing *Holland v. State,* 696 So. 2d 757, 759 (Fla. 1997) [22 Fla. L. Weekly S387a].

Where "the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense is or has been committed, probable cause exists. *Brinegar v. United States,* 338 U.S. 160, 175-76, 69 S.Ct. 1302, 93 L.Ed 1879; *see also, State v. Betz,* 815 So. 2d 627, 633 (Fla. 2002) [27 Fla. L. Weekly S285b].

The Second District Court of Appeal has stated that:

"Probable cause is a fluid concept that deals in probabilities, which includes common sense conclusions by law enforcement officers." *Williams v. State,* 731 So. 2d 48, 50 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D734a] (citing *Illinois v. Gates,* 462 U.S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983) See also, *State v. Catt,* 839 So. 2d 757 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D341a].

This Court finds that there was probable cause to stop the Defendant for failure to utilize headlights in violation of Section 316.217(1)(a), F.S.

Stop of an Automobile—Reasonable Cause for a Criminal Investigation

Officer Van Horn testified that he stopped the Defendant's motor vehicle because he believed that the driver was not using headlights after dark in violation of Section 316.217(1)(a), F.S. and he believed the driver to possibly be impaired when the right front and rear of her tires touched the white lane line and she abruptly came to a stop before pulling off onto the shoulder of the road.

In order to stop and detain a person for criminal investigation, a police officer must have a reasonable suspicion, based upon objective, articulable facts, that the person to be detained has committed, is committing, or is about to commit a crime. *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968); *Walker v. State,* 846 So. 2d 643 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D1304b]; *Belsky v. State,* 831 So. 2d 803 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D2630b].

§901.151(2), *Florida Statutes,* the "Florida Stop and Frisk law" provides:

> "Whenever any law enforcement officer of this state encounters any person under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a violation of the criminal laws of this state or if the criminal ordinances of any municipality or county, the officer may temporarily detain such person for the purpose of ascertaining the identity of the person temporarily detained and the circumstances surrounding the person's presence abroad which led the officer to believe that the person had committed, was committing, or was about to commit a criminal offense."

Whether an officer has a reasonable suspicion for a stop depends upon the totality of the circumstances, in light of the officer's knowledge and experience. *Belsky,* at 804 (citing *Ippolito v. State,* 789 So. 2d 423, 425 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1556a]. A hunch or mere suspicion is not enough. *Ippolito,* at 425.

The Second District Court of Appeal has held that erratic driving which does not reach the level of a traffic violation may be sufficient to establish a founded or reasonable suspicion to stop a driver of a motor vehicle in order to conduct an investigation into whether there is probable cause to believe that the driver has committed the offense of driving under the influence (DUI). *State v. DeShong,* 603 So. 2d 1349 (Fla. 2d CA 1992); *Department of Highway Safety and Motor Vehicles v. Kurdziel,* 908 So. 2d 607 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D1963a]

Further, the Florida Supreme Court has held that a brief investigatory traffic stop may be warranted to determine whether a driver is ill, tired or driving under the influence in situations less suspicious than that required for other types of criminal behavior, even though there is no reasonable belief that criminal activity is taking place, when there is legitimate concern for the safety of the motoring public. *Bailey v. State,* 319 So. 2d 22, 26 (Fla. 1975); *DeShong, supra* at 1350.

In *Bailey,* the driver was observed by a Florida Highway patrolman operating her vehicle at a slow rate of speed and weaving within her lane of traffic. The officer testified that he followed the car on the Florida Turnpike for almost three miles in light traffic. The vehicle was traveling at about 45 mile per hour and ". . .weaving to some extent, but, 'was not weaving all that bad.' " At no time during the almost three mile he was following the car did the Trooper observe it cross the lane divider on the inside of the lane or did it go off the roadway on the outside of the lane. *Bailey.* at 24.

In *DeShong,* the Second District Court of Appeal, relying on *Bailey,* upheld the stop of a driver by a deputy sheriff assigned to a DUI Task Force, who testified that: ". . .seemed to be using the lane markers to position his vehicle." *Id.* at 1350. The officer decided to stop the vehicle when: ". . .for no apparent reason, the driver abruptly slowed from 55 to 30 miles per hour and then accelerated rapidly." *Id.* at 1350. The officer stopped the vehicle because he found this driving behavior erratic and he was concerned the either the driver was impaired or that the vehicle was malfunctioning. *Id.* at 1350; *See also, State v. Carrillo,* 506 So. 2d 495 (Fla. 5th DCA 1987). *Compare, Ndow v. State,* 864 So. 2d 1248 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D321a] (vehicle sat through an entire light cycle and officer observed other unusual behavior).

On the other hand, the Second District Court of Appeal, in *Crooks v. State,* 710 So. 2d 1041 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D1323b], reversed the denial of a motion to suppress and holding that a deputy sheriff had no objective basis to stop the defendant's vehicle, even though the deputy observed the vehicle drive over the right-hand line on the edge of the right lane of traffic on three occasions. The deputy did not believe that the driver was impaired, but he stopped him for a violation of Section 316.089(1), *Florida Statutes* which requires a vehicle to be driven as nearly as practicable within a single lane. *See also, State v. Riley,* 638 So. 2d 507 (Fla. 1994) (failure to use turn signal must create reasonable safety concern); *S.A.S. v. State,* 884 So. 2d 1167 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D2428b] (stop was illegal when there was no evidence that any other driver was affected by the defendant's left turn without signal).

Based upon the totality of the circumstances, in light of Officer Van Horn's training and experience, and his observations of the Defendant's operation of the motor vehicle, the Court finds that there were objective, articulable facts, that the Defendant was impaired in violation of Section 316.193, Florida Statutes. Therefore the stop of the Defendant was lawful and consistent with the holdings of the Florida Supreme Court in *Bailey* and the Second District Court of Appeal in *DeShong*.

In conclusion, this Court finds that there was probable cause to stop the Defendant for failure to utilize headlights, for the motor vehicle's right side front and rear tires crossing/touching briefly the white lane line and her abrupt braking before pulling off onto the shoulder. Even if there was not, there was objective, reasonable cause to stop the Defendant for driving under the influence of an alcoholic beverage based upon the totality of the circumstances.

It is therefore,

ORDERED AND ADJUDGED that Defendant's Motion to Suppress is hereby **DENIED**.

* * *

Criminal law—Driving under influence—Evidence—Refusal to submit to breath test—Confusion doctrine—Confusion as to whether defendant was entitled to speak with attorney before making decision to take breath test, which allegedly resulted from fact that defendant was informed of his Miranda right to have counsel before being asked to submit to breath test, does not warrant suppression of breath test refusal—Further, even if confusion doctrine were applicable, motion to suppress would be denied where deputy clarified any confusion by advising defendant that he did not have right to counsel before making decision on test

STATE OF FLORIDA, v. ANTHONY MILEN, Defendant. County Court, 12th Judicial Circuit in and for Manatee County. Case No. 2021 CT 6. April 20, 2021. Heather Doyle, Judge.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE came on to be heard upon Defendant's Motion to Suppress Statements pursuant to the Confusion Doctrine. Having heard testimony of witnesses, and having heard argument of counsel, and being otherwise fully advised in the premises, the Court makes the following findings of facts and conclusion of law:

FACTS

1. On December 31, 2020 at approximately 10:20 p.m., the Defendant was the driver of a vehicle stopped by Deputy Vanover of the Manatee County Sheriff's Office (hereinafter referred to as "Deputy").

2. The interaction is captured on videotape, entered into evidence by stipulation as State's Exhibit 1.

3. At time stamp 6:40 of the video (all time stamps are in minutes and second time intervals), the Deputy asks the Defendant to exit the vehicle, of which he complied.

4. At 8:11, the Deputy administered the HGN exercise to the Defendant.

5. At 12:30, the Deputy began verbally instructing the Defendant on the Walk and Turn exercise.

6. At 13:20, the Defendant stated, "[y]ou know what? I've got artificial hips. I don't think I can do that" The Deputy and the Defendant then had further discussion about that topic.

7. At 14:10 the Defendant stated to the Deputy "I don't want to do this. Go ahead and write me up for DUI and I'm going to go home,",—and shortly thereafter stated, "[w]rite me up, whatever you want to do, but I'm done."

8. At 14:35 the Deputy stated to the Defendant "Do you understand that if you don't perform the rest of the exercises I have to take into account what I've seen up to this point"

9. The Defendant replied "[t]hat's fine."

10. At 14:50, the Defendant agreed to answer questions by the Deputy. The Deputy then reads the Defendant his Miranda Warnings and the Defendant agrees to answer questions. This interaction takes place roadside, with both the Defendant and the Deputy standing near one another.

11. At 15:30 the Deputy and Defendant spoke about the amount of drinks the Defendant consumed. However, at 16:12, the Defendant stated "[y]ou know what? No more questions."

12. The Deputy then placed the Defendant under arrest.

13. At 17:54, the Deputy asked "[w]ill you take a breath test for me?" The Defendant replied, "[n]o, I'm not doing anything for you. Enough already."

14. At 18:02, the Deputy stated "I gotta read you implied consent" and then read the implied consent warnings to the Defendant.

15. At 19:35 the Defendant stated "[s]o you're saying that (inaudible) I'm going to lose my driving rights for a year if I don't take the test?" The Deputy responds "[c]orrect, if you refuse to submit to the breath test."

16. The Defendant then stated "[o]k, so what I'm going to do is I'm going to call my attorney before I answer that question."

17. The Deputy responded, "[o]k, well I need to advise you, this isn't something you're entitled to an attorney to make a decision prior to that."

18. The Defendant interjects, and states "[o]fficer, you got the wrong guy, ok? Do what you gotta fucking do."

19. The Deputy then asks "You don't want to take the breath test?" and the Defendant states "I'm not going to do anything without my attorney." There is a further comment by Defendant that is not fully audible.

Conclusions of Law

In his Motion to Suppress, the Defendant seeks to suppress his statements refusing to take the breath test based on the Confusion Doctrine. The Defendant argues that the Deputy created confusion by reading the Defendant his *Miranda* warnings and then asking the Defendant to submit to a breath sample. Stated simply, reading *Miranda* warnings and then seeking a breath sample created confusion on the part of the Defendant as to his right to speak with an attorney before making the decision to take the breath test. The Defendant further argues that he articulated that confusion to the Deputy verbally as is shown by the videotaped evidence.

Conversely, the State argues that the Confusion Doctrine does not apply, and even if it does, that the Deputy sufficiently clarified that the Defendant had no right to a lawyer before deciding whether to take the breath test, that the refusal should be admitted, and that the Motion should be denied.

The Court finds that the proper analysis of this decision turns on two questions: (1) Does Florida law require this Court to apply the Confusion Doctrine, and (2) If it does, does this doctrine apply to the facts of this case such that suppression is warranted?

The Confusion Doctrine:

There exists "confusion" over whether the Confusion Doctrine exists in Florida at all. This Court finds the analysis of the Court in *Kurecka v. State,* 67 So. 3d 1052 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2162b] instructive. *Kurecka* casts significant doubt over whether the Confusion Doctrine applies at all in Florida, and reasons:

> [i]f a statute does not expressly list the exclusionary rule as a remedy, the Florida Supreme Court will "not infer that this remedy is available for violations of the statute—regardless of its effectiveness as a deterrent or how desirable or beneficial we believe the exclusion may be." *Jenkins v. State*, 978 So.2d 116, 130 (Fla. 2008) [33 Fla. L. Weekly S147c]. Courts must look at the terms of the statute at issue and the legislative intent rather than to "judge-made exceptions to judge-made rules" when deciding whether to suppress evidence. *Id*. (citing *Davis v. State*, 529 So.2d 732, 733 (Fla. 4th DCA 1988)). *See State v. Gunn*, 408 So.2d 647, 649 (Fla. 4th DCA 1981) (explaining that "[w]e find no legislative intent to impose a further sanction on the state by excluding as evidence the results of a chemical test administered to a driver (who has not affirmatively revoked the statutory consent) merely because of his not being informed, prior to testing, of the consequences should testing be refused.")

Kurecka at 1061.

This Court rejects the application of a judicially created "Confusion Doctrine" and echoes the statement of the Court in *Bishop,* that "to do so would require this Court to impose a new rule of law." *Bishop v. DHSMV,* 3 Fla. L. Weekly Supp. 14a (12th Cir. Cty. Ct., 1992). Further, it appears that a Circuit Court judge in this Circuit sitting it his appellate capacity also called the application of the doctrine into question, if not expressly rejecting it. *See Potts v. DHSMV,* 15 Fla. L. Weekly Supp. 783a (12th Cir. Ct., 2008).

Finally, "[d]etermining whether informing a suspect that he does not have the right to an attorney for breath testing purposes—as part of the implied consent warning—supports or frustrates the goal of gathering evidence for these cases is a matter for the legislature to decide." *See Kurecka,* at 1062.

For all of the foregoing reasons, the Motion to Suppress is denied. However, this does not prevent the Defendant from presenting evidence of his confusion over his refusal to submit to testing and to make all appropriate arguments regarding said confusion.

The Court notes that, even if it were to find that the Confusion Doctrine applied here, the Court would nevertheless deny the Defendant's Motion to Suppress. This Court finds that the Deputy *did* read the Defendant his Miranda Warnings and then requested a breath sample. The Court further finds that the Defendant *did* articulate confusion over his right to counsel prior to making the decision to take a breath test. Giving all benefit to the Defendant that the confusion was created by the Deputy, the Court finds that the Deputy cleared the confusion by telling the Defendant that he did not have the right to counsel for this decision. *See Kurecka.*

Therefore,

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

* * *

Insurance—Discovery—Depositions—Failure to appear—Sanctions

FLORIDA WELLNESS CENTER, INC., a/a/o Yoel Rojas, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-053365. March 31, 2021. Michael C. Baggé-Hernández, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Teodora Siderova, Kubicki Draper, Tampa, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS

THIS MATTER having come before the court on March 31, 2021 on Plaintiff's Motion for Sanctions. Timothy A. Patrick appeared for Plaintiff. Teodora Siderova appeared for Defendant. The court having reviewed the file, considered the Motion, the arguments presented by counsel, applicable law, and being otherwise fully advised, makes the following findings,

1. Plaintiff's Motion for Sanctions alleges that Defendant's Corporate Representative and Defendant's counsel failed to appear for a duly noticed deposition and that Defendant failed to file and schedule a Motion for Protective Order for hearing prior to failing to appear for said deposition.

2. Plaintiff's Motion for Sanctions as to entitlement is **HEREBY GRANTED.**

3. The Court shall hold a subsequent hearing in which to award the amount of sanctions to Plaintiff's counsel, Timothy A. Patrick.

* * *

Venue—Insurance—Venue selection clause—Domestic corporation

FLORIDA WELLNESS CENTER, INC., a/a/o Yoel Rojas, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-053365, Division L. March 31, 2021. Michael C. Baggé-Hernández, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Teodora Siderova, Kubicki Draper, Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS RE: IMPROPER VENUE PURSUANT TO VENUE SELECTION CLAUSE & FLORIDA DOMESTIC CORPORATION STATUS VIA FLA. STAT. 47.051

THIS CAUSE, having come before the Court for a hearing on March 31, 2021 upon Defendant's Motion to Dismiss Re: Improper Venue Pursuant to Venue Selection Clause & Florida Domestic Corporation Status via Fla. Stat. 47.051, and the Court having reviewed the filings and Court docket, having heard the parties' arguments, and being otherwise advised in the premises, it is:

ORDERED AND ADJUDGED as follows:

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

2. Defendant's Venue Transfer is **GRANTED.**

3. Said action shall be moved from Hillsborough County, Florida to Miami-Dade County, Florida pursuant to Florida Statute § 47.051 as Defendant is a domestic corporation and the proper venue is Miami-Dade County as supported in the Affidavit of Defendant's Corporate Representative, Litigation Adjuster and Records Custodian.

4. The Defendant shall bear the cost to transfer the case to Miami-Dade County, Florida with payment to be made within 30 days of the entrance of this order.

* * *

Insurance—Personal injury protection—Venue—Forum selection clause—Policy provision stating that any legal action against insurer to determine coverage under policy shall be filed and maintained in county where policy was issued is valid mandatory forum selection clause—Transfer of venue to county where policy was issued is required by clause

BAYSIDE REHAB CLINIC INC., a/a/o Dontavius Oakley, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-061233, Division K. March 29, 2021. Jessica G. Costello, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Teodora Siderova, Kubicki Draper, Tampa, for Defendant.

ORDER GRANTING IN PART "DEFENDANT'S MOTION TO DISMISS RE: IMPROPER VENUE PURSUANT TO VENUE SELECTION CLAUSE & FLORIDA DOMESTIC CORPORATION STATUS VIA FLA. STAT. 47.051"

THIS MATTER came before this Court on February 16, 2021, on "Defendant's Motion to Dismiss re: Improper Venue Pursuant to Venue Selection Clause & Florida Domestic Corporation Status via Fla. Stat. 47.051" ("Motion") filed January 7, 2021. Having reviewed and considered Defendant's Motion, Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss/Transfer Venue filed February 10, 2021, argument of counsel for the parties, the court file, the evidence, relevant case law, and being otherwise fully advised, the Court finds:

Background

1. On September 30, 2020, Plaintiff instituted this action by filing its Petition for Declaratory Judgment alleging Defendant denied coverage for a personal injury protection benefits claim submitted by Plaintiff for services rendered to Defendant's insured Dontavius Oakley. Plaintiff's Petition seeks a declaration that it is entitled to personal injury protection coverage on the subject claim.

2. On January 7, 2021, Defendant filed its Motion alleging venue in this matter is improper on multiple grounds. First, Defendant argues that the insurance policy in this matter contains a mandatory forum selection clause that requires this litigation be brought in Miami-Dade County. Second, Defendant asserts that, in as much as it is a domestic corporation, Florida Statutes section 47.051 requires that this matter be filed and litigated in Miami-Dade County.

3. On January 22, 2021, Defendant filed the Affidavit of its Corporate Representative, Litigation Adjuster, and Records Custodian, Jean Labossiere, ("Affidavit") in support of its Motion.

4. In opposition, on February 10, 2021, Plaintiff filed a Memorandum of Law in Opposition to Defendant's Motion to Dismiss/Transfer Venue. Plaintiff's Memoandum does not include any argument addressing the forum selection clause. Plaintiff argues that Defendant is a foreign corporation and this action may be brought in any county in which the corporation has agents or representatives. Plaintiff also argues that venue is proper where payments under a contract should have been made and asserts that the payments in the case were to be made in Orange County. Plaintiff also asserts that other Hillsborough County courts and other Florida county courts have denied similar motions to dismiss or transfer.[1]

Motions for Dismissal or Transfer of Venue

5. Although titled as a Motion to Dismiss, Defendant's Motion reflects that it seeks either dismissal **or** transfer of the action.[2]

6. While improper venue is a defense that can be raised by motion, *see* Florida Rule of Civil Procedure 1.140(b), and may be made on a motion to dismiss, *see James A. Knowles, Inc. v. Imperial Lumber Co.,* 238 So. 2d 487, 490 (Fla. 2d DCA 1970), "[t]he widely accepted practice in Florida courts, including the Florida Supreme Court, is that where venue is improper, the case should be transferred, not dismissed." *Russomano v. Maresca,* 220 So. 3d 1269, 1271 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1416a]; *see also McClain v. Crawford,* 815 So. 2d 777, 778 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1143b] (stating "the remedy for improper venue is a transfer to the proper venue, not dismissal"). As such, the Court treats Defendant's Motion as one for transfer based on improper venue rather than dismissal on that basis.

7. In contesting the venue selected by Plaintiff, a defendant bears "burden of clearly proving that the venue selected by the plaintiff is improper" and demonstrating where proper venue is. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. National Bank of Melbourne & Trust Co.,* 238 So. 2d 665, 667 (Fla. 4th DCA 1970). Additionally, "[a] motion by the defendant to dismiss or transfer on the ground of improper venue raises issues of fact and must be resolved by an evidentiary hearing, unless the face of the complaint demonstrates venue is improper." *Leatherwood v. Cardservice International, Inc.,* 885 So. 2d 997, 998 (Fla. 4th. DCA 2004) [29 Fla. L. Weekly D2460a]; *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 238 So. 2d at 667.[3]

Venue Selection Clause

8. Defendant's policy of insurance provides: "Any legal action against 'us' to determine coverage under this policy ***shall*** be filed and maintained in the county where the policy was issued." United Automobile Insurance Company Florida Personal Automobile Insurance Policy, Part G, Section 3 (p. 18) (emphasis added).

9. "Parties to a contract may include a provision that establishes venue in a particular forum in the event of a contract dispute." *American Boxing & Athletic Association, Inc. v. Young,* 911 So. 2d 862, 864 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2271c]. Such provisions establishing venue "should be enforced in the absence of a showing that enforcement would be unreasonable or unjust" and that showing must amount to more than inconvenience or increased expense. *Manrique v. Fabbri,* 493 So. 2d 437 (Fla. 1986).

10. Forum selection clauses are considered either mandatory or permissive. Mandatory clauses "require that a particular forum be the exclusive jurisdiction," while permissive clauses "only provide that there may be jurisdiction . . . in a particular forum." *Shoppes Ltd. Partnership v. Conn,* 829 So. 2d 356, 357-358 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D2378a]. "Exclusivity exists where 'forum selection clauses state or clearly indicate that any litigation must or shall be initiated in a specified forum,' but not where words such as 'may' are used." *Golf Scoring Systems Unlimited, Inc. v. Remedio,* 877 So. 2d 827, 829 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D1591b] (quoting *Shoppes Ltd. Partnership,* 829 So. 2d at 358).

11. The language of the forum selection clause in the subject insurance policy is mandatory in nature. As such, any legal action on coverage determinations with regard to the policy are required to "be filed and maintained in the county where the policy was issued."

12. The evidence before the Court reflects that the insurance policy in this matter was issued in Miami-Dade County. *See* Affidavit of Jean Labossiere ¶¶ 5 & 10.

13. Defendant has shown, by virtue of the policy's mandatory forum selection clause and the location of the policy's issuance, that venue in Hillsborough County is improper and that the policy dictates this action should only be filed and maintained in Miami-Dade County. There has been no argument set forth by Plaintiff that the forum selection clause in this matter is unreasonable or unjust. As such, transfer of this action pursuant to the forum selection clause is appropriate.

Florida Statutes § 47.051

14. Although not necessary based on the finding above, because the issue was raised and argued, the Court also addresses Defendant's argument under section 47.051.

15. Florida Statutes section 47.051 provides:

> Actions against domestic corporations shall be brought only in the county where such corporation has, or usually keeps, an office for transaction of its customary business, where the cause of action accrued, or where the property in litigation is located. Actions against foreign corporations doing business in this state shall be brought in a county where such corporation has an agent or other representative, where the cause of action accrued, or where the property in litigation is located.

16. While two of the possible venue locations under section 47.051 are the same for domestic and foreign corporations, the third possibility for venue against corporations differs depending on whether the corporation is domestic or foreign.

17. Defendant argues it is a domestic corporation, *see* Affidavit of Jean Labossiere ¶ 4, and, as a domestic corporation, venue is improper in Hillsborough County because it "does not maintain an office from which it transactions its customary business in Hillsborough County, Florida." *Id.* Additionally, Defendant asserts that venue is proper in Miami-Dade County, Florida as it "transacts its customary business of insurance in the State of Florida from its corporate office," which is located in Miami Gardens, Florida. *Id.*

18. On this point, Plaintiff argues that Defendant is a foreign corporation and that the action may be brought in any county where the corporation has an agent or representative. Paragraph 3 of Plaintiff's Petition for Declaratory Judgment does not allege Defendant is a foreign or domestic corporation; it simply alleges that Defendant "was a corporation licensed and engaged to do business in the State of Florida and doing business in Hillsborough County, Florida." Plaintiff has not provided any evidence that Defendant is a foreign corporation or that Defendant "has, or usually keeps, an office for transaction its customary business" in Hillsborough County to counter the Affidavit of Jean Labossiere.

19. The Court finds that the evidence before it establishes: 1) Defendant is a domestic corporation; 2) Defendant does not have an office for its customary business in Hillsborough County, Florida; and 3) Defendant has an office for transaction of its customary business in Miami-Dade County, Florida. As such, under the first venue option for domestic corporations in section 47.051—"the county where such corporation has, or usually keeps, an office for transaction of its customary business"—Defendant has established venue is not proper in Hillsborough County and would be proper in Miami-Dade County.

20. Although Defendant has established that venue is not proper in Hillsborough County and would be proper in Miami-Dade County on that particular basis, section 47.051 also provides for action against a domestic corporation where the cause of action accrued or where the property is located.

21. Plaintiff has the option of bringing action against the Defendant in any county meeting one of the three venue possibilities set forth in section 47.051. Defendant has not met its burden to establish venue is improper in Hillsborough County and proper in Miami-Dade County under the other venue possibilities for actions against domestic corporations. As such, based on the information before the Court, Defendant has not established that transfer to Miami-Dade County is required pursuant to section 47.051.

Conclusion

22. In as much as Defendant has shown that venue in Hillsborough County is improper by virtue of the mandatory forum selection clause in the insurance policy, and that Miami-Dade County is the required venue, transfer, not dismissal, of this matter to Miami-Dade County is appropriate.

Based on the foregoing it is therefore **ORDERED AND ADJUDGED:**

A. Defendant's Motion to Dismiss re: Improper Venue Pursuant to Venue Selection Clause & Florida Domestic Corporation Status via Fla. Stat. 47.051 filed January 7, 2021 is hereby **GRANTED in part.**

B. Defendant's Motion is granted as to the transfer of the action pursuant to the forum selection clause in the insurance policy. This action shall be transferred to Miami-Dade County. Plaintiff shall pay any filing fee or other costs necessary to effectuate the transfer.

C. Defendant's Motion is denied as to the transfer of the action based on Florida Statutes section 47.051.

D. Defendant's Motion is denied as to the dismissal of this action.

---

[1]The cited orders are not binding on this Court. Additionally, the Hillsborough County cases cited are distinguishable from the instant matter because the cases involved motions to transfer based on inconvenience of the forum/Florida Statutes section 47.122.

[2]Plaintiff's Memorandum in opposition to Defendant's Motion, through its title and headings, appears to recognize that Defendant's Motion seeks transfer in the alternative to dismissal.

[3]Although, the Court is considering Defendant's Motion a motion to transfer based on improper venue, the Court notes that the *Merrill Lynch, Pierce, Fenner & Smith* case supports the possibility of considering an affidavit in support of a motion to dismiss on the issue of venue as opposed to being constrained solely to the allegations in the complaint. 238 So. 2d at 667 (stating that "[i]n the present case the defendant's affidavit in support of the motion to dismiss, when considered in conjunction with the allegations in the complaint, made a prima facie showing that the proper venue under F.S. Section 47.051, F.S.A., was Orange County. Based upon this affidavit, the trial court correctly determined that venue was not properly laid in Brevard County").

* * *

Insurance—Personal injury protection—Medical benefits—Electric stimulation—Statutory fee schedules—Policy form 9810A clearly and unambiguously elects to limit reimbursement payments to schedule of maximum charges described in sections 627.736(5)(a)(1)-(5)—Electrodes used on insured during electrical stimulation therapy performed at provider's office were incident to service and not separately compensable

FLORIDA PAIN AND WELLNESS CENTER, a/a/o Roxana Barreda, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Small Claims Division. Case No. 17-CC-041850, Division K. March 1, 2019. Jared E. Smith, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Marsha M. Moses, Kubicki Draper, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT REGARDING 9810A POLICY AND MOTION FOR SUMMARY JUDGMENT REGARDING DENIAL OF CPT CODE A4556; DENYING PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having coming before the Court on January 8, 2019 on (1) Defendant's Motion for Summary Judgment (regarding 9810A policy) certificate of service December 14, 2018; (2) Defendant's Motion for Summary Judgment Regarding Denial of CPT Code A4556 certificate of service December 14, 2018; and (3) Plaintiff's Amended Motion for Summary Judgment and Supporting Memorandum of Law certificate of service September 25, 2018, considering the affidavits, memorandum, depositions, exhibits, transcript of the relevant hearing, and, having heard argument of counsel finds:

I. UNDISPUTED FACTS

1. This is a personal injury protection ("PIP") breach of contract action after Defendant, State Farm Mutual Automobile Insurance Company's denial of CPT code A4556 for date of service, May 17, 2017.

2. Defendant issued policy form 9810A to its named insured that provided PIP benefits to assignor, Roxana Barreda.

3. Plaintiff, Florida Pain and Wellness Center as assignee of Roxanna Barreda, submitted several bills to Defendant for services and treatment of Barreda including the date of service in question, May 17, 2017. On that date, Plaintiff claimed services included an office visit for evaluation of the claimant (code 99203), hot/cold packs (code 97010), electrical stimulation (code G0283) and electrical stimulation pads (code A4556).

4. It is undisputed that CPT code A4556 was provided to Barreda as incident to a physician's services, namely, code G0283 for electrical stimulation.

5. It is also undisputed that CPT code A4556 was not provided to

Barreda as DME (Durable Medical Equipment) or for home use as the service was performed in and the electrical stimulation provided in the Plaintiff's office.

II. FINDINGS

A. Defendant's Motion for Summary Judgment Regarding Policy Form 9810a

6. The Second District Court of Appeal has already ruled that State Farm's policy form 9810a, the policy form at issue here, clearly and unambiguously elects to limit reimbursement payments to the schedule of maximum charges described in Florida Statutes § 627.736(5)(a)(1)-(5). *See State Farm Mutual Automobile Insurance Company v. MRI Associates of Tampa, Inc. dba Park Place MRI,* 252 So. 3d 773 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1149a]. Accordingly, Defendant's motion for summary judgment on this issue is granted.

B. Plaintiff's and Defendant's Competing Motions for Summary Judgment Regarding Compensability of CPT Code A4556 for Reusable Electrodes

7. Plaintiff argues the electrodes used on Ms. Barreda were reusable and should be separately compensable, while Defendant asserts the electrodes, regardless of quality or duration of use, should be considered incident to service. The facts of this case are analogous to those before two other Hillsborough County judges, both of whom recently concluded the electrodes were incident to service and not separately compensable. *See Florida Pain and Wellness Centers, Inc. (a/a/o Juan O. Gonzalez) v. State Farm Mutual Automobile Ins. Co.,* 26 Fla. L. Weekly Supp. 670a (Fla. 13th Jud. Cir. Cty. Ct., Hillsborough Cty., Aug. 10, 2018, Herbert Berkowitz, Judge); *Florida Pain and Wellness Centers, Inc. (a/a/o Jean Henriquez) v. State Farm Mutual Automobile Ins. Co.,* (Fla. 13th Jud. Cir. Cty. Ct., Hillsborough Cty., Case No. 17-CC-017875, Jan. 18, 2019, Joelle Ober, Judge) [26 Fla. L. Weekly Supp. 994a].

8. This Court acknowledges a contrary decision, also of recent origin, cited by Plaintiff. *See Florida Pain and Wellness Centers (a/a/o Maria Gil) v. Allstate Ins. Co.,* (Fla. 13th Jud. Cir. Cty. Ct., Hillsborough Cty., Case No. 17-CC-017980, Mar. 13, 2018, Gaston Fernandez, Judge) [26 Fla. L. Weekly Supp. 40a]. In *Gil,* the court expressly relied upon *Florida Injury Kissimmee, LLC (a/a/o Theresa Miranda) v. State Farm Mutual Auto. Ins. Co.,* 24 Fla. L. Weekly Supp. 191b (Fla. 17th Jud. Cir. Ct., Broward Cty., December 4, 2015, Robert W. Lee, Judge) in reaching its conclusion. This Court notes the *Miranda* decision is inapplicable under the present facts, as the *Miranda* court found the defendant failed to preserve the defense of the product being incident to service because it did not raise that affirmative defense. *Id.* This is not analogous to the case *sub judice,* in which State Farm has in fact pled the affirmative defense of incident to service. Following the well-reasoned opinions of *Gonzalez* and *Henriquez,* this Court grants Defendant's motion for summary judgment and denies Plaintiff's motion for summary judgment.

9. Defendant's Motion for Summary Judgment regarding 9810A policy is **GRANTED**.

10. Defendant's Motion for Summary Judgment regarding Denial of CPT Code A4556 is **GRANTED**.

11. Plaintiff's Amended Motion for Summary Judgment is **DENIED**.

12. Final Judgment is hereby entered in favor of Defendant State Farm Mutual Automobile Insurance Company.

13. The Plaintiff, Florida Pain and Wellness Centers, Inc., as assignee of Roxana Barreda, shall take nothing by this action and the Defendant, State Farm Mutual Automobile Insurance Company, shall go hence without a day.

14. This Court reserves jurisdiction to consider any claims for attorney's fees and costs, if applicable.

* * *

Venue—Transfer—Corporations—Venue transferred to Miami-Dade County pursuant to section 47.051 as defendant is a domestic corporation and venue is proper there

MRI ASSOCIATES OF TAMPA, INC., d/b/a PARK PLACE MRI, a/a/o Rafael Agustin Fermin, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-010548, Division L. September 15, 2020. Michael C. Baggé-Hernández, Judge. Counsel: Benjamin A. Kincer, John V. Orrick, P.L., Tampa, for Plaintiff. Marsha M. Moses, Kubicki Draper, Tampa, for Defendant.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS RE: IMPROPER VENUE PURSUANT TO VENUE SELECTION CLAUSE & FLORIDA DOMESTIC CORPORATION STATUS VIA FLA. STAT. 47.051

THIS CAUSE, having come before the Court for a hearing on September 8, 2020 and September 14, 2020 on Defendants' Motion to Dismiss Re: Improper Venue Pursuant to Venue Selection Clause & Florida Domestic Corporation Status via Fla. Stat. § 47.051, and the Court having reviewed the filings and Court docket, and being otherwise advised in the premises, it is:

ORDERED AND ADJUDGED as follows:

1. Defendant's, UNITED AUTOMOBILE INSURANCE COMPANY, Motion to Dismiss Re: Improper Venue Pursuant to Venue Selection Clause & Florida Domestic Corporation Status via Fla. Stat. § 47.051 is hereby **GRANTED.**

2. Said action shall be moved from Hillsborough County, Florida to Miami-Dade County, Florida pursuant to Florida Statute § 47.051 as Defendant is a domestic corporation and the proper venue is Miami-Dade County.

3. The Defendant shall bear the cost to transfer the case to Miami-Dade County, Florida.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Emergency medical condition—"Special Report" documenting EMC is not service reimbursable under policy or No Fault Law

ALLIANCE SPINE & JOINT II, INC., a/a/o Palmenia Alfonso, Plaintiff, v. GEICO INDEMNITY COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE20023656, Division 50. March 23, 2021. Mardi Levey Cohen, Judge. Counsel: Abdul-Sumi Dalal, Plantation, for Plaintiff. Jamie Peters and Chris Marshall, The Law Offices of George Cimballa, III, Plantation; and Michael A. Rosenberg, Cole Scott & Kissane, P.A., Plantation, for Defendant.

ORDER VACATING DENIAL OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter having been presented before this court for consideration, having reviewed and considered pertinent caselaw, applicable court rulings, the record, argument of counsel, and all applicable rules, it hereby vacates this Court's Order Denying Defendant's Motion for Summary Judgement.

Pursuant to *Injury One a/a/o Amanda Riera v. Progressive Insurance Co.*, 24 Fla. L. Weekly Supp. 461a (Broward Cty. Ct. April 2016), CPT Code 99080 "Special Report" is not for a service or care reimbursable under the policy of insurance or the Florida Motor Vehicle No Fault Law. Although the form itself is required before $10,000 PIP benefits are triggered that alone does not make the form reimbursable.

ORDERED AND ADJUDGED that this Court's Order Denying Defendant's Motion for Summary Judgment is vacated and substituted for the order above which grants the Defendant's Motion for Summary Judgment.

* * *