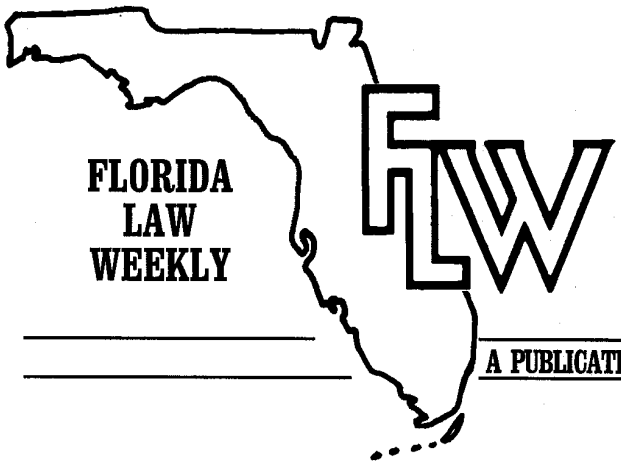
Volume 29, Number 3, July 30, 2021



SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 149-222

Reports of Decisions of:

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

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

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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Driving under influence—Breath test—Argument that breath test was not valid because officer failed to perform third test when first and second test were not within 0.020g/210L of each other is based on mistake as to results of first two tests—No merit to argument that hearing officer erred in failing to consider urine test results where no urine test results were admitted into evidence, and clean urine test would not impeach breath test results—No merit to argument that breath test was not incident to lawful arrest because it occurred two hours after arrest—No merit to argument that arresting officer was not qualified to conduct breath test where test was conducted by trained breath test operator—Petition for writ of certiorari is denied

DARRELL KENNETH MALONE, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2016-CA-7351-XXXX-MA, Division CV-F. April 27, 2021. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(MARIANNE L. AHO, J.) This cause is before this Court on Petitioner Darrell Kenneth Malone's Petition for Writ of Certiorari filed November 21, 2016. Petitioner seeks review of an order by the Respondent, Department of Highway Safety and Motor Vehicles, which determined that Petitioner's driving privilege was properly suspended. The Petition was filed pursuant to sections 322.2615(13) and 322.31, Florida Statutes (2016). This Court has jurisdiction pursuant to Article V, Section 5(b), Florida Constitution, Florida Rule of Appellate Procedure 9.030(c)(3), and section 322.2615(13), Florida Statutes (2016).

The scope of this Court's review on certiorari is limited to "determining (1) whether due process was accorded, (2) whether the essential requirements of law were observed, and (3) whether the administrative findings and judgment were supported by competent, substantial evidence." *Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles,* 209 So. 3d 1165, 1170 (Fla. 2017) [42 Fla. L. Weekly S85a].

Petitioner seeks review of the one-year suspension of his driving privilege as the result of his arrest for DUI on September 10, 2016. Petitioner was arrested by JSO officer J. K. Hoover, who observed Petitioner traveling 71 miles per hour in a posted 45-mph zone on Atlantic Boulevard in Duval County. When he made contact with Petitioner, Officer Hoover detected the odor of an alcoholic beverage on Petitioner's breath, and observed that Petitioner's eyes were watery and bloodshot, and his speech sounded slurred. Officer Hoover recorded on the Arrest and Booking Report that Petitioner's eyelids were droopy and Petitioner had a lethargic manner. Petitioner admitted having consumed one alcoholic beverage earlier in the evening. Officer Hoover administered field sobriety exercises, and arrested Petitioner based on his observations and on Petitioner's performance of the field sobriety exercises. At the pre-trial detention facility, Petitioner provided breath and urine samples for testing.

Petitioner sought review before a Department Hearing Officer and the hearing was held on October 16, 2016. At the formal review hearing below, Petitioner objected to the lack of evidence that Officer Hoover had been trained or retrained as a breath test operator. Petitioner also objected to the length of time between arrest and administration of breath alcohol testing. He moved to suppress the breath test results based on the passage of time, arguing that they were prejudicial because they did not accurately reflect what the results would have been had a test been performed at the scene, and because the arresting officer was not trained to administer breath alcohol tests. No witnesses testified. On October 20, 2016, Hearing Officer Beff Ek sustained the suspension by written order.

Petitioner's first issue is titled, "OFFICER NOT QUALIFIED TO PERFORM BREATH TEST" but actually argues that the breath test results were invalid because only two samples were tested, and the difference between the two results was greater than 0.020 grams per 210 liters of breath. When two samples are not within 0.020 g/210L of each other, a third breath test is required. Fla. Admin. Code R. 11D-8.002. Petitioner asserts that his two breath samples tested at 1.115 g/210L and 1.222 g/210L, a difference of 0.107 g/210L. Petitioner is simply mistaken. The Breath Alcohol Test Affidavit, entered into evidence at the hearing below as DDL #4 and attached to the instant Petition as page 11 of the Appendix, shows test results of 0.122 g/210L and 0.115 g/210L, a difference of only 0.007 g/210L. Therefore, a third sample was not required.

For his second issue, Petitioner asserts that the Department failed to observe the essential requirements of law when the hearing officer did not consider results of any urine test. Documents in the Appendix to the Petition indicate that Petitioner was, at a minimum, requested to submit a urine sample for testing. (App. at 10, 14.) No evidence of urine test results was introduced before the hearing officer. (App.) Petitioner asserts that "[i]nclusion of the urine test *which would verify Petitioner's blood alcohol levels* was necessary as it may have proved exculpatory . . . ." (Pet. at 7 (emphasis added).) However, "[b]reath and blood tests detect alcohol content, whereas urine tests detect controlled substances." *State v. Bodden,* 877 So. 2d 680, 689 (Fla. 2004) [29 Fla. L. Weekly S153a]. Therefore, in light of Petitioner's breath test results of 0.115 g/210L and 0.122 g/210L (well in excess of the legal limit of 0.08 g/210L), urine test results could not have benefited Petitioner. A completely clean urine test would not impeach the breath test results, because they measure different substances, and a urine test showing the presence of controlled substances could only potentially harm Petitioner further.

As his third issue, Petitioner asserts that there was an almost two-hour delay between his arrest and the administration of the breath test. He claims the breath test was not incidental to his arrest and therefore was invalid. A chemical or physical test of breath to determine the alcoholic content of blood or breath "must be incidental to a lawful arrest . . . ." § 316.1932(1)(a)l.a., Fla. Stat. (2016). Petitioner cites *Department of Highway Safety & Motor Vehicles v. Whitley,* 846 So. 2d 1163 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1090a] for the proposition that an arrest must precede a breath test for the breath test to be incidental to an arrest. However, Petitioner alleges, without support, that "it is implicit in the wording that the test be taken at the time of the arrest or shortly thereafter and that a two hour period is not 'incident to an arrest.' " (Pet. at 8.) In fact, the *Whitley* court found the breath test incidental to arrest where, as here, the driver was not tested at the scene, but was transported to the police department. *Whitley,* 846 So. 2d at 1165. The court did not note how much time passed between arrest and administration of the breath test, but, in holding that the breath test was incidental to the arrest, described it as having been administered "well after" the arrest. *Id.* at 1167. *Cf. Gallagher v. State,* 606 So. 2d 1236, 1236 (Fla. 3d DCA 1992)(holding blood-alcohol test results admissible as having been conducted within a reasonable time, where blood samples were taken up to 142 minutes after auto accident); *see also State v. Brigham,* 694 So. 2d 793, 795 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D1174a] (explaining that breath alcohol is a measure of blood alcohol because alcohol in breath occurs when alcohol evaporates from blood into the breath in the

lungs). Petitioner's assertion that his breath alcohol tests were not incidental to his arrest is without merit.

To the extent to which Petitioner attacks Officer Hoover's qualifications to conduct breath alcohol testing, the argument is without merit. The record indicates that breath alcohol testing was conducted by Officer Christopher Dinkins, and that Officer Dinkins was trained as a breath test operator in June 2015 and not due for retraining until June 30, 2019. (App. at 11, 18.) To the extent to which Petitioner argues that Officer Hoover, as the stopping officer, was required to be qualified to conduct breath alcohol testing because breath alcohol testing should have been conducted at the scene to avoid delay, the argument is without merit because, as discussed above, the breath alcohol testing conducted at the pre-trial detention facility was incidental to arrest and was conducted within a reasonable time after arrest.

This Court finds that none of Petitioner's arguments warrants overturning the Hearing Officer's decision in this case. Therefore, it is

ORDERED that the Petition for Writ of Certiorari is hereby **DENIED**.

* * *

Licensing—Driver's license—Suspension—Driving under influence—Breath test—Substantial compliance with administrative rules—Twenty-minute observation period—No merit to argument that there is no competent substantial evidence to support finding that observation period was conducted because period was begun in sally port using clock that could have differed from clock on breath testing instrument—Observation form narrative, affidavit and notes written by deputy who conducted observation period constitutes competent substantial evidence supporting finding that deputy complied with observation period—Petition for writ of certiorari is denied

JEFFREY J. VOCHATZER, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2020-AP-13, Division AP-A. April 23, 2021. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: David M. Robbins and Susan Z. Cohen, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

(PER CURIAM) This cause is before this Court on Petitioner, Jeffrey J. Vochatzer's "Petition for Writ of Certiorari," filed on March 2, 2020. The Petition raises one argument for review: Whether or not the hearing officer's order was supported by competent, substantial evidence and departed from the essential requirements of the law when the Department did not provide competent, substantial evidence that a twenty-minute observation period occurred before Deputy Garlow administered a breath test to Petitioner.

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

Petitioner argues the hearing officer's order was not supported by competent, substantial evidence and departed from the essential requirements of the law because the Department did not provide competent, substantial evidence that a twenty-minute observation period occurred before Deputy Garlow administered a breath test to Petitioner. Deputy Garlow reported that he began the observation period at 11:38 p.m. in the sally port. Petitioner argues the Department did not offer any evidence as to how Deputy Garlow determined the initial observation time. Deputy Patrone, the agency inspector for the breath test instrument, testified at the hearing that the initial observation time should come from the breath test instrument. Petitioner points out that Deputy Garlow could not have used the breath test instrument to determine the initial observation time because he began the observation period in the sally port. Petitioner contends that the clock used by Deputy Garlow could have differed from the breath test instrument's clock and resulted in an observation period of less than twenty minutes. Petitioner avers that, as such, the Department did not provide competent, substantial evidence that twenty minutes elapsed before administration of the breath test. We disagree.

Rule 11D-8.007(3) of the Florida Administrative Code provides:

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

Here, competent substantial evidence supported the hearing officer's finding that Deputy Garlow complied with the twenty-minute observation period. Both the Breath Alcohol Test Affidavit and the Intoxilyzer 20 Minute Observation Form noted 11:38 p.m. as the initial observation time. The Breath Alcohol Test Affidavit show the first breath sample was taken at one minute after midnight (00.01). The Observation Form provided a comprehensive narrative of the twenty-minute observation period, during which Deputy Garlow searched Petitioner and read the Implied Consent Form to him. The Affidavit stated Deputy Garlow observed the twenty-minute observation period and administered the breath test to Petitioner in accordance with the procedures described in Chapter 11D-8, Florida Administrative Code. The Department also submitted Deputy Garlow's handwritten notes that corroborated the initial observation time on the Affidavit and Observation Form. During the hearing, Deputy Garlow swore and affirmed that the statements in these documents were true. Such evidence constituted competent, substantial evidence to support finding Deputy Garlow complied with the twenty-minute observation period. Therefore, Petitioner's claim is denied.

On April 17, 2020, Petitioner filed a "Motion for Oral Argument," requesting oral argument on the instant Petition. Since this Court finds Petitioner is not entitled to certiorari relief, Petitioner's request for oral argument is moot.

Based on the foregoing, the "Petition for Writ of Certiorari" is **DENIED**, and the "Motion for Oral Argument" is **DENIED** as **MOOT** (SALEM, SALVADOR, AND CHARBULA, JJ., concur).

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Confusion doctrine—Certiorari challenge to order upholding license suspension for refusal to submit to breath test and rejecting argument that reading of *Miranda* warnings caused confusion about licensee's right to counsel before taking test is denied where finding that licensee was not confused is supported by competent substantial evidence

HEATHER M. O'NEILL, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for Volusia County. Case No. 2020 31514 CICI, Division 32. April 12, 2021. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(MARY G. JOLLEY, J.) THIS CAUSE came before this Court on a Petition for a Writ of Certiorari (Dckt. No. 2) filed by Heather M.

O'Neill (hereinafter "Petitioner"). The court, having reviewed the Petition and attached Exhibits, the Response filed by the Florida Department of Highway Safety and Motor Vehicles (hereinafter "the Department"), and the Supplement to Petition (Dckt. Nos. 2, 7, and 8), and being fully advised in the premises, finds as follows:

Statement of the Case

Petitioner was arrested on August 23, 2020. Two charging affidavits state Petitioner was arrested for leaving the scene of a crash involving damage as well as possession of a controlled substance without a prescription, driving under the influence with damage to a person or property, and refusal to submit to a DUI breath test. (Dckt. No. 2 at 31-39). Petitioner was served notice with the citation of the suspension of her driver's license for unlawfully refusing to submit to breath, blood or urine test. (Dckt. No. 2 at 30). Petitioner timely requested an administrative hearing on the suspension of her driver's license. The administrative hearing was held on October 13, 2020. (Dckt. No. 6).

On October 19, 2020, the hearing officer entered her Findings of Fact, Conclusions of Law, and Decision, affirmed the suspension of Petitioner's driver's license. The hearing officer found that (a) law enforcement had probable cause to believe that Petitioner was driving or in actual control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances and (b) Petitioner refused to submit to any such test after being requested to do so and had been advised that if she refused to submit her driver's license would be suspended. (Dckt. No. 2 at 26-27).

In doing so, the hearing officer found:

> A twenty-minute observation period began at 01:08 hours. The Petitioner was asked to submit to a breath test and refused. She was extremely talkative and repeatedly requested to call her attorney. She also stated: 'I vote for cops" multiple times. The Petitioner was read the Implied Consent Warning. She was visibly sweating and complained of dry mouth and being hot. There was no evidence that the Petitioner was confused. She was provided with several opportunities to prove a breath sample, but maintained her refusal at approximately 01:44 hours.

(Dckt. No. 2 at 25).

Specifically addressing Petitioner's argument under the confusion doctrine and the decision of *Kurecka v. State,* 67 So.3d 1052 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2162b], the hearing officer found:

> Counsel's argument was carefully considered but found not be persuasive. Although the Petitioner chose to testify in this case, the record was devoid of any competent substantial evidence of what the Petitioner believed while she was refusing. There was no evidence offered that she was confused. The Petitioner's testimony merely established that she repeatedly requested to call her attorney.

(Dckt. No. 2 at 26).

The instant petition for a writ of certiorari was timely filed. An order to show cause was entered and a response was filed in accordance therewith. This review follows.

Statement of the Facts

The following testimony and evidence was before the hearing officer during the October 13, 2020 hearing:

On August 23, 2020, Petitioner was arrested by Ormond Beach Police Officer Jessica Fowler, "near the scene of an accident which [Petitioner] was suspected to have fled on foot" (Dckt. No. 2 at 4). Officer Fowler read Petitioner her *Miranda*[1] rights, and Petitioner requested to speak with an attorney. (Transcript of Hearing, Dckt. No. 6 at 10, 16). After the audio from the body camera footage was played for the witness, Officer Fowler acknowledged that Petitioner requested to speak with an attorney several times and was clear in her request. *Id.* at 17. Officer Fowler stated that she did not read or otherwise offer Petitioner any information with regards to taking a breath test. *Id.* at 18.

Ormond Beach Police Officer Richard Taylor testified that he came into contact with Petitioner while Petitioner was in the holding area of the police station. *Id.* at 32. He did not read any implied consent information to Petitioner and he clarified that his role in this matter was limited only to providing access to the breath test machine to the certified breath test operator. *Id.* at 34.

Petitioner testified that she was arrested for driving under the influence at a location away from the scene of an accident, and was advised of her *Miranda* rights. She indicated that upon such advisement, she repeatedly asked for or to call counsel. *Id.* at 34. She made such a request no less than thirteen times after receiving her *Miranda* rights and was not permitted to contact an attorney. Petitioner testified she was handcuffed and taken to another location. *Id.* at 37-39. She again asked to speak to an attorney and was not permitted to do so. *Id.*

After transport to the Ormond Beach Police Station, Petitioner was reread her *Miranda* rights, and states she asked for an attorney and was not afforded that opportunity. *Id.* at 39. Petitioner was not advised that she did not have a right to speak to an attorney before refusing to take a breath test. *Id.* Petitioner continued her request at least six more times during the twenty minute observation period and before deciding whether to submit to the breathalyzer. She was not given the opportunity to call an attorney. *Id.* at 40. Petitioner identified herself on Officer Fowler's body camera footage and the last video depicts her asking for her attorney several times. *Id.*

When questioned by the hearing officer, Petitioner testified that she recognized her voice from Officer Taylor's body camera, stating, "He was at the police station and I was really confused and I was trying to have somebody let me use the phone and call my attorney." *Id.* at 41. She reiterated that she asked Officer Taylor if she could call her attorney. *Id.* Petitioner concluded her testimony noting that she made multiple requests to be told what she was being arrested and charged with, and she was unable to obtain an answer on either the charges or for her request for an attorney. *Id.* at 42.

Multiple exhibits were admitted into evidence including *inter alia*: (i) DUI Uniform Traffic Citation and Uniform Traffic Citation; (ii) 707 Charging Affidavit; (iii) Refusal Affidavit and Implied Consent Warning; (iv) Breath Alcohol Test, Affidavit (refusal); (v) Ormond Beach Police Department DUI Report; and (vi) Uniform Probable Cause Affidavit. Also included were the audio recordings from both Officer Fowler and Officer Taylor's Axon body camera footage.

Ruling

The Court has jurisdiction to consider this Petition pursuant to section 322.21 of the Florida Statutes (2020) and Florida Rule of Appellate Procedure 9.030(c)(3).

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

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

2d 1270 (Fla. 2001) [26 Fla. L. Weekly S329a]. The third factor focuses on whether there is "evidence in the record that supports a reasonable foundation for the conclusion reached" by the Hearing Officer, and that the administrative findings and judgment are supported by competent substantial evidence. *Dep't of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a].

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

Petitioner contends that the findings of the hearing officer are not supported by competent substantial evidence. Specifically, she contends that no competent substantial evidence exists regarding the finding that she lawfully refused to submit to a breath test.

Section 316.1932(1)(a)l.a of the Florida Statutes (2020), commonly referred to as "implied consent," provides in pertinent parts:

> Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages. The chemical or physical breath test must be incidental to a lawful arrest and administered at the request of a law enforcement officer who has reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle within this state while under the influence of alcoholic beverages. . . ***The person shall be told that his or her failure to submit to any lawful test of his or her breath will result in the suspension of the person's privilege to operate a motor vehicle for a period of 1 year for a first refusal, or for a period of 18 months if the driving privilege of such person has been previously suspended as a result of a refusal to submit to such a test or tests, and shall also be told that if he or she refuses to submit to a lawful test of his or her breath and his or her driving privilege has been previously suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood, he or she commits a misdemeanor in addition to any other penalties.*** The refusal to submit to a chemical or physical breath test upon the request of a law enforcement officer as provided in this section is admissible into evidence in any criminal proceeding.

(Emphasis added.)

Petitioner contends that, after she was read her *Miranda* rights, she repeatedly requested the opportunity to speak with an attorney prior to taking the breath test and that she was not told that "her right to counsel and/or the right to remain silent did not apply to the decision of whether to take a breath test." Petition at 5. Petitioner argues that she should have been "unequivocally" told that her right to speak to a lawyer or remain silent did not apply to the breath test and absent that clarification, the finding that she knowingly refused cannot stand. The Department counters that Petitioner's argument, referred to as "the confusion doctrine," is an exclusionary rule not recognized in Florida and thus does not warrant certiorari relief.

In support of their respective positions, both Petitioner and Respondent detail numerous circuit and county court decisions referencing the confusion doctrine. Yet, in the absence of a decision by the Florida Supreme Court, this Court must look to the Fifth District Court of Appeal for controlling authority first and alternatively to the remaining district courts where the Fifth District Court of Appeal has not otherwise ruled. *Pardo v. State,* 596 So.2d 655, 666 (Fla. 1992). No district court of appeal has concluded that the confusion doctrine entitles a person, similarly procedurally situated to Petitioner, to certiorari relief.

This Court looks to the two district court of appeal opinions that have broached the issue. First is *Department of Safety and Motor Vehicles v. Marshall,* 848 So.2d 482 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1553b]. There, the defendant refused to take a breath test because she wanted to talk to an attorney first. The Fifth District Court of Appeal determined that nothing in the record supported the defendant's self-serving testimony that she was told in the field that she could consult with an attorney before deciding whether or not to take a breath test. In doing so, the Court cited generally to *State v. Burns,* 661 So.2d 842 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D1942a] for the proposition that administration of breath test was not constitute "a crucial confrontation" requiring the presence of defense counsel, and then concluded that the only evidence that "Marshall was misled was her own self-serving testimony, which the hearing officer rejected." *Marshall,* 848 So.2d at 486. Without directly addressing the confusion doctrine, the Fifth District Court of Appeal rejected this argument given the absence of any independent evidence or testimony that would support the notion that the defendant misunderstood her rights, or, in other words, was confused in advance a breath test refusal.

The second decision is *Kurecka,* which was considered by the hearing officer below. There, the Fourth District Court of Appeal heard a consolidated appeal of two cases, both of which presented the question of whether the defendants' refusal to submit to a breath test following their arrests for DUI should have been suppressed in their criminal trials. 67 So.3d at 1054-1056. In the first of the two cases, defendant Kurecka was arrested for DUI, taken to the police station, and asked to submit to his breath test. The parties stipulated that this defendant requested to speak to an attorney after the request to submit to a breath test and that he had not been advised of his *Miranda* rights. Thus, his request for an attorney was his own, not based upon any advisement of his right to an attorney. *Id.* at 1053-1054. The Fourth District Court of Appeal determined, on a certified question of public importance from the county court, that if the confusion doctrine existed in Florida, it did not apply when law enforcement failed to eliminate a defendant's confusion about the right to counsel before submitting to a breath test even though law enforcement did not cause the confusion. *Id.*

In the second of the consolidated cases in *Kurecka,* defendant Power was arrested for DUI and taken to the breath testing center for questioning and testing. He responded to every question, including routine booking questions, by stating that he wanted a lawyer. *Id.* at 1055. Thereafter, defendant Power was read the implied consent law and advised of the consequences of refusing the test. However, the sergeant did not repeat his request for Power to take the breath test; rather, he interpreted Power's actions of requesting a lawyer as a refusal to submit to testing. The sergeant then read Power his *Miranda* rights and asked him if he wanted to answer questions. Power shook his head and said he wanted a lawyer. *Id.* Power sought to suppress evidence of the question-and-answer session and his refusal to take

the test. The county court granted the motion to suppress, holding that because Power made clear that he thought he was entitled to counsel before submitting to a breath test, law enforcement had an obligation to correct that mistaken belief, even though law enforcement did nothing to create that belief. The county court again certified a question as one of great public importance. On that question, the Fourth District Court of Appeal found that a defendant's mistaken belief in the right to counsel prior to breath testing, not created by law enforcement, but made known to law enforcement, did not require the suppression of the refusal to submit to breath testing when law enforcement did not correct the defendant's mistaken belief. *Id.* at 1056.

The *Kurecka* court began its analysis by noting that under Florida law, "a person arrested for DUI does not have the right to consult with counsel before deciding whether to submit to a breath test." *Id. See also Burns, supra.* Going further than *Marshall,* the Fourth District Court of Appeal distinguished numerous cases in which law enforcement had possibly created the defendant's mistaken belief that he could consult with counsel prior to taking a breath test and those cases in which law enforcement had not created that mistaken belief but merely failed to correct it. The former category of cases were those in which law enforcement read the defendant his or her *Miranda* rights prior to asking the defendant to submit to a breath test, while the latter category consisted of cases in which the defendant was first asked to submit to a breath test and given the *Miranda* rights later. *Id.* 1057-1060.

The district court then concluded that it was undisputed on the record that law enforcement did nothing to create confusion in either appellant about the applicability of their *Miranda* rights. *Id.* at 1061. The *Kurecka* court also noted that nothing in the implied consent statute required law enforcement to advise people arrested for DUI that their right to counsel did not attach to their decision to submit to breath testing. *Id.* While the court observed that explaining this to suspects who request counsel would be a minimal burden on law enforcement, the court also recognized that the imposition of any such obligation must come from the legislature rather than from the judiciary.[2] *Id.*

With that backdrop, this Court notes initially that the hearing officer specifically found that there was no evidence that Petitioner was confused. Rejecting Petitioner's argument under the confusion doctrine and the decision in *Kurecka,* the hearing officer noted that Petitioner chose to testify, and there was no evidence offered that demonstrated she was confused and the record "devoid of any competent substantial evidence of what the Petitioner believed while she was refusing." *See* Dckt. No. 2 at 26. The confusion doctrine as applied here is predicated upon the notion that a person is confused as to his or her legal rights following the advisement of *Miranda* and then presented with the decision of whether to submit to a breath test. Here, the hearing officer specifically found that Petitioner was not confused at the time she made her refusal. As provided *supra,* this Court "must take care not to reweigh the evidence or substitute its judgment for the findings of the Department Hearing Officer." *Education Development Ctr., Inc.,* 541 So.2d at 108; *Allen,* 539 So.2d at 21.

In order for Petitioner to prevail here, this Court must then (a) ignore the factual finding of the hearing officer that Petitioner was not confused; and then (b) find there is confusion *per se* when a defendant is read his or her *Miranda* warnings, asks for an attorney prior to the breath test request, and then refuses the breath test, *unless* that there is a specific warning from law enforcement that he or she is not entitled to speak with an attorney or has a right to remain silent about that breath test decision.

This Court declines both invitations as the factual finding cannot and shall not be reweighed given the evidence presented at the hearing and, in the absence of any controlling authority, this Court will not find or otherwise create a *per se* rule on certiorari review. With that, Petitioner has not come forward with any other bases to disturb the ruling of the hearing officer.

Accordingly, it is hereby

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

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[1]*Miranda v. Arizona,* 384 U.S. 436 (1966).

[2]*Kurecka* further provides:

> Our research has not yielded any clear indication that the confusion doctrine is a recognized exclusionary rule or defense to a license suspension in Florida. And though we might agree that the confusion doctrine could properly be applied in circumstances where law enforcement created a defendant's confusion about the right to counsel for breath testing, the cases before us do not present those circumstances. Here, the undisputed facts show that the defendants' confusion was not officer-induced. The arresting officers did not advise the defendants of their *Miranda* rights before or during their reading of the implied consent law.
>
> As discussed above, our implied consent statute does not obligate a police officer to advise an accused that the right to counsel does not apply to the breath test setting. However, we see no harm in placing a minimal burden on officers to briefly explain this to suspects who request counsel when asked to submit to a breath test. Such an explanation would clear up a suspect's confusion and ensure that refusals admitted into evidence at trial are, in fact, knowing and voluntary refusals that show "consciousness of guilt." We believe that responsible police practice "should lead professional, courteous officers to advise insistent defendants that the right to counsel does not apply to chemical tests. Where a driver repeatedly asks to speak with an attorney, it would be courteous and simple for the officer to correct the accused's mistaken assumptions." [*State v.*] *Reitter,* 595 N.W.2d [646, 655 (Wis. 1999)].
>
> Of course, we cannot impose duties beyond those created by the legislature. The implied consent statute was enacted to assist in the prosecution of drunk drivers. Determining 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.

Kurecka, 67 So.3d at 1061-1062.

* * *

Counties—Code enforcement—Operating business without certificate of use—Due process—Business charged with violating county code was denied due process when it was denied opportunity to make proffer to preserve issue for appeal at conclusion of hearing—County did not meet burden to prove violation by preponderance of evidence where evidence showed that notice of violation was based on incomplete computer search and that business held valid certificate of use listing incorrect address

SNAPP INDUSTRIES, INC., Appellant, v. MIAMI-DADE COUNTY, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000082-AP-01. L.T. Case No. 2018-T079358. May 12, 2021. On Appeal From Final Administrative Action of the Miami-Dade County Office of Code Enforcement. Counsel: Ryan C. Shrouder, Spink, Shrouder & Karns, P.A., for Appellant. Abigail Price-Williams, Miami-Dade County Attorney, and Ryan Carlin, Assistant County Attorney, for Appellee.

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

(TRAWICK, J.) Appellant, Snapp Industries, Inc. ("Snapp"), appeals a decision rendered by a Hearing Officer on February 28, 2019, finding Snapp in violation of section 33-8(a) of the Code of Miami-Dade County (the "Code") for operating a business without a valid Certificate of Use ("C.U.").

Snapp owned and operated a business at 2902 N.W. 22nd Street, Miami, Florida (Lots 39-41, Folio Number 30-3128-017-0100) (the "Property"). Snapp was issued a citation at the Property on March 28, 2001, for an alleged violation of Code section 33-260, (Uses confined to building) for failure to conduct a business from within a completely enclosed building. Snapp's then attorney wrote a letter to a County Neighborhood Compliance Supervisor to verify that the citation would be dismissed based upon the County having received a copy of a valid Zoning Use Permit. The letter apparently referenced a

document from 1974 captioned "Zoning Use Permit, Certificate of Use and Occupancy" and includes a building permit number (the "C.U./Building Permit"). It was issued to "Snap Inc,"[1] listing a different street address and legal description, respectively, 2178 N.W. 29 Avenue and "Lot 42 44 No River Dr."[2] On August 21, 2001, a County Hearing Officer dismissed the prior citation.

On October 27, 2018, a Miami-Dade County Compliance Officer issued a courtesy warning notice advising Snapp that it was in violation of Code section 33-8(a) (Certificate of use) for operating a business at the Property without a C.U. On November 29, 2018, after Snapp failed to comply with the warning notice, Miami-Dade County (the "County") issued Uniform Civil Violation Notice (T079358) for the alleged violation of Code section 33-8(a). An Administrative Hearing was held on February 28, 2019, after which the Hearing Officer issued her "Findings of Fact and Conclusions of Law" affirming the citation. This appeal followed.

Circuit court review of an administrative agency decision is governed by a three-prong standard of review: "(1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent, substantial evidence." *Bennett D. Fultz Co. v. City of Miami,* 2005 WL 5302110 (Fla. 11th Cir. June 7, 2005) [12 Fla. L. Weekly Supp. 832a] (citing *Haines City Community Development v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]; *Board of County Commissioners of Brevard County v. Snyder,* 627 So. 2d 469 (Fla. 1993); *Metropolitan Dade County v. Blumenthal,* 675 So. 2d 598 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1445c], *rev. dismissed,* 680 So. 2d 421 (Fla. 1996)).

Snapp alleges that they were denied due process when they were not permitted to make a proffer to preserve an issue for appeal at the conclusion of the hearing. A denial of a party's request to make a proffer to the court for the record constitutes a denial of due process. *Martinez v. Bank of New York Mellon,* 198 So. 3d 911, 914 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1717c]. *See also Garcia-Mathies Interiors, Inc. v. Pere,* 259 So. 3d 213, 216 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2400a] (petitioner not allowed the opportunity to make a proffer before the trial judge walked off the bench). Surprisingly and troublingly, the Appellee here has argued that the record is devoid of any request to proffer and that this argument has been waived. The following colloquy belies this argument:

> THE HEARING OFFICER: if you want to put anything on the record, I'll give you five minutes to do it.
>
> MS: HOSKINS [County's attorney]: We can't do that ma'am. I'm sorry but either testimony has been closed or it's going to be opened. If he puts something on the record, we have to have the opportunity to rebut it. Testimony is closed. Testimony is closed.
>
> THE HEARING OFFICER: She has a point. We have gone back and forth, around and around with the same facts, same statements. We haven't presented anything new, as I stated before, in the last hour, except for Officer Rodriguez' testimony.
>
> MR. SHROUDER: What change was the conclusion that the name change—
>
> MS. HOSKINS: You can always appeal her decision sir. MR. SNAPP: I would have a point to appeal, to lock in.
>
> MS. HOSKINS: The hearing is over. The hearing is over. The hearing is over.

The Hearing Officer offered Snapp's attorney an opportunity to make a proffer. However, this offer was co-opted by the County's attorney, who repeatedly overstepped her bounds by proclaiming that "the hearing is over." Rather than assert her authority and permit Snapp's counsel to proceed with the proffer, the Hearing Officer allowed the County's attorney to lead her into error. As a result, Snapp was denied due process. The County's waiver argument is entirely without merit.

Snapp also asserts that not only did the County fail to present competent substantial evidence to show that Snapp lacked a valid certificate of use at the time of the citation, the evidence before the Hearing Officer shows the contrary. Code section 33-8(a) (Certificate of use) provides that:

> No structure, other than a single-family residence or duplex, shall be used or any existing use enlarged, or any new use made of any land, body of water, or structure, without first obtaining a certificate of use (C.U.) therefor from the Department. Said certificate of use shall be required for each individual business and each multi-family building located within unincorporated Miami-Dade County.

Testimony from the County's witnesses established that the Notice of Violation was based upon an incomplete computer search. Quite tellingly, the County's attorney admitted that the basis of the citation was grounded upon an incomplete search.

> MS. HOSKIN: So, for the record, the County is not stating that the report is a complete report as far as what may or may not exist on the property as far as the use. In fact, it doesn't, but that report was what was pulled when the violation was issued. So the basis of the Officer's issuance of the citation was what she had as far as the report.

Snapp on the other hand presented evidence that it held a valid C.U. at the time of the prior citation including: the letter from Snapp's previous attorney; the dismissal of the prior citation; and testimony from Mr. Snapp that Snapp never owned Lots 42-44, and that the Lot numbers on the 1974 C.U. / Building Permit were incorrect. While recognizing that the circuit court is not free to re-weigh or reevaluate the evidence presented below, *Miami-Dade County v. Reyes,* 772 So. 2d 24, 28 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D2014b], we find that the County did not present competent substantial evidence to meet its burden by the preponderance of the evidence that Snapp violated Code section 33-8.

As Snapp was denied procedural due process and since the Hearing Officer's decision was not supported by competent substantial evidence, the decision of the Hearing Officer is hereby QUASHED. (WALSH and SANTOVENIA, JJ. concur.)

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[1]While the 1974 CU, was issued to "Snap Inc," this appears to have been a scrivener's error by the responsible County official. However, we make no finding on this point.

[2]Snapp asserted during oral argument that Snapp property rests on a number of lots at the intersection of N.W. 22nd Street and N.W. 29th Avenue. While this may help explain the address discrepancy in the 1974 C.U., we again make no finding on this point.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Implied consent warning—Although only evidence that implied consent warning was read to licensee who gave one breath sample and refused to cooperate in providing second sample is checked off box next to form language on refusal affidavit that was completed before licensee gave first breath sample, evidence is sufficient to support hearing officer's finding that warning was read to licensee

CAMILO ESPINOSA, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-241-AP-01. May 12, 2021. On Petition for Writ of Certiorari from an Administrative Hearing Officer of the State of Florida, Department of Highway Safety and Motor Vehicles. Counsel: Francisco A. Marty, for Petitioner. Elana J. Jones, Assistant Attorney General Counsel, DHSMV, for Respondent.

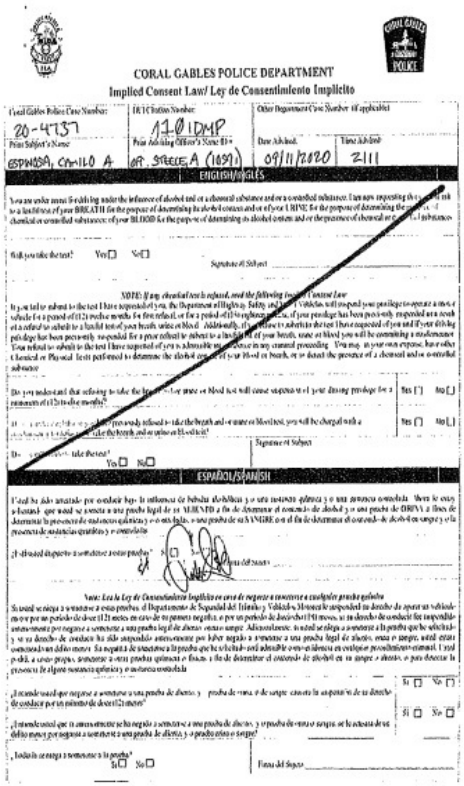
(Before TRAWICK, WALSH, and SANTOVENIA, JJ.)

OPINION

(TRAWICK, J.) On September 11, 2020, at approximately 7:52 p.m., a BOLO was issued for a vehicle matching the description of Peti-

tioner's vehicle. A Coral Gables Police Department officer, Officer Zaccheo, attempted to initiate a traffic stop on the vehicle, but the vehicle continued traveling before turning onto a side-road where the vehicle came to a complete stop. After the vehicle was stopped, Officer Henson arrived on the scene and observed the Petitioner in the driver's seat of the vehicle. He observed that the Petitioner appeared disoriented with glassy eyes and slurred speech. There was an open bottle of champagne visible on the passenger floorboard. A third officer, Officer Contreras, administered field sobriety test exercises. After determining that Petitioner's performance was poor, along with other signs of impairment, Petitioner was arrested for driving while intoxicated (DUI) and transported to the Coral Gables Police Station.

While being interviewed at the station, Officer Steele read the first part of an Implied Consent Form to Petitioner in Spanish. The form is reproduced below,



CORAL GABLES POLICE DEPARTMENT

Implied Consent Law/ Ley de Consentimiento Implícito

Coral Gables Police Case Number: 20-4737

DUI Citation Number: 170IDMP

Other Department Case Number (if applicable)

Print Subject's Name: ESPINOSA, CAMILO A

Print Arresting Officer's Name/ID#: OF. STEELE A (1091)

Date Advised: 09/11/2020

Time Advised: 2111

ENGLISH/INGLÉS

You are under arrest for driving under the influence of alcohol and or a chemical substance and or a controlled substance. I am now requesting that you submit to a lawful test of your BREATH for the purpose of determining its alcohol content and/or of your URINE for the purpose of determining the presence of chemical or controlled substances; of your BLOOD for the purpose of determining its alcohol content and/or the presence of chemical or controlled substances.

Will you take the test? Yes ☐ No ☐

Signature of Subject

NOTE: If any chemical test is refused, read the following Implied Consent Law

If you fail or refuse to submit to the test I have requested of you, the Department of Highway Safety and Motor Vehicles will suspend your privilege to operate a motor vehicle for a period of (12) twelve months for first refusal, or for a period of (18) eighteen months, if your privilege has been previously suspended as a result of a refusal to submit to a lawful test of your breath, urine or blood. Additionally, if you refuse to submit to the test I have requested of you and if your driving privilege has been previously suspended for a prior refusal to submit to a lawful test of your breath, urine or blood you will be committing a misdemeanor. Your refusal to submit to the test I have requested of you is admissible into evidence in any criminal proceeding. You may, at your own expense, have other Chemical or Physical Tests performed to determine the alcohol content of your blood or breath, or to detect the presence of a chemical and/or controlled substance.

Do you understand that refusing to take the breath test or urine or blood test will cause suspension of your driving privilege for a minimum of (12) twelve months? Yes ☐ No ☐

If you previously refused to take the breath and urine or blood test, you will be charged with a [illegible] take the breath and urine or blood test? Yes ☐ No ☐

Signature of Subject

ESPAÑOL/SPANISH

Nota: Esta Ley de Consentimiento Implícito se usa de negarse a someterse a cualquier prueba química

Si usted se niega a someterse a esta prueba, el Departamento de Seguridad del Tránsito y Vehículos Motores le suspenderá su derecho de operar un vehículo motorizado por un período de doce (12) meses en caso de su primera negativa, o por un período de dieciocho (18) meses, si su derecho de conducir fue suspendido anteriormente por negarse a someterse a una prueba legal de aliento, orina o sangre. Adicionalmente, si usted se niega a someterse a la prueba que he solicitado y si su derecho de conducir ha sido suspendido anteriormente por haber negado a someterse a una prueba legal de aliento, orina o sangre, usted estará cometiendo un delito menor. Su negativa de someterse a la prueba que he solicitado será admisible como evidencia en cualquier procedimiento criminal. Usted podrá, a cargo propio, someterse a otras pruebas químicas o físicas a fin de determinar el contenido de alcohol en su sangre o aliento, o para detectar la presencia de algún contenido químico y/o sustancia controlada.

¿Entiende usted que negarse a someterse a una prueba de aliento y prueba de orina o de sangre causará la suspensión de su derecho de conducir por un mínimo de doce (12) meses? Sí ☐ No ☐

¿Entiende usted que si anteriormente se ha negado a someterse a una prueba de aliento, y a prueba de orina o sangre, se le retirará el derecho de conducir por un mínimo de doce (12) meses? Sí ☐ No ☐

¿Todavía se niega a someterse a la prueba? Sí ☐ No ☐

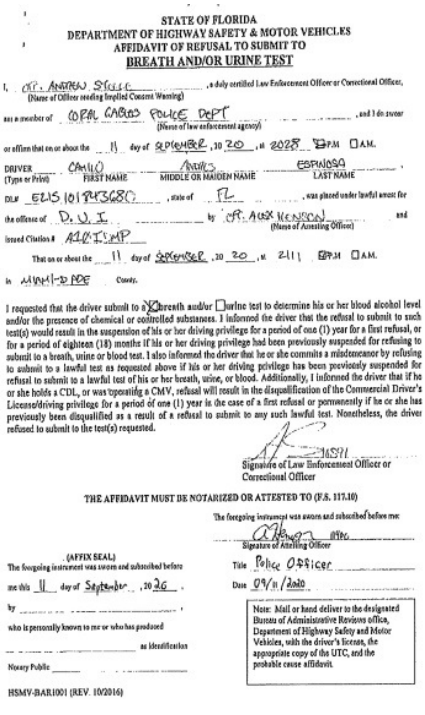
Firma del Sujeto

This portion of the form stated that the Petitioner was under arrest for driving under the influence of alcohol and or a controlled substance and that he was being requested to provide a breath test for determining the presence of alcohol; a urine test to determine the presence of controlled substances; and a blood test to determine the presence of alcohol and controlled substances. Petitioner was asked by Officer Steele if he was willing the take the test. He indicated that he was and he signed the Spanish version of the form (although it is not clear on the form itself whether he checked off yes or no to his willingness to submit to the test). According to a notation on the form, this was done at 9:11 p.m. Following his signature on the form, in bold print, is the following language in both English and Spanish:

"Note: If any chemical test is refused, read the following Implied Consent Law:"

After this notation appears an advisement of the statutory consequences of refusing to submit to a test. Following this advisement appears a statement asking the subject whether they understand these consequences, as well as boxes for checking yes or no; another statement again asking whether the subject will take the test along with yes or no boxes; and finally a signature block for the subject. There is no indication on the form that this portion of the form was ever read to or acknowledged by the Petitioner. This would not seem to be a requirement given that the Petitioner agreed to submit to a breath, blood or urine test when first asked.

Another form, an Affidavit of Refusal to Submit to Breath And/Or Urine Test was completed by Officer Steele. This form was also allegedly completed at 9:11 p.m. On this form Office Steele checked off a box indicating in pertinent part that the Petitioner had been requested to submit to a breath test and advised of the consequences of refusal. The form language concludes by stating that the driver (Petitioner) refused to submit to the requested test. The form was signed by Officer Steele and sworn to before an attesting officer. The form is reproduced below.



STATE OF FLORIDA

DEPARTMENT OF HIGHWAY SAFETY & MOTOR VEHICLES

AFFIDAVIT OF REFUSAL TO SUBMIT TO

BREATH AND/OR URINE TEST

I, OF. ANDREW STEELE, a duly certified Law Enforcement Officer or Correctional Officer, (Name of Officer making Implied Consent Warning)

am a member of CORAL GABLES POLICE DEPT (Name of law enforcement agency), and I do swear or affirm that on or about the 11 day of SEPTEMBER, 20 20, at 2028 ☒P.M. ☐A.M.

DRIVER (Type or Print) CAMILO (FIRST NAME) ANDRES (MIDDLE OR MAIDEN NAME) ESPINOSA (LAST NAME)

DL# E215 101 84 368 0, state of FL, was placed under lawful arrest for the offense of D. U. I. by OF. ALEX HERNDON (Name of Arresting Officer) and issued Citation # 170IDMP

That on or about the 11 day of SEPTEMBER, 20 20, at 2111 ☒P.M. ☐A.M.

in MIAMI-DADE County.

I requested that the driver submit to a ☒breath and/or ☐urine test to determine his or her blood alcohol level and/or the presence of chemical or controlled substances. I informed the driver that the refusal to submit to such test(s) would result in the suspension of his or her driving privilege for a period of one (1) year for a first refusal, or for a period of eighteen (18) months if his or her driving privilege had been previously suspended for refusing to submit to a breath, urine or blood test. I also informed the driver that he or she commits a misdemeanor by refusing to submit to a lawful test as requested above if his or her driving privilege has been previously suspended for refusal to submit to a lawful test of his or her breath, urine, or blood. Additionally, I informed the driver that if he or she holds a CDL, or was operating a CMV, refusal will result in the disqualification of the Commercial Driver's License/driving privilege for a period of one (1) year in the case of a first refusal or permanently if he or she has previously been disqualified as a result of a refusal to submit to any such lawful test. Nonetheless, the driver refused to submit to the test(s) requested.

Signature of Law Enforcement Officer or Correctional Officer

THE AFFIDAVIT MUST BE NOTARIZED OR ATTESTED TO (F.S. 117.10)

(AFFIX SEAL)

The foregoing instrument was sworn and subscribed before me this 11 day of September, 2020, by [illegible], who is personally known to me or who has produced [illegible] as identification.

Notary Public [illegible]

The foregoing instrument was sworn and subscribed before me.

Signature of Attesting Officer

Title Police Officer

Date 09/11/2020

Note: Mail or hand deliver to the designated Bureau of Administrative Reviews office, Department of Highway Safety and Motor Vehicles, with the driver's license, the appropriate copy of the UTC, and the probable cause affidavit.

HSMV-BAR1001 (REV. 10/2016)

According to a Breath Alcohol Test Affidavit prepared by Officer Steele, Petitioner was administered a breath test at 9:45 p.m. The result was a reading of .229 g/210L. After a twenty-minute waiting period, Petitioner was asked to provide a second sample. This time, rather than blow air into the mouthpiece, he attempted to suck in air. Officer Steele determined this to be a refusal, resulting in the license suspension at issue before this Court.

The arrest affidavit and the Incident/Investigation Report, both prepared by Officer Henson, mention details regarding the field sobriety test and Petitioner's failure to provide a second breath sample. However, no mention is made of when the Petitioner was advised of the consequences of refusing to submit to a test.

At the formal administrative review of Petitioner's license suspension, no witnesses testified. Various documents, including the ones described above, were admitted into evidence. After the hearing, the hearing officer issued a written order in which she concluded:

> Petitioner was requested to submit to a breath test with a Result of 0.229 g/210L at 21:45. Petitioner was requested to provide a second sample, did not follow instructions to provide another sample, sucked air from the mouthpiece therefore it was deemed a refusal. Petitioner was read Implied Consent warnings and maintained his refusal.

On an appeal of a decision of an administrative hearing officer, this court's review is limited to determining whether the agency 1) complied with procedural due process; 2) observed the essential requirements of law; and 3) based its ruling on competent, substantial evidence. *City of Deerfield Beach v. Vaillant,* 419 So.2d 624, 626 (Fla. 1982); *Haines City Cmty. Dev. v. Heggs,* 658 So.2d 523 (Fla. 1995) [20 Fla. L. Weekly S318a]; *City of Miami v. Cortes,* 995 So.2d 604 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D2691d].

Petitioner here only contests the existence of competent substantial evidence to support the hearing officer's conclusion. Nonetheless, the record supports a finding that the Petitioner received procedural due process and that the hearing officer observed the essential requirements of law.

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].

Petitioner argues without any record support other than Officer Steele checking off a box on a pre-printed form, that there is a lack of competent substantial evidence to support the hearing officer's decision. He cites the case of *Flanary v DHSMV,* 17 Fla. L. Weekly Supp 1078a (Fla. 11th Jud. Cir. App. July 21, 2010) in support of this argument. In *Flanary,* there were inconsistencies in the arrest paperwork, including both "yes" and "no" answer boxes being checked; different answers to the same questions in different languages; the identification of the Petitioner as both Hispanic and non-Hispanic; documents which indicated that the Petitioner had refused to submit to a breathalyzer test without indicating that he had been given implied consent warnings; and a one-page form with marked answers which was then crossed out with "refusal" written across the page. A panel of this Court found that since no live testimony was presented to clarify these apparent inconsistencies, there was a lack of competent substantial evidence to support the hearing officer's determination.

This Court does have reservations about the evidence supporting the Hearing Officer's conclusion. While the Hearing Officer found that the Petitioner was read an implied consent warning and that he maintained his refusal, the Affidavit of Refusal to Submit to Breath And/Or Urine Test was completed at 9:11 p.m., prior to the first test being administered at 9:45 p.m. There is no indication that Petitioner was warned at a later time of implied consent and the consequences of a refusal to submit to a test. In fact, the form indicates that the warnings regarding implied consent are not to be read until a "chemical test" is refused.[1] Particularly troubling however is that while Petitioner signed the form agreeing to take the test, he did not sign the form acknowledging that the implied consent warning was given. While it is entirely possible that Officer Steele may have read the implied consent warning at a later point in time, or that Petitioner refused to sign the form acknowledging the warning was read to him, there is nothing in the record to substantiate these conclusions other than Officer Steele checking off a box followed by form language. Indeed, neither the arrest affidavit, the offense incident report or any other report make any mention of the implied consent warnings being given at all.

As in *Flanary,* the DHSMV chose not to present witnesses to explain the circumstances surrounding the Petitioner's implied refusal and accompanying implied consent warnings. However, what distinguishes this case from *Flanary* is that in *Flanary* there were significant discrepancies and conflicts in the record. Here, while questions are raised by the documents considered by the Hearing Officer, we cannot say that there is no competent substantial evidence to support her conclusion. The Affidavit of Refusal to Submit to Breath And/Or Urine Test was sworn to by Officer Steele. In it he stated, albeit in pre-printed language, that the implied consent warning was given. While there is nothing else in the record to support the conclusion that an implied consent warning was appropriately given, unlike *Flanary,* there is nothing contradicting the affidavit either. As a result, we are reluctantly constrained to find that there is sufficient competent substantial evidence to sustain the Hearing Officer's determination that implied consent warnings were given and the Petitioner maintained his refusal.

We caution Administrative Hearing Officer's that the types of omissions evident here, as well as the discrepancies discussed in *Flanary,* should not be cavalierly ignored by the Hearing Officer, Respondent should be required to present evidence to address these types of issues. The conscious choice not to call witnesses due to budgetary concerns and the routine and unexplained unavailability of witnesses should not be an excuse for allowing the Respondent to make a questionable "barebones" presentation. Due process requires more than simply deferring to the wishes of the Respondent.

The Petition for Certiorari is **DENIED.** (WALSH and SANTOVENIA, JJ., concur.)

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[1]Based on the record before us, we will assume that the term "chemical test" applies to a breathalyzer test as well.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop—Officer had probable cause to stop licensee for traffic infraction where licensee's vehicle was stopped in lane of travel—Hearing officer did not err in concluding that licensee was in actual physical control of vehicle where licensee was observed dancing in roadway next to open driver's side door of vehicle that was stopped in roadway with motor running, licensee entered vehicle upon noticing officer's vehicle pull up behind his vehicle, and licensee was sole occupant of vehicle—Petition for writ of certiorari is denied

ADOLFO ARIEL REAL, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-182 AP 01. May 16, 2021. On Petition for Writ of Certiorari from a decision of the Department of Highway Safety and Motor Vehicles. Counsel: Joel L. Mumford and Louis C. Arslanian, for Petitioner. Christie S. Utt, General Counsel, and Elana J. Jones, Assistant General Counsel, for Respondent.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

OPINION ON REHEARING

(SANTOVENIA, J.) On Petitioner's Motion for Rehearing, the Motion is granted, the Opinion dated March 29, 2021 is withdrawn[1], and this Opinion is substituted therefor.

Adolfo Ariel Real ("Real" or "Petitioner") filed an Amended Petition for Writ of Certiorari ("Petition") herein challenging the August 24, 2018 Findings of Fact, Conclusions of Law and Decision of the Department of Highway Safety and Motor Vehicles ("Respondent" or "DMV") affirming the suspension of his driving privilege for violating Section 316.193, Fla. Stat., the driving under the influence statute, and for refusing a breath test. Real contends that the officer who approached his vehicle lacked probable cause for an investigatory stop, thereby invalidating the license suspension. He also contends that the evidence does not support a finding that Petitioner was in actual physical control of a motor vehicle within the meaning of Section 322.2615(7)(b)1, Fla. Stat. at the time of the stop.

Following Petitioner's arrest for driving under the influence, Petitioner requested a formal administrative review of his license suspension pursuant to Section 322.2615, Fla. Stat. (2017). An evidentiary hearing was held on August 21, 2018 before a hearing officer, who upheld the suspension.

On July 15, 2018 at 3:17 a.m., Officer Murphy of the Tallahassee Police Department was traveling west on Miccosukee Road, approaching Marys Drive. He observed a gray four-door Lexus, with license number BQCZ95 stopped in the left turn lane with a man standing outside the car, dancing next to the open driver's side door with the engine running and the music turned up. Officer Murphy pulled behind the vehicle, at which time the individual saw the officer. The officer activated his rear flashing lights to warn any traffic coming from behind. The man, identified as Petitioner, staggered as he looked in Officer Murphy's direction, climbed into the vehicle, and closed the door. Upon walking up to the vehicle, Officer Murphy noted that the driver's window was open and could smell the odor of alcohol coming from Petitioner. He further noted that Petitioner had a "1000-mile stare." Officer Murphy asked Petitioner to exit his vehicle, which he did very slowly, stumbling as he exited. Petitioner was unable to give coherent answers to basic questions.

Due to Petitioner's behavior and the smell of alcohol coming from his person, Officer Murphy believed he was intoxicated. He then called for Officer Shea to come to the scene and conduct a DUI investigation. After Officer Murphy shared his observations with Officer Shea, Officer Shea conducted his investigation. He observed that Petitioner had a flushed face, extremely glassy eyes, and sweat dripping from his forehead. He also noted that Petitioner's upper torso was swaying back and forth as he leaned on the patrol car. Officer Shea noted the faint smell of alcohol coming from Petitioner's breath. In conversing with Officer Shea, Petitioner slurred his words and was not able to maintain a consistent conversation. Officer Shea requested Petitioner to participate in field sobriety exercises. Petitioner refused. Officer Shea placed Petitioner under arrest for DUI. At the scene, Officer Shea asked Petitioner if he would provide a breath sample and Petitioner refused. Officer Shea read Petitioner the implied consent warning, after which Petitioner again refused to provide a breath sample.

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

Petitioner does not argue a lack of due process. Notwithstanding, the record reveals that Petitioner received notice of the hearing and a hearing at which he was represented by counsel, and had the opportunity to present evidence and cross-examine the DMV's witnesses. As such, Petitioner received due process. *See Kupke v. Orange County,* 838 So. 2d 598 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D413a] (procedural due process requires notice and an opportunity to be heard).

Petitioner also does not contest that he refused to provide a breath sample or that he was advised that such failure would result in suspension of his license. Rather, Petitioner argues that the facts do not support a finding that Petitioner was driving or in actual physical control of his motor vehicle while under the influence of alcoholic beverages or controlled substances pursuant to Section 322.2615(7)(b)1. Petitioner contends that he was neither driving nor in actual physical control of the car because he was outside of the car when the officer stopped him. Further, Petitioner argues that the facts do not establish a lawful basis for the officer's initial encounter with the Petitioner and that the officer's positioning of the police car behind Real's car and activation of the police car's emergency lights constituted an impermissible investigatory stop.

The only district court opinion upon which Real relies for the proposition that he was not in control of the car for purposes of the driving under the influence statute is *Hughes v. State,* 943 So. 2d 176 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1872a]. *Hughes* did not analyze the meaning of "control" of a motor vehicle in the context of the driving under the influence statute beyond reciting the standard jury instruction for criminal cases involving this charge. The *Hughes* defendant, a commercial pilot charged with operating an airplane while intoxicated, attempted to apply inoperability, which is a defense to a charge pursuant to Section 316.193, Fla. Stat., to defend his charges for the operation of an airplane while intoxicated. The court stated that:

> Section 316.193, the driving under the influence statute, provides that, before a person may be found guilty of this offense, the State must prove the following two elements beyond a reasonable doubt:
>
> 1. That the defendant drove or was in actual physical control of a vehicle, and
>
> 2. While driving or in actual physical control of the vehicle the defendant
>
> a. was under the influence of [alcoholic beverages][a chemical substance] [a controlled substance] to the extent that [his] [her] normal faculties were impaired, or
>
> b. had a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood, or a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.
>
> "Actual physical control of a vehicle" means the defendant must be physically in or on the vehicle and have the *capability to operate the vehicle,* regardless of whether he/she is actually operating the vehicle at the time.
>
> Fla. Std. Jury Instr. (Crim.) 28.1.
>
> A defendant, therefore, may be found guilty of this offense if he/she (1) drove or is driving a vehicle while under the influence or (2) is in actual physical control of a vehicle while under the influence.

Id. at 192-93 (emphasis added). Indeed, the Third District Court of Appeal noted that Hughes had not been charged with violating Section 316.193, the driving under the influence statute. Any analysis of the provisions of that statute in *Hughes* would be dicta in any event.

Petitioner challenges the hearing officer's finding that the stop was not an investigatory stop or detention. At the very least, there was reasonable suspicion for Officer Murphy to approach Petitioner's car to investigate. *See Popple v. State,* 626 So. 2d 185, 186 (Fla. 1993) ("[A] police officer may reasonably detain a citizen temporarily if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime."); *Fulmer v. Dep't of Highway Safety & Motor Vehicles,* 22 Fla. L. Weekly Supp. 43a (Fla. 9th Cir. Ct. July 23, 2014). Although reasonable suspicion for such a stop is sufficient and the heightened standard of probable cause is not necessary, we find that probable cause was present when Officer Murphy observed Petitioner's vehicle stopped in the left-hand turn lane.

Aside from any suspicion that Real's dancing outside his car in the left-hand turn lane at 3:17 a.m. was indicative of possible intoxication, the officer had probable cause to stop Real because the car was stopped in a lane of travel. This act is in violation of Section 316.1945(1)(a), Fla. Stat., which prohibits stopping, standing, or parking a vehicle in a roadway or within an intersection. Petitioner does not contest that he "may have been in violation of §316.1945(1)(a) (stopping a vehicle in the roadway)". Petitioner's reply brief at p. 8.

Pursuant to Section 318.14, Fla. Stat., in relevant part, "any person cited for a violation of chapter 316. . . is charged with a noncriminal infraction and *must be cited for such an infraction and cited to appear*

before an official." (emphasis added). The officer was thus permitted to stop Real in order to issue a citation to him.

The fact that the officer did not charge Real with the noncriminal infraction because he ultimately arrested Real for driving under the influence does not change the fact that the officer had probable cause to detain Real. *See State v. Potter,* 438 So. 2d 1085, 1086-87 (Fla. 2d DCA 1983) (where stop was based on a violation of Chapter 316, the officer was acting under the authority of Section 901.15(5), Fla. Stat. which authorized him to arrest the driver, regardless of whether the violation of Chapter 316 was charged).

Petitioner attempts to challenge the correctness of the hearing officer's conclusion that Real was in actual physical control of the vehicle "due to the Petitioner's proximity to the vehicle, the fact that Petitioner being the sole occupant of the vehicle, the vehicle being in the left turn lane, the vehicle being in the middle of traffic, the key being in the ignition, and that the engine was running". Once it is determined that Officer Murphy had probable cause to stop Real for a different infraction, this challenge fails. Officer Murphy witnessed Real entering the car voluntarily and without hesitation upon noticing Officer Murphy's vehicle behind Real's car, notably without being asked to do so or to retrieve anything inside the car, thus confirming that he was the driver of the car and had control of the vehicle. Moreover, an empty car did not drive itself to the intersection with the key in the ignition, open its door and accept Real, who just happened to be dancing at that location, as its driver. The only inference to be drawn from the fact that Real entered the car through the open driver's side door he was dancing next to when he saw the officer is that he was the driver of the car, especially in the absence of any passengers or other individuals in the area. This was enough for the Petitioner to be considered in control of the vehicle.

This factual scenario and conclusion are analogous to cases finding that a sleeping, intoxicated individual who has access to a car key or key fob is in control of a vehicle. *See State of Florida Dept. of Hwy Safety and Motor Vehicles v. Prue,* 701 So. 2d 106 (Fla. 4th DCA 1989) (defendant was the only person in the vehicle and keys were near enough for him to use them to start the vehicle and drive away); *Fieselman v. State,* 537 So. 2d 603 (Fla. 3d DCA 1988) (location of keys and defendant's presence asleep in vehicle are factors to be considered in determining whether defendant was in actual physical control of vehicle). As the Second District Court of Appeal noted in *State v. Fitzgerald,* 63 So. 3d 75, 77 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1076a], quoting *Hughes v. State,* 535 P. 2d 1023, 1024 (Okla. Crim. App. 1975):

> [A]n intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than where an intoxicated person is actually driving the vehicle, but it does exist. The defendant when arrested may have been exercising no conscious violation with regard to the vehicle, still there is a legitimate inference to be drawn that he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away. He therefore had "actual physical control" of the vehicle within the meaning of the statute.

We therefore find that Petitioner was in actual physical control of the vehicle. Because the August 24, 2018 Findings of Fact, Conclusions of Law and Decision below suspending the Petitioner's driver's license was correctly entered, the Petition for Writ of Certiorari is therefore DENIED. (TRAWICK and WALSH, JJ., concur.)

[1]The appellate record in this case does not include a copy of the transcript of the administrative hearing below. Accordingly, the March 29, 2021 Opinion of this court denied the Petition for Writ of Certiorari on the basis of *Applegate v. Barnett Bank,* 377 So. 2d 1150, 1152 (Fla. 1979). However, the Court has subsequently located the transcript of the August 18, 2018 administrative hearing filed in Eleventh Judicial Circuit Court Case No. 2018-32270 CA 01, Appendix to Petition for Writ of Certiorari (incorrectly titled Amended Complaint), docket entry no. 7 at pp. 23-42.

* * *

Colleges and universities—Student discipline—Plagiarism—University violated due process rights of student charged with plagiarism where student was denied opportunity to cross-examine teaching assistant as to his motives and bias against her, contrary to university's rules allowing charged students to question adverse witnesses

SAMANTHA RAMOS, Petitioner, v. FLORIDA INTERNATIONAL UNIVERSITY, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-121 AP 01. May 11, 2021. On Petition for Writ of Certiorari from final agency action of Florida International University affirming a decision of the Student Conduct Committee. Counsel: Andrew M. Kassier, Andrew M. Kassier, P.A., for Petitioner. Oscar Marrero and Lourdes E. Wydler, Marrero & Wydler, P.A., for Respondent.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

OPINION

(PER CURIAM.) The Amended Petition for Writ of Certiorari ("Petition") filed by Samantha Ramos ("Ramos" or "Petitioner") challenges Florida International University's ("FIU" or "Respondent") decision denying her appeal and affirming the Student Conduct Committee's ("SCC") April 21, 2020 decision finding Ramos responsible for plagiarism[1] in violation of FIU's Student Conduct and Honor Code ("FIU Student Code").

During the Fall 2019 semester, Ramos, a member of the FIU Honors College and Qualifying Biology in the Classroom ("QBIC") Program, was enrolled in Organic Chemistry I Laboratory. At issue are three Organic Chemistry lab reports which FIU contends were plagiarized by Ramos. The December 19, 2019 charge letter sent to Ramos provides, in relevant part, that:

> "During the Fall 2019 semester, you were enrolled in CHM 2210L U09 Organic Chemistry Lab. Allegedly, your lab reports for Recrystallization, Extraction, and Thin Layer Chromatography and Column Chromatography have significant portions directly from a lab report submitted by another student in a previous semester.

Pursuant to Section 8 of the FIU Student Code, Ramos had the option of waiving a hearing and proceeding to a summary resolution for a hearing officer to determine the findings and sanctions on discipline, or addressing the allegations of plagiarism at either an administrative hearing before a single hearing officer or at a hearing before the SCC, which is comprised of both student and faculty representatives. Ramos opted for an SCC hearing, which was held on April 14, 2020 ("SCC hearing").[2] Following the SCC hearing, Ramos was found to be responsible for the charge, and received the following sanctions: (1) a written reprimand where the letter of the decision served as official notice that the actions were inappropriate and not in accordance with community standards; (2) a grade reduction for the assignments in question where she received a grade of zero points on the three lab reports in the course and in Lab Technique and Skill; and (3) an educational activity requiring completion of a reflection paper after attending an Ethics and Community Standards Seminar.

Standard of Review

Our standard of review of administrative action requires the court to determine "(1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether there was competent, substantial evidence to support the administrative findings and judgment." *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982).

Due Process in Administrative Hearings

The extent of procedural due process afforded to a party in a quasi-judicial hearing is not as great as that afforded to a party in a full judicial hearing. *Seminole Entertainment, Inc. v. City of Casselberry*,

811 So. 2d 693, 696 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1720a]. Consequently, such hearings are not controlled by strict rules of evidence and procedure. *Id.*

Nevertheless, a party to a quasi-judicial hearing "must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts." *Kupke v. Orange County*, 838 So. 2d 598, 599 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D413a] (citing *Lee County v. Sunbelt Equities, II, Ltd. Partnership*, 619 So. 2d 996 (Fla. 2d DCA 1993)).

In student disciplinary actions, due process requires adequate notice, an opportunity to be heard, and substantial evidence to support the penalty. *Matar v. Florida Int'l Univ.*, 944 So. 2d 1153, 1160 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D3130a]; *Student Alpha ID No. Guja v. Sch. Bd. of Volusia County*, 616 So. 2d 1011, 1012 (Fla. 5th DCA 1993). The due process requirement of a student administrative proceeding requires that the proceeding must be "essentially fair." *Abramson v. Fla. Int'l Univ.*, 704 So. 2d 720 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D133b]; *Student Alpha, supra.*, 616 So. 2d at 1013. It is equally clear that disciplinary proceedings do not require the same safeguards afforded to criminal defendants. *Id.* (citing *Gordon v. Savage*, 383 So. 2d 646 (Fla. 5th DCA 1980)).

In *Matar*, the Third District Court of Appeal stated that:

> Section 120.68, Florida Statutes, provides that "[a] party who is adversely affected by final agency action is entitled to judicial review." § 120.68(1), Fla. Stat. (2005); *Morfit v. Univ. of S. Fla.*, 794 So. 2d 655, 656 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D1588a]. A district court reviewing a final agency action shall reverse or set aside agency action if it finds that "[t]he fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure." § 120.68(7)(c), Fla. Stat. (2005); see also *Ames v. Dist. Bd. of Trustees, Lake City Cmty. Coll.*, 908 So. 2d 1142, 1143 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D1922a] (specifying that Florida's Administrative Procedure Act ("APA") permits reversal only upon a showing of "material error in procedure or a failure to follow prescribed procedure"). This standard of review "has been characterized as the APA's version of the harmless error rule." *Ames*, 908 So. 2d at 1143.

944 So. 2d at 1157.

Florida universities and community colleges follow different procedures than other administrative agencies. *See Morfit v. Univ. of S. Fla.*, 794 So. 2d 655, 656 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D1588a], review denied, 817 So. 2d 852 (Fla. 2002). "In any proceeding in which the substantial interests of a student are determined by the state university system or a community college district, sections 120.569 and 120.57 (the general due process provisions of the Administrative Procedure Act) do not apply." *Id.*; § 120.81(1)(g), Fla. Stat. (2005). Rather, pursuant to section 6C-6.0105(1) of the Florida Administrative Code, each university president is directed to "establish university rules that ensure fairness and due process in student disciplinary proceedings and that guarantee the academic integrity of the university." *Matar*, *supra.*, 944 So. 2d at 1157.

Analysis

In order to prevail on her Petition pursuant to the applicable standard of review, Ramos would have to show that the SCC hearing did not afford her due process as alleged. *See City of Deerfield Beach*, *supra.*, 419 So. 2d at 626.

The relevant law in this case is derived from the FIU Student Code which is set forth in FIU's Student Handbook 2019-2020, Policies and Regulations FIU-2501. The FIU Student Code also expressly specifies the "Due Process Rights of the Charged Student or Student Organization" in Section 11, subsections a. through j.

With regard to the due process rights of a Charged Student, FIU's policy states that the student has "[t]he opportunity to present relevant Witnesses and information at the hearing" and "[t]he opportunity to question Witnesses in accordance with the Hearing Procedures", among other rights.

The FIU Student Handbook specifically provides as to a Charged Student's due process rights:

> **DUE PROCESS RIGHTS OF THE CHARGED STUDENT OR STUDENT ORGANIZATION** The Charged Student or Student Organization has the following rights: a. Reasonable, written notice of the Code charge(s) and the allegations upon which the charge(s) is/are based. b. A fair and impartial hearing. c. Accompanied by an Advisor of their choice and expense at any time during the Code process. d. The opportunity to review all relevant information or evidence to be used in the hearing prior to the hearing. e. The ability to participate in the Student Conduct hearing either physically or by contemporaneous alternative means (e.g., Skype, phone). **f. The opportunity to present relevant Witnesses and information at the hearing. g. The opportunity to question Witnesses in accordance with the Hearing Procedures.** h. Not to provide self-incriminating testimony. (This right does not apply to Student Organizations.) Invoking the right against self-incrimination will not be considered as a negative factor in the decision of the Hearing Officer or Hearing Body. i. Receive notification of the decision of the Hearing Body in writing within fourteen (14) Business Days of the hearing. j. Appeal the decision via the process established by the University.

Section 11, FIU Student Code (emphasis added).

Both FIU's Student Code and Florida Administrative Code Rule 6C-6.0105(6)(f) and (g) have been interpreted as "provid[ing] that the student may present information in his or her own behalf and that the student may hear and **question adverse witnesses."** *See Matar*, *supra.*, 944 So. 2d at 1158-59 (emphasis added). Moreover, an agency violates a person's due process rights if it ignores rules it promulgated which affect individual rights. *Id.* at 1157 (citing *Armesto v. Weidner*, 615 So. 2d 707, 709 (Fla. 3d DCA 1992)); *Morton v. Ruiz*, 415 U.S. 199 (1974).

Pursuant to the Charged Student's rights in the FIU Student Code, Ramos had the due process right to cross-examine FIU's witnesses at the SCC hearing. Ramos also had the due process right to present relevant witnesses and information at the SCC hearing.

FIU called as witnesses Jose Consuegra, Ramos's teaching assistant ("Teaching Assistant") and Dr. Sandra Stojanovic, the lab supervisor and Ramos's professor ("Professor") for the Organic Chemistry course corresponding to the Organic Chemistry lab. The record reveals that there was a contentious relationship between Ramos and both the Professor and Teaching Assistant. Ramos testified that the Professor would not allow Ramos to drop her Organic Chemistry class and that Ramos had to have the department chair override the Professor's refusal in order to drop the class. Ramos also testified that the Teaching Assistant had told another student—a potentially favorable witness for Ramos—"do not engage" when the student inquired about speaking to Ramos. Further, the Teaching Assistant had threatened that student with legal trouble if he spoke to Ramos[3], thus interfering with Ramos's ability to question witnesses in preparation for the SCC hearing.

In addition, Ramos and other students had criticized the Teaching Assistant's organization skills for a last-minute e-mail assignment he had sent to the lab group. Ramos also testified that the Teaching Assistant was biased against her because she had previously confronted him about allowing two students to walk over to a testing center with a written examination in hand, which Ramos had confirmed was not permitted. Ramos testified that the Teaching Assistant reacted very angrily and had said: "You are going to ruin my whole entire career, and you know that. I am going to ruin yours." (SCC Hearing transcript at 7).

Motive and bias of these witnesses were certainly relevant areas of inquiry that were permissible as a matter of the Charged Student's rights as set forth in the FIU Student Code. Motive and bias of these witnesses are also relevant areas of inquiry because of how the Teaching Assistant and Professor came to focus on Ramos[4] for the charge of plagiarism.

Ramos attempted to question the Teaching Assistant about his motive or bias towards her, asking him if he had threatened her (SCC Hearing transcript at 46), but was not allowed to do so. Instead, the hearing officer at the SCC hearing, Jennifer Martin, Assistant Director, FIU SCAI ("Hearing Officer") instructed Ramos to redirect her questions to the topic of lab reports.

The motive and bias of the Teaching Assistant and Professor were relevant not only to the plagiarism charge, but also to the discipline which Ramos received as a result of the SCC hearing. While the FIU Student Code provides for a right of appeal of disciplinary action, Ramos argues in her brief that the discipline which she received was greater than FIU's discipline of the other two students who were also charged with plagiarism. Ramos points out in her reply brief that these students elected not to contest the allegations against them and thus were not sanctioned as severely as Ramos where their only punishment, which was minimal, was to receive a course grade of "B" for their lab. By comparison, Ramos received zeros for each of the three lab reports in question and for Lab Technique and Skill, resulting in a "C" for the course despite allegedly performing better than both of these students.[5] Therefore, there would appear to be support for Ramos's argument that she was punished for her claimed plagiarism more severely than two other students because she pursued her appeal rights set forth in the FIU Student Code.

The failure to allow Ramos to cross examine the Teaching Assistant as to his bias or motive against her was a "material error in procedure or a failure to follow prescribed procedure" which resulted in a denial of due process. Reversal is mandated where, as here, a university does not follow its own rules and fails to afford a student due process. *See Morfit*, 794 So. 2d at 656 (held that the university did not follow its own rules and failed to afford the student due process). The *Morfit* court stated that:

> Subsection 6 of the code describes the student judicial process and proceedings, and subsection 7(b) delineates the student's due process rights. Specifically, section 7(b)5 gives the student the right to question witnesses: "**The student may hear and question adverse witnesses**, except in cases of violent misconduct where the student may submit questions to the hearing officer for use in questioning adverse witnesses." Although Morfit claims several other violations of his due process rights, **the violation of this right is sufficient to require reversal of the dean's decision**.
>
> The complaining witnesses were never called. In fact, the only statements from the alleged victims were contained in the investigation report written by an officer who talked with them. **Morfit was entitled to have the witnesses make their statements directly to the hearing officer, and he was entitled to question them. This is a fundamental ingredient of due process in any judicial or quasi-judicial proceeding**.

Id. (emphasis added); *Seminole*, *supra.*, 811 So. 2d at 696 (held that hearing on license revocation violated due process where licensee was denied the right to challenge, through cross-examination, the testimony of the principal witness against it.). Contrast *Matar*, 944 So. 2d at 1159 (due process rights not violated where "[a] careful review of the transcript of the proceedings reflects that Mr. Matar never attempted to cross examine the sole witness against him, Prof. Farmer, and that Mr. Matar was permitted to fully present his case").

For the foregoing reasons, we find that FIU violated Ramos's due process rights in failing to follow its own rules, grant the Petition and quash the April 21, 2020 decision of the SCC and the May 5, 2020 decision denying Ramos's appeal. (TRAWICK, WALSH, and SANTOVENIA, JJ., concur)

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[1]Plagiarism is defined in the FIU Student Code as "the deliberate use and appropriation of another's work without any indication of the source and the representation of such work as the Student's own." Section 1.6.g.1., FIU Student Code.

[2]Ramos appealed the April 21, 2020 decision of the SCC based on due process errors and the severity of the sanctions.

[3]While Ramos asked the Teaching Assistant at the SCC hearing if he had threatened the student, the Teaching Assistant pointed to email communications between himself and the student, but did not directly answer the question.

[4]The Teaching Assistant noticed that two other students (and not Ramos) had included in a lab report the wrong quantity, 1.5 scoops, of a drying agent used for an experiment. The experiment called for only 1 scoop of the drying agent. However, 1.5 scoops was the quantity that had been used for the experiment the year before, raising the Teaching Assistant's suspicion that the two students had copied another student's lab report from the prior year. The Teaching Assistant apparently remembered the contents of a particular student's lab notebook from the year before ((SCC Hearing transcript at 27) and obtained that student's lab notebook. Upon reviewing all of the lab reports for Ramos's lab group, the Teaching Assistant noted that the discussion section of three of Ramos's lab reports contained similarities to the prior year's student's lab reposts, while noting that Ramos's work was mostly original and that her conclusion and numerical results were unique to her lab. The Teaching Assistant brought his suspicions and findings to the Professor, who submitted the academic misconduct form resulting in Ramos being charged with plagiarism.

[5]The case against the two other students was intertwined with FIU's presentation of its case against Ramos and in FIU's response brief, which argues that the Professor and Teaching Assistant were allegedly not biased against Ramos because the other two students were also charged with plagiarism and sanctioned. FIU argues in its response brief that "[i]n light of the potential sanctions, including suspension or expulsion, the sanctions imposed [against Ramos] were the lightest pursuant to the Code". Ramos disputes that a written reprimand which remains on her record for seven years is a light sanction. Furthermore, it follows that if Ramos's sanctions were the "lightest" under the FIU Student Code, then the sanctions apparently received by the other two students were less than the lightest sanctions outlined in the FIU Student Code. Notably, pursuant to Section 15 of the FIU Student Code, the sanctions outlined for any Charged Student found to have violated the FIU Student Code do not distinguish between a Charged Student who chooses a summary resolution without a hearing and a Charged Student who chooses either an administrative hearing or a hearing before the SCC.

* * *

Municipal corporations—Code enforcement—Unpermitted construction—Unsafe structures—Final orders of city code enforcement board and city unsafe structures panel finding that unpermitted work had been performed on boarding house and that structure must be repaired or demolished are affirmed—No merit to argument that panel only has jurisdiction to hear code violations for single-family and duplex residences where city code does not provide such a limitation and specifically states that procedures regarding panel are applicable to all multi-unit structures—Board did not act arbitrarily or capriciously by ignoring 1996 court opinion reversing board final order regarding unpermitted work at boarding house where board's current order concerns unpermitted work performed after 1996—Owner's admission that she never obtained any permits for work on boarding house buildings is competent substantial evidence that buildings are unsafe

HAYDEE ALFARO GONZALEZ, Appellant, v. CITY OF MIAMI CODE ENFORCEMENT BOARD, et al., Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-88 AP 01. May 11, 2021. On Appeal from administrative decisions of the City of Miami Code Enforcement Board and Unsafe Structures Panel. Counsel: Rex E. Russo, for Appellant. Victoria Mendez, City Attorney, and Kerri C. McNulty, Assistant City Attorney, for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

OPINION

(PER CURIAM.) AFFIRMED.

This is a consolidated appeal of two separate orders entered by the City of Miami ("City") Code Enforcement Board and Unsafe

Structures Panel regarding Appellant's property located in the City of Miami ("Property"): a Final Administrative Enforcement Notice of the City Code Enforcement Board dated March 2, 2018 and a final action Order of the City's Unsafe Structures Panel dated July 27, 2018.

Factual and Procedural History

Petitioner runs a boarding house for men at the Property. The Property is comprised of two structures containing a total of nine bedrooms and nine bathrooms. The code enforcement history throughout Appellant's ownership of the Property includes multiple citations for construction of additions and work performed without permits.

The City issued five notices of violation to Appellant for May 25, 2017 through January 17, 2018 for work completed without a permit ("current violations"). The notices of violation mandate correction of the current violations and inspector approval of the corrections within a specific time period.

On March 1, 2018, a hearing was held before the City Code Enforcement Board ("Board") regarding the current violations. The Board found the Appellant guilty of charges involving work without a permit for a fence, concrete wall and driveway, all of which Appellant had conceded. The Board also found the Appellant guilty of work without a permit as to a second kitchen and the rooms and bathrooms exceeding the five that existed in 1994 per the County property records. The Board gave Appellant sixty days to acquire after-the-fact permits for the work without a permit and levied a $250 per day fine. Following the hearing, the Board issued a March 2, 2018 Final Enforcement Notice ("Board's Order"). On March 23, 2018, Appellant appealed the Board's Order.

After entry of the Board's Order, an inspection was conducted by the Unsafe Structures Section of the City's Building Department. The unsafe structures inspector issued a repair or demolish notice to the Appellant on March 7, 2018. This citation referred to the work done without a permit in the Board's Order and additional violations for an unsafe structure. On July 27, 2018, a hearing was held before the City's Unsafe Structures Panel. Rene Diaz, the Chief of the Unsafe Structures Section, testified as to the unsafe Property conditions and presented photographs as evidentiary support. Diaz testified about fire safety concerns regarding the Property posed by hanging electrical wires and restricted egress as well as safety concerns involving exposed drainpipes and flooding issues related to the level of a concrete slab. Diaz further testified that a permit search confirmed that there were no permits issued for any construction on the Property. At the conclusion of the hearing, the Unsafe Structures Panel adopted the recommendations of the Unsafe Structures Section. The final action Order of the Unsafe Structures Panel dated July 27, 2018 ("Panel's Order") required the Appellant to repair or demolish the unsafe structure within 180 days. On July 31, 2018, Appellant appealed the Panel's Order and moved to consolidate its appeals of both the Board's Order and the Panel's Order.

In December 1994, the Property was first cited for work done without a permit. Appellant claims that the 1994 notice of violation pertains to an addition to the Property's main building which was constructed in 1981. On March 8, 1995, the Board entered a final order affirming that violation. Appellant successfully appealed that order, which was reversed by this court on September 6, 1996. *See Haydee Alfaro Gonzalez v. City of Miami*, Slip Opinion, Eleventh Judicial Circuit Court Appellate Division Case No. 95-147 AP 01. Appellant argues that the notices of violation issued to Appellant for May 25, 2017 through January 17, 2018 for work completed without a permit pertain to the same work which was the subject of the 1994 notice of violation. Furthermore, Appellant argues in this appeal that the City is barred from pursuing the current violations against Appellant because of this court's reversal of the 1995 Code Enforcement Board order.

The City's position, however, is that the Board's Order and the Panel's Order in this appeal do not pertain to any work done prior to 1996. The file of the City Code Enforcement inspector indicates that the current violations were for further work that had been completed after the 1995 final order was reversed in September 1996. An inspection note in the Code Enforcement inspector's file indicates that a May 8, 1996 inspection of the Property revealed a total of five bedrooms and five bathrooms. A subsequent inspection on December 27, 1996 revealed eight bedrooms and eight bathrooms with two kitchens. Upon inquiry, the inspector was informed that there was a ninth bedroom and an additional bathroom behind a locked door. At a March 10, 2017 Property inspection, the Code Enforcement inspector noted that the square footage for the buildings had doubled.

Standard of Review

The applicable standard of review of an administrative decision by the circuit court includes a determination of: (1) whether procedural due process is 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 Broward County v. G.B.V. International, Ltd.,* 787 So. 2d 838 (Fla. 2001) [26 Fla. L. Weekly S463a]; *Haines City Community Development v. Heggs,* 658 So. 2d 523 (Fla. 1995) [20 Fla. L. Weekly S318a].

Relevant City Code Provisions

Code Violations

Code violations are addressed in Chapter 2, Article X of the City of Miami Code. This Chapter requires that a property owner be given notice of the violation in writing and a reasonable time in which to correct the violation. Section 2-815 (c)-(e) of the City of Miami's Code delineates the procedures for hearings before the Code Enforcement Board. As with any administrative hearing, "formal rules of evidence shall not apply." *Id.*

Unsafe Structures

Section 8-5 of the Miami Dade County Code provides that a municipality may establish by ordinance its own standards and administrative process to address unsafe structures within its boundaries, including a process for appeal. A municipality adopting such ordinance shall also be authorized to establish its own standards for declaring a structure to be unsafe, and for the repair or demolition of an unsafe structure.

Article VI, Chapter 10 of the City of Miami Code addresses unsafe structures. Section 10-101(J)(1) of the City of Miami Code applies to all multi-unit structures. This Section applies the jurisdiction of the City's Unsafe Structures Panel to situations "where there is a danger to the health, safety, and welfare of the citizens in the community."

Pursuant to the City Code, structures can be unsafe because of their condition:

> Buildings or structures that are, or hereafter shall become, unsafe, unsanitary or deficient, and dilapidated facilities, with inadequate means of egress, or which constitute a fire or windstorm hazard, or are otherwise dangerous to human life or public welfare by reason of illegal or improper use, occupancy or maintenance, or which have been substantially damaged by the elements, acts of God, fire, explosion or otherwise, shall be deemed unsafe structures and a permit shall be obtained to demolish the structure, or where specifically allowed by this article, to bring the building into compliance with the applicable codes as provided herein.

§ 10-101(a)(2), City of Miami Code. The Code includes a separate basis for finding that a building or structure is unsafe if it was constructed or is being constructed without the required permits:

> Incomplete buildings commenced without a permit or for which the permit has expired, or completed buildings commenced without a permit or for which the permit has expired, prior to completion and no certificate of occupancy has been issued, shall be presumed and deemed unsafe and a permit shall be obtained to demolish the structure or bring the building into compliance with the applicable codes as provided herein.

§ 10-101(a)(3), City of Miami Code. A building can be unsafe, therefore, because of its current condition or because it was constructed without the required permits, and each of these bases for declaring a structure unsafe is entirely independent of the other. Under the City Code, if a building is deemed an unsafe structure and is ordered to be repaired and such repairs are not completed within a reasonable time, the building will be demolished. § 10-101(a)(4), City of Miami Code.

Analysis

(1) Procedural Due Process

Procedural due process requires notice and an opportunity to be heard. *Kupke v. Orange County,* 838 So. 2d 598 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D413a]. Procedural due process in the administrative setting does not always require application of the judicial model. *Hadley v. Dept. of Admin.,* 411 So. 2d 184 (Fla. 1982). The formalities of judicial proceedings are not necessary to meet due process requirements in an administrative hearing. *Id.* Under all circumstances, due process requires notice reasonably calculated to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. *Dawson v. Saada,* 608 So. 2d 806 (Fla. 1992).

A review of the record demonstrates that the Appellant was afforded notice and an opportunity to present testimony, witnesses and objections at both the City Board and Panel hearings. Appellant was thus afforded due process.

(2) Essential Requirements of the Law

A ruling constitutes a departure from the essential requirements of the law when it amounts to a violation of a clearly established law resulting in a miscarriage of justice. *Miami Dade County v. Omnipoint Holdings, Inc.,* 863 So. 2d 195, 199 (Fla. 2003) [28 Fla. L. Weekly S717a].

Appellant argues that there was a departure from the essential requirements of law because the Panel lacked subject matter jurisdiction to enter an unsafe structures order. Appellant also argues that the Property is commercial (citing no zoning designation), while the Board only allegedly has jurisdiction to hear code violations for single-family and duplex residences.

The County Code allows for municipalities to set up their own administrative process to address unsafe structures, and the City has done so in Chapter 10 of the City Code. The City Code states generally, without limitation to single family houses or duplexes, that the "[u]nsafe structures panel(s) shall hear unsafe structures cases, and appeals of decisions, of the city building official declaring properties and their structures and accessory structures to be unsafe where there is a danger to the health, safety, and welfare of the citizens in the community, all in the manner prescribed in this article." § 10-101 (a), City of Miami Code. Furthermore, the City Code also states specifically that the procedures regarding its unsafe structures panel "shall be applicable to all multi-unit structures." § 10-101 (j), City of Miami Code.

Appellant also argues that there was a departure from the essential requirements of law because the Board acted arbitrarily and capriciously in ignoring the 1996 opinion of this court reversing the Board's March 8, 1995 final order. However, Appellant's reliance on the 1996 reversal of the Board's 1995 final order is misplaced. The reversal was based on the City's failure to meet its evidentiary burden to show that a permit was not issued after Appellant alleged that she had in fact obtained a permit for the construction work. However, there was no substantive finding by the court that Appellant had either obtained permits for the work or that there were no code enforcement violations at the Property which would preclude a contrary finding by the Board or Panel regarding work done after 1996.[1] As such, the Board's Order and Panel's Order comply with the essential requirements of the law.

(3) Competent Substantial Evidence

Both the Board and the Panel engaged in fact-finding determinations strictly limited by City Code provisions. Specifically, the City Code restricts the Board for "purposes of a civil violation notice . . . to whether the violation did occur, and if so, whether the person named in the civil violation can be held responsible for the violation."

Appellant "plead[ed] guilty" to the charge regarding work without a permit as to demolishing a wall, and "conced[ed]" the charges regarding work without a permit pertaining to a fence. Appellant testified and admitted that she did not obtain a permit for work on the driveway and even admitted that she had never obtained a permit for any of the work performed on the Property.

Appellant's testimony that she never obtained any permits, standing alone, is competent substantial evidence supporting the conclusion that the buildings are unsafe pursuant to the City Code. See § 10-101(a)(3), City of Miami Code ("completed buildings commenced without a permit. . . shall be presumed and deemed unsafe and a permit shall be obtained to demolish the structure or bring the building into compliance with the applicable codes as provided herein").

The testimony of Code Enforcement Inspector Vanessa Pino and Rene Diaz, the Chief of the Unsafe Structures Division at both hearings, as well as documentary evidence corroborated Appellant's admission that permits were never issued for the work to the building constructed post-1995. Pino testified, using records from the County, that the number of bedrooms and bathrooms in the County records had increased since the 1994 violations from a five bedroom, five bathroom house to an eight bedroom, eight bathroom house in 1996. At the March 10, 2017 inspection, Pino observed eight bedrooms and eight bathrooms plus two kitchens, and the manager told her there was an additional ninth bedroom and bathroom behind a locked door. Inspector Pino testified that the City had no records of any permits for any of the violations at issue in the hearing—additional rooms, a kitchen, a fence, a driveway—since 1996.

Appellant's brief ignores her own admissions made at the hearing and instead focuses in very large part on the weight to be given the City's evidence, the credibility of the City's witnesses, and evidence supporting a contrary conclusion to the Orders entered by the Board and the Panel. However, Appellant misconstrues this court's standard of review on appeal. This court is not entitled to reweigh the evidence or substitute its judgment for that of the hearing officer. *Dusseau v. Metropolitan Dade County Board of County Comm'rs,* 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a]. "The appellate court cannot conduct an independent review searching for evidence to rebut the hearing officer's decision." *Clay County v. Kendale Land Dev. Inc.,* 969 So. 2d 1177, 1181 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2870a]. Instead, this limited review is confined to whether the decision is supported by the record. *Education Development Center, Inc. v. City of West Palm Beach Zoning Bd. of Appeals,* 541 So. 2d 106, 108 (Fla. 1989). "The question is not whether, upon review of the evidence in the record, there exists substantial competent evidence to support a position *contrary* to that reached by the agency. Instead, the circuit court should review the factual determination made by the agency and determine whether there is substantial

competent evidence to support the agency's conclusion." *Id.* . The Florida Supreme Court in *Dusseau, supra.* 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." 794 So. 2d at 1276.

Accordingly, there is competent substantial evidence in the record below to support the Board's Order, the Panel's Order and the conclusion that work was done without a permit to the interior of the main building after 1996. For the foregoing reasons, the Final Administrative Code Enforcement Notice of the City Code Enforcement Board dated March 2, 2018 and the final action Order of the City's Unsafe Structures Panel dated July 27, 2018 are hereby AFFIRMED. (TRAWICK, WALSH, and SANTOVENIA, JJ., concur.)

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[1]That opinion provides, in its entirety, as follows:

A review of the record reveals that the City of Miami failed to present substantial competent evidence to prove the lack of a permit by the Appellant Haydee Alfaro Gonzalez. After the question was raised by the Appellant that a permit was obtained, the burden shifted to the City to answer the question by presenting competent evidence as to the nature of and the quality of the search done by the City. Having failed to meet this burden, the finding by the Board must be reversed.

Appellant's Appendix at 71-72.

* * *

Municipal corporations—Code enforcement—Short-term rentals—Special magistrate who found that there was no evidence that homeowners violated village land development code by renting guest house on date specified in citation was required to dismiss citation—Magistrate exceeded his authority by finding that guesthouse is accessory unit as defined in code and cannot be rented as standalone unit

ADA GUTIERREZ, Appellant, v. VILLAGE OF PINECREST, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-67-AP-01. L.T. Case No. CC-19-0487. May 21, 2021. On Appeal from an Order of Dismissal by Special Magistrate for Village of Pinecrest Department of Building and Planning. Counsel: Gustavo Gutierrez, Gutierrez & Gutierrez, P.A., for Appellant. Laura K. Wendell, Jose L. Arango, and Alejandro Uribe, Weiss Serota Helfman Cole & Bierman, P.L., for Appellee.

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

OPINION

(PER CURIAM.) Appellant, Ada Gutierrez, ("Ms. Gutierrez"), appeals a February 3, 2020 Order, entered by a Special Magistrate of the Village of Pinecrest (the "Village") dismissing a citation in Case Number CC-19-0487, for a violation of the Village of Pinecrest Code of Ordinances (the "Code") section 30-4.2(c)4 (Prohibited Use in EU-1 District. Single Family). The citation alleged that Ms. Gutierrez was using her guest house as a short-term rental unit in violation of the Village Land Development Regulations. While the Special Magistrate dismissed the citation, he made additional findings, conclusions, and warnings in the body of the order proscribing future rental use of an accessory guesthouse on the property.

Background

On June 4, 2019, the Village issued a code compliance reminder to Ms. Gutierrez advising her that Code section 30-4.4(c)4 prohibits use of an accessory guest house for short term rental: "A detached guest house is not permitted to be rented. Cease rental/ advertisement of guest house as a vacation rental." On October 22, 2019, the Village issued a "Notice of Violation and Notice to Appear" before a special magistrate citing Ms. Gutierrez for the same violation alleged to have occurred on June 3, 2019. The Village conducted two hearings on the violation.

At the first hearing on December 11, 2019, the Village introduced evidence of the reminder; the citation; evidence that the homeowners were served and that notices were posted; and internet postings listing the guest house for rent on a short-term rental website. The Village inspector, Officer Cabrera, testified that the home is in zoning district EU-1, within which rental of guest houses is prohibited.

It was uncontroverted that there was no evidence to support the claim that the property owners rented the guest house on June 3, 2019. (App. at p. 21). But the Village urged the Special Magistrate to issue an order prohibiting further advertisement of the guesthouse for short-term rental. Mr. Gutierrez, who is Ms. Gutierrez's husband, as well as joint owner and counsel, argued that the hearing exceeded the scope of the notice by going well beyond the date of the purported violation, constituted improper notice and thus a due process violation. (App. at p. 25). He also argued that there was a vested right to rent the guest house because, having been built in 1955, the right to its use was grandfathered. Additionally, he argued the guesthouse has been rented continuously during that entire period with lapses in use and rentals, but has been rented at least once a year throughout. (App. at pp. 20-21).[1] The Special Magistrate asked both sides to present him with written memos addressing these arguments raised by the homeowner and rescheduled the hearing.

Ms. Gutierrez claimed in a "Memorandum of Law and Statement of Facts," that "[a]t its core, this dispute with the Village involves an attack on the vested rights of the Homeowner. . . ." (S. App. at p. 25). As part of this vested rights argument, she argued that "the primary residence and Back House were permitted and existed from inception, when the property was 'developed' in 1952" and "[t]he 'land use' has never changed." (S. App. at p. 27). The "Village is pre-empted by State law from prohibiting" short-term rentals on platforms such as VRBO. (S. App. at p. 26).

Ms. Gutierrez further argued that because the Village regulations only apply to development and redevelopment of land, the Village was powerless to regulate a guest house which was in existence since the 1950s. Finally, she argued that " 'a property which is only partially rented is not a vacation rental.' Section 5.32 Village Code.' " (App. at p. 26).

The Village responded in its memorandum that the Village Land Development Regulations forbid rental of accessory units. Code section 30-9.2, which both defines an accessory unit, specifically prohibits its rental. Code section 30-4.2(c)3 requires that any of the limited uses for a particular accessory unit within zoning district EU-1 be approved by a Village official, with such use being certified by the property owner.

It is not disputed that the use of the subject guest house as a rental property was not approved by the appropriate Village official. Ms. Gutierrez maintains that such approval is not required because she enjoys "vested rights" in the property. Addressing this argument, the Village explained in its memorandum that to be a legally nonconforming use, the owners were required to prove that the use of the rental property was a lawful use prior to the enactment of the Village Code, or under the prior Miami-Dade County Code of Ordinances (the "County Code").

To further rebut the claim of vested rights, the Village offered proof that even if a legally nonconforming use previously existed, the owners abandoned such use. The Village attached an affidavit used by the owner to support a Homestead exemption in 2005. (S. App. at p. 47). The owner stated in her affidavit:

2. The residential use of the subject property consists of a homestead dwelling and an additional dwelling unit used as a guest quarters or other specific ancillary use more particularly described as Property address unit *# n/a* **and is currently used as *Home***.

3. **The additional guest dwelling unit which is an integral part of the subject property is not a rental unit, is not currently rented and Affiant does not intend to use the guest quarters as a rental unit in the future**.

4. The subject property, including the guest dwelling unit, is occupied and used by the Affiant, his/ her family, and/or guests as part of his/her homestead property.

5. If the guest dwelling unit is used, rented or leased by anyone other than family or guests, affiant shall notify, in writing, this change in use of the homestead residential property or portion thereof to the Property Appraiser no later than January 1, of the next year.

Id. (Emphasis added).

In 2005, after the Homestead application was granted, the County Property Appraiser considered the guesthouse to be a second living unit and taxed the property as one folio with two structures. (App. at p. 53). The owners maintained their homestead exemption from 2005 through 2015. The Village further pointed out that under section 196.031, Florida Statutes, rental of a dwelling previously claimed as a homestead shall constitute an abandonment of said dwelling as a homestead. Therefore, the Village argued that even if the owners had a vested legally nonconforming use, the homestead exemption from 2005 through 2015 and the owners' relinquishment of use as a rental unit was a voluntary abandonment of the allegedly pre-existing "vested" right to rent the guest house.

At a second hearing on February 3, 2020, Mr. Gutierrez testified that 16 years ago, when his daughter lived in the guesthouse, the family submitted the affidavit to obtain a homestead exemption. Mr. Gutierrez testified that while his family maintained a homestead exemption and that the guesthouse was not rented while his daughter lived there.

The Village attorney introduced a detailed tax history of the property. The homeowner's claim that there were always two living units on the property, one of which was rented, appears to be refuted by the tax records which proved that the first time that any records existed which deemed the guesthouse a separate living unit was in 2005. (S. App. at p. 39).

At the conclusion of the February 3, 2020 hearing, the Special Magistrate found that there was no violation. (App. at pp. 66, 67) The Village questioned whether, because the violation was dismissed, a future violation would be a first or repeat violation. (App. at p. 67) Mr. Gutierrez complained, "I think what the Village is now asking for declaratory judgment." *Id.*

The Special Magistrate concluded:

I cannot and I'm not going to issue an order restraining him from advertising.

* * *

Okay. He is on notice by bringing this case and by my making an order that it is an accessory unit, that's a determination and the Village ordinance prohibits as an accessory unit the rental of it.

Should you rent it, you will be in violation of the ordinance.

(App. pp. 67-68)

In the written order of dismissal, the Special Magistrate found:

Based upon the evidence presented including testimony presented at both hearings and the memorandum prepared by counsel and the Village which are herein incorporated as part of the record, the magistrate finds that the portion of the property referred to as the "back house," "guesthouse" and "2nd structure" is an accessory unit as defined under the Village of Pinecrest Land Development Code. As such an accessory unit may not be rented as a standalone unit pursuant to the laws of the Village of Pinecrest.

The evidence presented by the Village indicated that this accessory unit was rented in the past in violation of the law; however, based on the testimony of the Respondent, it was not rented on June 3, 3019 the cited date of violation and is not currently rented. The case is therefore dismissed; however, the Respondent is put on notice of this holding and is admonished about future use of the property.

(App. at p. 6).

Ms. Gutierrez filed a timely notice of appeal.

Jurisdiction

"Circuit courts shall have jurisdiction of appeals from final administrative orders of local government code enforcement boards . . . ." § 26.012, Fla. Stat. (2021).

Analysis

Ms. Gutierrez does not challenge the dismissal of the citation, but rather, whether the Special Magistrate unlawfully issued what she calls a declaratory judgment, and therefore exceeded his jurisdiction under Chapter 162, Florida Statutes.

On review from a final order of code enforcement, a circuit court panel sitting in its appellate capacity 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.[2] *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982); *Haines City Community Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a].

Due Process

"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 (Fla. 3d DCA 1991). Further, "the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts. . ." *Id.* Ms. Gutierrez received notice of the hearing, had an opportunity to be heard, presented evidence, and examined witnesses. However, Ms. Gutierrez raises a meritorious due process challenge.

Ms. Gutierrez argues that nothing in the notice of violation placed her on notice that her vested rights to accessory use of her guesthouse would be determined. Further, she argues that once the Special Magistrate concluded that the Village failed to prove the allegation in the citation, the Special Magistrate was required to dismiss the citation and lacked jurisdiction to make further findings. Ms. Gutierrez argues that the Special Magistrate's authority is limited to "enforcing any codes and ordinances in force in counties and municipalities, where pending or repeated violation continues to exist." § 162.02, Fla. Stat. (1989).

While the Village of Pinecrest has adopted an alternative code compliance procedure under its code,[3] nothing in the Village code nor in sections 162.07(4) or 162.08, Florida Statutes authorize a special magistrate or code enforcement board to adjudicate a property owner's rights once a citation is dismissed. Section 162.07(4), Florida Statutes, provides: "(4) At the conclusion of the hearing, the enforcement board shall issue findings of fact, based on evidence of record and conclusions of law, and **shall issue an order affording the proper relief consistent with powers granted herein**." Section 162.08 provides, "Each enforcement board shall have the power to: . . . (5) **Issue orders having the force of law to command whatever steps are necessary to bring a violation into compliance**." (emphasis added). Under the statutory authority, if there is no violation, there is no authority to "bring a violation into compliance."

Code section 2-142 of the Village of Pinecrest Code states: "Under this article, special magistrates shall have the power to: . . . (6) Enter findings of fact, conclusions of law, and issue orders having the force of law **to command whatever steps are necessary to bring a violation into compliance**." (emphasis added). Likewise, under the code, there was no violation here, and therefore no authority to make findings of fact nor conclusions of law.

Moreover, this Court can discern no statutory nor code authority granted to a Special Magistrate to independently determine vested property rights. We recently found that a hearing on a code violation is not the appropriate venue to adjudicate an allegation of vested

property rights. *See GPT 74 St Owner LLC—AIM Recycling, Inc. v. Town of Medley*, 28 Fla. L. Weekly Supp. 980a (Fla. 11th Cir. App. Ct. Jan. 2, 2021) (property owner in Medley was required to bring assertion of vested property rights to Town council, and special master could not adjudicate rights in enforcement proceeding).

In the Village of Pinecrest, section 30-5.20(6) relating to Grandfather clause states, "Existing land uses which were lawful conforming uses prior to the adoption of the comprehensive development master plan or the land development code shall continue as lawful uses and shall be **subject to and regulated by vested rights policies contained in the land development code**." (emphasis added). Section 30-2.1(e) provides that the Village Council has the power to "(f) **Review and approve applications for accessory uses**." Again, nothing in the Land Development Regulations grants authority to a special magistrate in a code violation hearing to regulate or adjudicate such rights.

The Village argues that even if the Special Magistrate lacked the authority to make such findings, he was invited by the Appellant to do so, and therefore the invited error doctrine bars consideration of this issue on review. *Fuller v. Palm Auto Plaza, Inc.*, 683 So. 2d 654, 655 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D2549b] (quoting *Lupton v. Village Key & Saw Shop*, 656 So. 2d 475, 478 (Fla.1995)). (citation omitted).

However, the owners objected at both hearings. At the first hearing, they complained that their due process rights were being violated:

> I think it's a violation of due process to charge someone with a violation with a specific date which says, "Date of violation, June 3, 2019," and then come in and say, "Oh, by the way, we're going to be talking about 1945, and 1978, and 1985, and 2017."
>
> That is inappropriate. It's improper notice and if that's the case I would like to have a rehearing on the matter and have the matter re-noticed for what it is that the Village claims was a violation and the times that the violations occurred.

(App. at p. 25).

At the second hearing, Mr. Gutierrez objected to the Village's attempt to resolve the issue of vested rights: "I think what the Village is now asking for declaratory judgment." (App. at p. 67). We find that this was not invited error.

Finally, Ms. Gutierrez argues that the findings of fact made by the Special Magistrate constituted a declaratory judgment. Because the Special Magistrate lacked authority to adjudicate the vested rights here, he was without authority to issue a declaratory judgment.[4]

Departure from the Essential Requirements of Law

Because we conclude that the findings made by the special magistrate were unauthorized by law, it is inappropriate for us to address the Appellant's arguments addressing the lawfulness of future accessory use of the guesthouse nor whether the owners have vested rights to use the guesthouse as a rental property.

Accordingly, we AFFIRM the order dismissing the violation but REVERSE the findings of fact and conclusions of law purporting to adjudicate the accessory use of Ms. Gutierrez' guesthouse. (TRAWICK, WALSH, and SANTOVENIA, JJ., concur.)

[1]The Appendix filed by the Appellant will be referred to as "App.," while the Supplemental Appendix filed on behalf of the Village will be referred to as "S. App."

[2]Ms. Gutierrez does not argue that there was a lack of competent, substantial evidence presented below.

[3]Section 162.13, Florida Statutes (1982) clarifies that the procedure set forth in section 162.02 is supplemental and "nothing contained in ss. 162.01-162.12 shall prohibit a local government body from enforcing its codes by any other means." The Village of Pinecrest has promulgated its own alternative system. See Village Code § 2-131.

[4]The findings and conclusions issued by the Special Magistrate have no legally preclusive effect that this court can discern, and thus we further find that the order fails as a declaratory judgment.

* * *

Licensing—Driver's license—Early reinstatement—Denial—It is not necessary for circuit court sitting in appellate capacity to consider argument that denial of license reinstatement due to citation evincing that licensee had driven while license was revoked was not supported by competent substantial evidence since citation was dismissed where licensee's admission to consuming alcohol within 12 months of seeking reinstatement, by itself, supports denial—Petition for writ of certiorari is denied

SEAN SMITH, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 20-CA-5630, Division F. April 13, 2021. Counsel: Joshua Monteiro, Sammis Law Firm, P.A., Tampa, for Plaintiff. Christie S. Utt, General Counsel, and Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(JENNIFER GABBARD, J.) **THIS MATTER** is before the Court on a Petition for Writ of Certiorari filed July 13, 2020. Petitioner asks this Court to quash the order denying early reinstatement of his driving privilege on a hardship basis arguing that the record lacks competent, substantial evidence to support the denial because the July 17, 2019, citation issued to Petitioner for leaving the scene of an accident—fewer than 12 months before he sought hardship reinstatement—was dismissed. Petitioner contends that the dismissal of the citation suggests a lack of competent, substantial evidence that he had driven while his license was revoked. A determination of whether evidence supports Petitioner's argument on this point is unnecessary, however. Petitioner's admission that he may have consumed alcohol within 12 months of seeking reinstatement in violation of section 322.271(2)(c), is, by itself, competent, substantial evidence to support the denial of reinstatement. Accordingly, the petition must be denied.

In the lower tribunal, the purpose of the hardship hearing is to investigate and determine a person's "qualification, fitness, and need to drive." § 322.271(1)(b), Fla. Stat. If eligible, the hearing officer may reinstate the driving privilege on a restricted basis solely for business or employment purposes. *Id.* On review in certiorari, circuit courts must determine (1) whether procedural due process was 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." *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). Petitioner does not argue, and this Court does not find, a denial of due process in the underlying proceeding. The transcript reflects that Petitioner had notice and an opportunity to be heard and participated in the underlying proceeding.

Petitioner's driving privileges were revoked effective June 28, 2018, for sustaining two convictions for driving under the influence (DUI) within five years. On June 11, 2020, a hearing was held on Petitioner's application for hardship reinstatement of his driving privilege. Petitioner testified as to his need for hardship driving privileges, what he learned in DUI school, and answered questions as to when he last drove a motor vehicle and consumed alcohol. Section 322.271(2)(c), Florida Statutes, mandates that ". . .the department shall require such persons upon reinstatement to have not driven *and* to have been drug free for *at least* 12 months immediately before the reinstatement. . .".[1]

Although resolution of this issue is not necessary to support the decision, the Court finds noteworthy that Petitioner answered vaguely when questioned as to when Petitioner last operated a motor vehicle. He answered "the night I got arrested." He did not provide a specific date. Though one might assume he meant October 4, 2017 (his second DUI), his driving record reflects that he was cited for leaving the scene of an accident during the revocation period on July 17, 2019, less than a year before he applied for reinstatement. The circumstances that led

to the issuance of the citation are not part of the record. The charge for leaving the scene was ultimately dropped for reasons that are not explained.

When asked the last time Petitioner consumed alcohol, he again responded somewhat vaguely, that it had been 11-and-a-half to 12 months before the hearing. Based on the totality of Petitioner's testimony, the hearing officer denied reinstatement. Petitioner argues that the fact that the charge for leaving the scene of an accident in 2019 was dropped leaves no competent, substantial evidence to sustain the denial of the hardship reinstatement. This is incorrect. Petitioner's testimony as to when he last consumed alcohol did not confirm that he had abstained for even the minimum period required for hardship reinstatement pursuant to section 322.271(2)(c). This alone provided the hearing officer competent, substantial evidence to support denying the reinstatement.

It is therefore ORDERED that the petition is **DENIED** in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

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[1]For purposes of section 322.271, alcohol is a drug. *Dept. of Highway Safety and Motor Vehicles v. Abbey*, 745 So. 2d 1024, 1025-26 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2413a]; *Dept. of Highway Safety and Motor Vehicles v. Chakrin,* 304 So. 3d 822, 829 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D2329a].

* * *

Licensing—Driver's license—Revocation—Appeals—Certiorari—Timeliness—Where licensee failed to file petition for writ of certiorari within 30 days of either Department of Highway Safety and Motor Vehicles' license revocation order or of decision of special supervision services program affirming another SSS program's decision to remove licensee from program, dismissal of petition is required—No merit to claim that hearing officer's order sustaining license revocation following hearing is order reviewable by filing petition for writ of certiorari 30 days after issuance of that order where there is no statutory provision authorizing department to conduct hearing to review license revocation

PAUL PHILLIP MASTROLEO, 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. 50-2020-CA-006391-XXXX-MB. May 14, 2021. Petition for Writ of Certiorari from the Bureau of Administrative Review, Department of Highway Safety and Motor Vehicles. Counsel: Catherine Mazzullo, Law Office of Catherine Mazzullo, P.A., Palm Springs; and Frederick C. Hutchinson, III, Hutchinson & Huffman, P.A., West Palm Beach, for Petitioner. Elana J. Jones, DHSMV, Tallahassee, for Respondent.

(PER CURIAM.) On May 14, 2020, a hearing officer with the Bureau of Administrative Review affirmed a decision by the Department of Highway Safety and Motor Vehicles (the "Department") to revoke Petitioner's hardship license. Petitioner filed a Petition for Writ of Certiorari in this Court to seek review of that May 14, 2020 decision. The Department responded by arguing that the instant Petition was untimely because Petitioner should have instead sought review of the Department's initial November 25, 2019 decision to revoke Petitioner's license. After reviewing the record and applicable statutes and regulations, the Court concurs with the Department and finds that the Petition must be dismissed as untimely.

Factual and Procedural Background

Petitioner's driver license was revoked for ten (10) years pursuant to section 322.28(2)(a), Florida Statutes, following his third conviction for driving under the influence. The Department later issued Petitioner a hardship license that was contingent upon him enrolling in a "Special Supervision Services Program" ("SSSP") called Metro Traffic School ("Metro"). *See* § 322.271(2)(c), Fla. Stat. (2019). As a term of his supervision, Metro required that Petitioner take, and pass, regular drug tests. On September 26, 2019, the results of a drug test indicated that Petitioner tested positive for THC. Although Petitioner claimed that he had a valid medical marijuana card issued by the State of Arizona (where Petitioner lives part-time), Metro found that the card was issued after Petitioner had taken the drug test. After its investigation, Metro informed Petitioner that he would be removed from the program and that it would recommend the revocation of his hardship license to the Department. *See* § 322.271(2)(c), Fla. Stat.; Fla. Admin. Code 15A-10.031(2) (2019).

Pursuant to regulations, Petitioner appealed Metro's decision to terminate his enrollment to another SSSP: Pride Integrated Services ("Pride"). *See* Fla. Admin. Code 15A-10.031(2). After holding a hearing on the matter, Pride issued its final decision on January 6, 2020 affirming Metro's decision to remove Petitioner. Prior to Pride's decision, on November 25, 2019, Petitioner also received notice from the Department that, due to Metro's recommendation, it revoked his hardship license effective December 16, 2019.

On March 4, 2020, Petitioner formally requested a hearing with the Department's Bureau of Administrative Review to contest the revocation of his hardship license.[1] During the hearing, the hearing officer asked Petitioner and his counsel why they did not seek a hearing within thirty days of receiving the Department's November 25, 2019 order revoking Petitioner's hardship license. Both Petitioner and his counsel indicated that they believed they timely sought a hearing based on Pride's January 6, 2020 decision. In a May 14, 2020 final order, the hearing officer noted that Petitioner's request for a hearing was untimely due to it being made more than thirty days after the Department revoked his license. Nevertheless, the hearing officer considered the merits of Petitioner's argument and found that the Department's decision was supported by competent, substantial evidence. Petitioner filed the instant Petition in the circuit court seeking review of the May 14, 2020 order.

Legal Analysis

The Department claims that the Court lacks jurisdiction over this action because the Petition was not filed within thirty days of a reviewable final order. *See* § 322.31, Fla. Stat.; Fla. R. App. P. 9.100(c). The thrust of the Department's argument is that Petitioner should have sought review of the Department's November 25, 2019 order and not the hearing officer's May 14, 2020 order. While Petitioner contends that he had to await Pride's final decision and the decision of a hearing officer in order to exhaust all administrative remedies, the first-tier of review for the Department's decision to revoke a hardship license is via a petition for writ of certiorari and not (as most Department decisions are) by an administrative hearing.

First, the Court notes that two parallel, but separate, administrative decisions occurred almost simultaneously with one another: Petitioner's removal from SSSP supervision *and* the revocation of his hardship license. SSSP operating procedures are governed by chapter 15A-10 of the Florida Administrative Code. *See Midgett v. Dep't of Highway Safety & Motor Vehicles*, 16 Fla. L. Weekly Supp. 795b (Fla. 4th Cir. Ct. Apr. 20, 2009). The SSSP's regulations allow a driver to appeal their removal from a SSSP to a second SSSP entity. If the second SSSP agrees with the initial decision, its decision to affirm becomes a final decision that is *directly appealable to the circuit court* via a petition for writ of certiorari. Fla. Admin. Code R. 15A-10.031(2), (6); *see, e.g.*, *Ventre v. State of Fla., Dep't of Highway Safety & Motor Vehicles*, 23 Fla. L. Weekly Supp. 667a (Fla. 6th Cir. Ct. Dec. 14, 2015).[2] Applying these regulations to the instant case, Pride's January 6, 2020 decision to uphold Petitioner's removal from Metro was a final, reviewable order.

In contrast, the revocation of a hardship license implicates chapter 322, Florida Statutes. If a driver fails to comply with the terms of supervision, the driver's SSSP *must* inform the Department and the Department *must* revoke the hardship license. § 322.271(2)(c), Fla.

Stat. While removal from a SSSP and the revocation of a hardship license are linked, they are not part of one larger, unitary decision since the Department can independently revoke a hardship license even if the driver is in the process of appealing the SSSP's decision. Fla. Admin. Code R. 15A-10.031(2). An order revoking a hardship license is a *final order* that is immediately appealable to the circuit court. §§ 322.27(7), 322.31, Fla. Stat. Unlike other decisions rendered by the Department, there is no "statutory right of a driver, whose license has been summarily revoked without notice, to an administrative hearing in which he has an opportunity to present his case." *Johnson v. State*, 709 So. 2d 623, 624 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D953b] (quoting *Mellon v. Cannon*, 482 So. 2d 604, 607 (Fla. 5th DCA 1986)); *see also Dep't of Highway Safety & Motor Vehicles v. Sperberg*, 257 So. 3d 560, 561-62 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2318a] (recognizing that the petitioner properly sought review of an order revoking his license by filing a petition for writ of certiorari with the circuit court).[3]

The facts in this case are very similar to that of a decision rendered by our sister circuit court in *Campbell v. State of Florida, Department of Highway Safety & Motor Vehicles*, 20 Fla. L. Weekly Supp. 778a (Fla. 17th Cir. Ct. May 14, 2013). In *Campbell*, a driver challenging the revocation of his license first sought an administrative hearing with the Department before filing a petition for writ of certiorari challenging the hearing officer's decision more than thirty days after his license was initially revoked. The *Campbell* court dismissed the driver's petition as untimely. It held that chapter 322 does not provide for an administrative hearing to review a license revocation and that it was unlawful for the Department to hold a hearing. *Id.* (citing *Johnson*, 709 So. 2d at 624). Instead, the circuit court noted that the statute "provides the only mechanism through which a licensee or cardholder may seek review of an order or suspension, which is by filing a petition for writ of certiorari." *Id.* (citing §§ 322.27(7), 322.31, Fla. Stat.).

The applicable statutes and regulations indicate that Petitioner had the opportunity to seek review of two separate final orders: the Department's November 25, 2019 revocation order and Pride's January 6, 2020 decision. Petitioner did not file a timely petition for writ of certiorari for either. We agree with *Campbell* and hold that, when the Department revokes a license pursuant to its authority under sections 322.27 and 322.271, a driver seeking review of that decision must timely file a petition for writ of certiorari in the circuit court. Petitioner did not need to request an administrative hearing to exhaust administrative remedies as there is no statutory basis for the hearing in the first place. *Johnson*, 709 So. 2d at 624; *Campbell*, 20 Fla. L. Weekly Supp. at 778a. Since the hearing officer's May 14, 2020 decision was not authorized by law, Petitioner also cannot rely on equitable tolling to overcome the untimely filing of his petition. *See Deal v. Deal*, 783 So. 2d 319, 321 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D951a].[4] Because Petitioner did not seek relief within thirty days of a reviewable final decision, the Court must dismiss the instant Petition for lack of certiorari jurisdiction. *See* Fla. R. App. P. 9.100(c).

Conclusion

While dismissing the instant Petition is the proper outcome, we note that the law concerning this issue is confusing at best and deceptive at worst. The record below indicates that Petitioner, his counsel, and the hearing officer herself were all unfamiliar with the contours of the applicable law, giving credence to the Second District Court of Appeal's assessment that "the current statutes do not provide clear procedures" for the review of license revocations. *Vichich v. Dep't of Highway Safety & Motor Vehicles*, 799 So. 2d 1069, 1072 n.6, 1074 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D2290a]. We echo the concerns of the *Vichich* court and urge the Department and the Legislature to consider amending the relevant statutes and regulations to create a more consistent and common-sense regulatory framework.

Accordingly, the Petition for Writ of Certiorari is **DISMISSED**. (SCHER, KERNER, and WILLIS, JJ., concur.)

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[1]Other record evidence suggests that an initial request for a hearing was made no later than February 5, 2020. However, according to the hearing officer's final order, a formal request was not made until March 4, 2020, and so the court considers this date to be the proper one.

[2]If the second SSSP does not agree, the Department makes a final decision that is then appealable to the circuit court. Fla. Admin. Code R. 15A-10.031(2)(d), (6).

[3]A driver does have the right to a "record review" in front of a hearing officer, but this "record review" is not considered a full administrative hearing and must be completed within thirty days of the Department's final order—i.e. before filing a petition for writ of certiorari in the circuit court would become untimely. *See Johnson*, 709 So. 2d at 624; *Vichich v. Dep't of Highway Safety & Motor Vehicles*, 799 So. 2d 1069, 1072-73 n.6 & n.7 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D2290a]; *Mikell v. Dep't of Highway Safety & Motor Vehicles*, 11 Fla. L. Weekly Supp. 683a (Fla. 2d Cir. Ct. Mar. 8, 2004).

[4]While the Seventh Judicial Circuit held that a decision by a hearing officer regarding a license revocation "invites judicial review," and thus creates an independent thirty-day window for a petitioner to seek review in a circuit court, this decision has almost certainly been abrogated by *Johnson* which is binding on this Court. *See Holland v. Dep't of Highway Safety & Motor Vehicles*, 4 Fla. L. Weekly Supp. 573a (Fla. 7th Cir. Ct. Feb. 13, 1997).

* * *

Municipal corporations—Rezoning—City commission lacked competent substantial evidence to deny rezoning ordinance where decision was based solely on generalized complaints and concerns of members of public—While city code gives city commission discretion whether to grant rezoning ordinance for residential planned development of less than ten acres, rezoning decision cannot be made arbitrarily or unreasonably

FLAGLER WPB OWNER LLC, Petitioner, v. CITY OF WEST PALM BEACH, Respondent. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Division AY. Case No. 50-2020-CA-000010-XXXX-MB. May 17, 2021. Petition for Writ of Certiorari from the City of West Palm Beach City Commission. Counsel: F. Martin Perry and Susan L. Taylor, Perry & Taylor, P.A., Palm Beach Gardens, for Petitioner. K. Denise Haire, City of West Palm Beach City Attorney's Office, West Palm Beach, for Respondent.

(PER CURIAM.) Petitioner Flagler WPB Owner LLC ("Flagler") filed a Petition for Writ of Certiorari challenging the City of West Palm Beach City Commission's (the "City Commission") decision to deny a rezoning ordinance that would have rezoned property owned by Flagler. Flagler argues that the City Commission's reliance on the opinion-based testimony of Flagler's neighbors was an insufficient basis to deny the rezoning ordinance and that the City Commission failed to observe the essential requirements of law. After reviewing the record below, the Court finds that the City Commission's decision was not supported by competent substantial evidence; thus, the Petition for Writ of Certiorari must be granted.

Factual Background

Petitioner is the owner of two adjacent parcels of land located in the City: one parcel located at 3907 South Flagler Drive and another located at 3906 Washington Road (collectively the "Property"). Three individual buildings were constructed on the Property which contained a combined twenty-five (25) rental units. Petitioner submitted a request to the City seeking to rezone the Property from a Multifamily High Density Residential ("MF32") zoning district to a Residential Planned Development ("RPD") district in order to demolish the existing buildings and replace them with a nine-story multifamily building containing twenty-seven (27) units. Although Petitioner conceded that a project with a similar number of units could be built in a MF32 district, it sought to utilize the specific regulations of RPD zoning so that it could more efficiently use the Property's odd shape and create a building with aesthetics that were more harmonious with the surrounding properties. After reviewing Petitioner's application,

the City's Planning & Zoning Board found that the project was consistent with the density and character of the surrounding neighborhood and that it met all the requirements for rezoning. The Board unanimously approved the project.

On August 12, 2019, the City Commission unanimously approved the rezoning ordinance, but, before the second reading of the ordinance took place, the City Commission asked Petitioner to meet with the condominium associations near the Property who voiced concerns about the project before the second reading of the ordinance took place. The City Commission took no further action at the mandatory second reading of the ordinance, and a third and final hearing on the matter was scheduled for December 2, 2019. During the final hearing, Petitioner told the City Commission that it had made certain changes to the project to help alleviate the concerns of nearby residents such as adding more parking and setting the building back an additional twelve (12) feet.

During the public comment portion of the hearing, members of the public in attendance voiced overwhelming opposition to the project. The complaints of the public generally fell into two broad categories. The first, and most common, complaint was that the proposed development was simply too big for the Property and would be incompatible with the neighborhood. The second major complaint was that the new building would affect the views, livability, and property values of the nearby residents. While the City Commission did not make detailed factual findings, several commissioners spoke on the record prior to the vote. The commissioners echoed many of the public's concerns about the size of the development relative to the Property and one commissioner even noted the public's broad opposition to the project. Ultimately, the City Commission unanimously denied the rezoning ordinance.

Analysis

At issue before the Court on first-tier certiorari review is whether the decision of the City Commission was supported competent substantial evidence. *See Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000) [25 Fla. L. Weekly S461a]. Competent substantial evidence is "tantamount to legally sufficient evidence" and exists where "the evidence relied upon to sustain the ultimate finding [is] sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Id.*; *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). On review, the Court determines if such evidence exists, but cannot reweigh the evidence or substitute its judgment for that of the municipal body. *Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs*, 794 So. 2d 1270, 1275-76 (Fla. 2001) [26 Fla. L. Weekly S329a]. Ultimately, for this Court to sustain the City Commission's decision to deny a rezoning ordinance, "it is sufficient that the record reflect substantial competent evidence favoring continuation of the status quo." *Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship*, 619 So. 2d 996, 1008 (Fla. 2d DCA 1993); *see also Sandhu v. Town of Mangonia Park*, 24 Fla. L. Weekly Supp. 493a (Fla. 15th Cir. Ct. Oct. 25, 2016).

Petitioner argues that the City Commission lacked competent substantial evidence to deny the rezoning ordinance because its decision was based solely on the opinion-based concerns of the general public. Petitioner relies on two decisions of the Fourth District Court of Appeal: *City of Apopka v. Orange County*, 299 So. 2d 657 (Fla. 4th DCA 1974) and *Pollard v. Palm Beach County*, 560 So. 2d 1358 (Fla. 4th DCA 1990). In *City of Apopka*, the district court found that the county commission's denial of a special exception was improperly based on the layperson testimony of nearby landowners who expressed concerned about noise, construction, future zoning changes, and even potential damage to the aquifer. *City of Apopka*, 299 So. 2d at 659. The court stated that the purpose of public zoning or land use hearings is not "to hold a plebiscite" for the community at large, but is instead to make factual findings about how the proposed changes would actually affect the public. *Id.* at 659-60. The district court held that the opinion of laypersons does not constitute competent substantial evidence unless those opinions can be backed up by other independently articulable facts. *Id.* at 659-60. The *Pollard* court reiterated this decision and held that "the opinions of residents are not factual evidence and not a sound basis for denial of a zoning change application." *Pollard*, 560 So. 2d at 1360 (citing *City of Apopka*, 299 So. 2d at 660); *see also Metro. Dade Cnty. v. Blumenthal*, 675 So. 2d 598, 607 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1445c] ("citizen testimony in a zoning matter is perfectly permissible and constitutes substantial competent evidence, *so long as it is fact-based*") (emphasis added) (citing *City of Apopka*, 299 So. 2d at 659).

The City Commission, in turn, points to a litany of other cases where layperson testimony was considered to be competent substantial evidence. However, after reviewing these decisions, the Court finds that they are distinguishable from the instant case. The objecting neighbors here are classic "Apopka witnesses" whose testimony merely stated general concerns about the appropriateness of the project and whether it belonged in the neighborhood. *See City of Hialeah Gardens v. Miami-Dade Charter Found., Inc.*, 857 So. 2d 202, 204-05 (Fla. 3d DCA 2003) [25 Fla. L. Weekly D308a]. When compared to the testimony of the public in the cases relied upon by the City Commission, the objecting residents here did not rely on expert testimony or on specific, articulable facts to support their opposition to the project. *See, e.g., City of Hialeah Gardens*, 857 So. 2d at 204 n.1 (residents relied on testimony of Chief of Police and Chief Zoning Official that the construction of a new charter school at the proposed site would be dangerous due to traffic patterns); *Miami-Dade Cnty. v. New Life Apostolic Church of Jesus Christ, Inc.*, 750 So. 2d 738, 738 n.1 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D308a] (reliance on zoning map to show the over-proliferation of churches); *Miami-Dade Cnty. v. Walberg*, 739 So. 2d 115, 116-17 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D1539c] (residents provided an expert engineer and environmental consultant to show rezoning would be "facially incompatible" with the surrounding property); *Grefkowicz v. Metro. Dade Cnty.*, 389 So. 2d 1041, 1042 (Fla. 3d DCA 1980) (residents able to competently testify to the fact that rezoning would allow one commercial property would be located in an area that was solely residential).

The City Commission further argues that section 94-207(c)(2) of the City of West Palm Beach's Code of Ordinances provided it with the absolute discretion to deny the rezoning ordinance because the Property's acreage was much smaller than what is typically allowed for a RPD zoning district. The Code of Ordinances states that a RPD district must be at least ten (10) acres, but also provides that "any area of lesser size may be approved" if the property in question meets one of three criteria. City of West Palm Beach, Fla., Code of Ordinances, § 94-207(c)(2) (2019). While the language of the Code of Ordinances does provide the City Commission with discretion to grant an exception, a rezoning decision still cannot be made arbitrarily or unreasonably. *Bd. of Cnty. Comm'rs of Brevard Cnty. v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993). Under the record before this Court, the basis for the City's decision was clearly derived from the generalized complaints and concerns of the public—which cannot form the basis of the competent substantial evidence needed to deny a rezoning ordinance. *See Pollard*, 560 So. 2d at 1360. The Court's decision does not mean that the City Commission must allow the rezoning to occur, but there must articulable facts in the record, that rise to the level of competent substantial evidence, to support whatever decision the City Commission makes.

Conclusion

Based on a review of the record, the Court finds that the City Commission's decision was purely based on "generalized statements of opposition," from the public. Because the statements were not

based on specific, articulable facts, the public's comments were no different from that of "Apopka witnesses" which do not rise to the level of competent substantial evidence. *See City of Hialeah Gardens*, 857 So. 2d at 204; *Blumenthal*, 675 So. 2d at 607. Since the City Commission lacked competent substantial evidence to deny the rezoning ordinance, its decision was not lawful. The Petition for Writ of Certiorari is **GRANTED**. The City Commission's December 2, 2019 decision to deny the proposed rezoning ordinance is hereby **QUASHED**. (GILLMAN, BOSSO-PARDO, and BELL, JJ., concur.)

* * *

LYNN HUBBARD, Petitioner, v. PALM BEACH COUNTY ETHICS COMMISSION, Respondent. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Division AY. Case No. 50-2021-CA-001210-XXXX-MB. May 11, 2021. Petition for Writ of Certiorari from the Palm Beach County Ethics Commission; Hearing Officer Thomas H. Dougherty. Counsel: Gwendolyn Tuggle, Slusher & Rosenblum, P.A., West Palm Beach, for Petitioner. Helene C. Hvizd, Palm Beach County Attorney's Office, West Palm Beach, for Respondent.

(PER CURIAM.) The Petition for Writ of Certiorari is **DISMISSED**. *See Damsky v. Univ. of Miami*, 152 So. 3d 789, 792 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D2560b] ("Unless the petition establishes irreparable harm, the court must dismiss the petition for lack of jurisdiction."). (SCHER, KERNER, and WILLIS, JJ., concur.)

* * *

MICHAEL MORGANSTEIN, 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. 50-2020-CA-000464-XXXX-MB. May 17, 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. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

(PER CURIAM.) The Petition for Writ of Certiorari is **GRANTED**. *See Cordaro v. Dep't of Highway Safety & Motor Vehicles*, No. 19CA15583 (Fla. 15th Cir. Ct. Apr. 21, 2021). The hearing officer's December 16, 2019 order is **QUASHED** and the matter is **REMANDED** for a new formal review hearing that comports with 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]. (MARTZ, BONAVITA, and FRANCIS, JJ., concur.)

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CIRCUIT COURTS—ORIGINAL

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose that insured vehicle was being used for business purposes

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. ARTHUR THOMAS VOILES, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2021-CA-001248-O. May 3, 2021. Denise K. Beamer, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Arthur Thomas Voiles, Pro se, Orlando, Defendant.

ORDER ON PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AS TO DEFENDANT, ARTHUR THOMAS VOILES

THIS CAUSE having come before this Court at the hearing on April 27, 2021, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendant, ARTHUR THOMAS VOILES, 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:

1. On April 15, 2021, this Court previously ruled that the First Request for Admissions and Second Request for Admissions served on the Defendant, Arthur Thomas Voiles, were deemed admitted. Specifically, it was deemed admitted that Arthur Thomas Voiles failed to disclose on the application for insurance that the insured vehicle(s) were being utilized for business purposes to move materials for jobs to property sites for A & G Properties Services, Inc. In addition, it was deemed admitted that Arthur Thomas Voiles was not injured in the motor vehicle accident which occurred on August 25, 2020 nor did Arthur Thomas Voiles seek any medical treatment as a result of the motor vehicle accident which occurred on August 25, 2020.

2. This Court finds that the Plaintiff, Direct General Insurance Company's application for insurance required Arthur Thomas Voiles to disclose that the insured vehicle was being used for business purposes at the time of the policy inception, that Plaintiff provided the required testimony to establish that Arthur Thomas Voiles' failure to disclose the business use for the insured vehicle was a material misrepresentation because Plaintiff would not have assumed the risk nor issued the policy, and thus, Plaintiff properly rescinded the subject insurance policy.

3. The Court finds there are no genuine issues of material fact as to Arthur Thomas Voiles. The Defendant, Arthur Thomas Voiles did not appear at the Summary Judgment Hearing or file any summary judgment evidence.

4. With respect to Defendant, Arthur Thomas Voiles, a Clerk's Default was entered against him on March 11, 2021.

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

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

6. This Court hereby enters final judgment for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendant, ARTHUR THOMAS VOILES.

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

8. This Court finds that the facts alleged by the Plaintiff, DIRECT GENERAL INSURANCE COMPANY, in its Complaint for Declaratory Judgment, the Motion for Final Summary Judgment, the transcript of the recorded statement of ARTHUR THOMAS VOILES, and in the Affidavit of Rose Chrustic, are not in dispute, which are as follows:

a. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # FLPAXXXXX2944, is rescinded and is void *ab initio*.

b. 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.

c. **This Final Summary Judgment against Defendant, ARTHUR THOMAS VOILES is effective between Plaintiff and Defendant, and shall not prejudice the rights of any persons not parties to this action.** ***See Fla. Stat. § 86.091.***

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose household resident age 14 and older

FIRST ACCEPTANCE INSURANCE COMPANY, INC., Plaintiff, v. NATASHA LOWMAN, NATASHA LOWMAN, as Parent, Natural and Legal Guardian of DELILIAH GORDON, a minor, NATASHA LOWMAN, as Parent, Natural and Legal Guardian of JAMERIYAH SANDERS, a minor, NATASHA LOWMAN, as Parent, Natural and Legal Guardian of JEMEILLA SANDERS, a minor, and NATASHA LOWMAN, as Parent, Natural and Legal Guardian of JANIYAH LOWMAN, a minor, Defendant(s). Circuit Court, 10th Judicial Circuit in and for Polk County. Case No. 2021-CA-000359. May 3, 2021. William D. Sites, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Natasha Lowman, Pro se, Tampa, Defendant.

ORDER ON PLAINTIFF, FIRST ACCEPTANCE INSURANCE COMPANY, INC.'S MOTION FOR FINAL SUMMARY JUDGMENT AGAINST DEFENDANTS, NATASHA LOWMAN, NATASHA LOWMAN, as Parent, Natural and Legal Guardian of DELILIAH GORDON, a minor, NATASHA LOWMAN, as Parent, Natural and Legal Guardian of JAMERIYAH SANDERS, a minor, NATASHA LOWMAN, as Parent, Natural and Legal Guardian of JEMEILLA SANDERS, a minor, and NATASHA LOWMAN, as Parent, Natural and Legal Guardian of JANIYAH LOWMAN, a minor

THIS CAUSE having come before this Court at the hearing on April 20, 2021, on the Plaintiff, FIRST ACCEPTANCE INSURANCE COMPANY, INC.'s Motion for Final Summary Judgment against the Defendants, NATASHA LOWMAN, NATASHA LOWMAN, as Parent, Natural and Legal Guardian of DELILIAH GORDON, a minor, NATASHA LOWMAN, as Parent, Natural and Legal Guardian of JAMERIYAH SANDERS, a minor, NATASHA LOWMAN, as Parent, Natural and Legal Guardian of JEMEILLA SANDERS, a minor, and NATASHA LOWMAN, as Parent, Natural and Legal Guardian of JANIYAH LOWMAN, 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, First Acceptance Insurance Company, Inc. brought the instant Action for Declaratory Judgment against the insured Defendants, Natasha Lowman, and Defendants, Natasha Lowman, as Parent, Natural and Legal Guardian of Deliliah Gordon, Jameriyah Sanders, Jemeilla Sanders and Janiyah Lowman, minors, regarding the policy rescission as a result of the insured's material misrepresentations on the application for insurance dated March 5, 2020. Plaintiff

rescinded the policy of insurance on the basis that Natasha Lowman failed to disclose that her daughter, Jamariyah Sanders, resided at the policy garaging address 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 5, 2020, Defendant, Natasha Lowman, answered "YES" to the following application question #3, which provides:

> Have all members of household 14 years and older been disclosed on this application? If no, please explain.

In addition, on the application for insurance dated March 5, 2020, Defendant, Natasha Lowman initialed/signed the pertinent page of the Applicant's Statement, which provides:

> I hereby apply to the Company for a policy of insurance as set forth in this application on the basis of the statements contained therein. I AGREE THAT SUCH POLICY MAY BE NULL AND VOID IF SUCH INFORMATION IS FALSE, OR MISLEADING, OR WOULD MATERIALLY AFFECT ACCEPTANCE OF THE RISK BY THE COMPANY."
>
> I also declare that all persons age 14 or over who live with me have been reported to the Company. I have reported any business or commercial use of my vehicle(s) to the Company. I also declare that my principle resident place of vehicle garaging is in Florida ten (10) or more months of each year. I have been provided with a duplicate signed copy of this application. I give the company permission to obtain the driving records of all residents.

On October 9, 2020, the Defendant, Natasha Lowman, provided sworn testimony at her Examination Under Oath (EUO) confirming that her daughter lived with her at the policy garaging address at the time of application for insurance. Plaintiff determined that had Natasha Lowman provided the proper information at the time of the insurance application dated March 5, 2020, then Plaintiff would have charged the insured a higher premium rate. Therefore, First Acceptance Insurance Company, Inc. declared the policy void *ab initio* due to a material misrepresentation and returned the paid premiums to Natasha Lowman. 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 Natasha Lowman, First Acceptance Insurance Company, Inc. may void the insurance policy as follows:

> **PART F—GENERAL PROVISIONS**
>
> APPLICABLE TO ALL COVERAGE PARTS
>
> **FRAUD AND MISREPRESENTATION**
>
> *Fraud or Misrepresentation in the Application or Notification of Change*
>
> The statements made by **you** in the application are deemed to be representations. If any representation contained in the application is false, misleading, or materially affects the acceptance or rating of the risk by **us,** this policy will be void from its inception.
>
> If any representation contained in any notification of change is false, misleading, or materially affects the acceptance or rating of the risk by **us,** this policy will be terminated from the effective date of the change.
>
> This provision shall apply to statements or representations that contain fraudulent, false, misleading or deceptive statements, direct misrepresentations, and omissions or concealments of fact. **We** may void this policy or deny coverage even after the occurrence of an **accident** or **loss.** This means that **we** will not be liable for any claims or damages that would otherwise be covered in the absence of the fraud or misrepresentation.

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, First Acceptance Insurance Company, Inc., 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 member as the terms were unambiguous within the application and policy.

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 daughter, Jamariyah Sanders, as a household member living at the policy garaging address at the time of the application for insurance. Therefore, it is irrelevant whether the undisclosed household member, Jamariyah Sanders, was involved in the subject motor vehicle accidents on August 15, 2020 and/or August 26, 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, Jason Northrop, provided sworn testimony to knowledge of the application for insurance and administration of the underwriting guidelines for the insurance policy issued to Natasha Lowman, and could claim personal knowledge from a review of the records, therefore, Plaintiff's affiant, Mr. Northrop, 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 Jason Northrop.

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 (Natasha Lowman) to disclose Jamariyah Sanders as a household member living at the policy garaging address at the time of the policy inception. In addition to providing a "YES" response to application question #3, the applicant (Natasha Lowman) initialed the Applicant's Statement and signed the application for insurance, which provided the following acknowledgment:

> **Application Review and Accuracy**
>
> I hereby apply to the Company for a policy of insurance as set forth in this application on the basis of the statements contained therein. I AGREE THAT SUCH POLICY MAY BE NULL AND VOID IF SUCH INFORMATION IS FALSE, OR MISLEADING, OR WOULD MATERIALLY AFFECT ACCEPTANCE OF THE RISK BY THE COMPANY.

The Carrier, First Acceptance Insurance Company, Inc. has a right to rely on the information provided by Natasha Lowman on the application for insurance. Since the Carrier relied on the representations by Natasha Lowman 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 Natasha Lowman subsequently claimed that the "agent did not ask" the questions on the application since Natasha Lowman signed the application which is a legal contract and thus, Natasha Lowman is bound by the terms and conditions of the contract. Further, the Defendant, Natasha Lowman, did not establish any proof of coercion, duress, and/or fraud in the inducement during the application process.

In addition, since Natasha Lowman 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 First Acceptance Insurance Company, Inc. 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 Examination Under Oath (EUO) of Natasha Lowman is Admissible Evidence for Summary Judgment

The Court agreed with the Plaintiff, First Acceptance Insurance Company, Inc.'s position that the statements provided by Natasha Lowman during her Examination Under Oath (EUO) provided on October 9, 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) 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 testimony from the Examination Under Oath (EUO) of Natasha Lowman is admissible and proper summary judgment evidence.

Conclusion

This Court finds that the Plaintiff, First Acceptance Insurance Company, Inc.'s application for insurance unambiguously required Defendant, Natasha Lowman, to disclose her daughter, Jamariyah Sanders, as a household member living at the policy garaging address, that Plaintiff provided the required testimony to establish said that Defendant, Natasha Lowman's failure to disclose Jamariyah Sanders 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, FIRST ACCEPTANCE INSURANCE COMPANY, INC.'s Motion for Final Summary Judgment is hereby **GRANTED**.

b. This Court ***hereby enters final judgment*** for Plaintiff, FIRST ACCEPTANCE INSURANCE COMPANY, INC., and against the Defendants, NATASHA LOWMAN, NATASHA LOWMAN, as Parent, Natural and Legal Guardian of DELILIAH GORDON, a minor, NATASHA LOWMAN, as Parent, Natural and Legal Guardian of JAMERIYAH SANDERS, a minor, NATASHA LOWMAN, as Parent, Natural and Legal Guardian of JEMEILLA SANDERS, a minor, and NATASHA LOWMAN, as Parent, Natural and Legal Guardian of JANIYAH LOWMAN, a minor.

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

d. The Court finds that the facts alleged by the Plaintiff, FIRST ACCEPTANCE INSURANCE COMPANY, INC., in its Complaint for Declaratory Judgment, the transcript of the Examination Under Oath (EUO) of NATASHA LOWMAN, Plaintiff's Motion for Final Summary Judgment, and in the Affidavit of Jason Northrop, are not in dispute, which are as follows:

e. The FIRST ACCEPTANCE INSURANCE COMPANY, INC. Policy of Insurance, bearing policy # 29-CSFLXXXXX7822, 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 FIRST ACCEPTANCE INSURANCE COMPANY, INC.;

g. The Defendant, NATASHA LOWMAN, failed to disclose that additional residents over the age of 14 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 # 29-CSFLXXXXX7822, issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC.;

h. The Defendant, NATASHA LOWMAN breached the insurance policy contract and application for insurance, under the policy of insurance, bearing policy # 29-CSFLXXXXX7822, issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC.;

i. The material misrepresentation of Defendant, NATASHA LOWMAN on the application for insurance dated March 5, 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 # 29-CSFLXXXXX7822, issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC.;

j. There is no insurance coverage for the named insured, NATASHA LOWMAN for any property damage liability coverage and personal injury protection benefits coverage, under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822;

k. Notwithstanding the subject policy rescission, the insurance policy bearing policy # 29-CSFLXXXXX7822, does not provide any bodily injury liability insurance coverage;

l. The Plaintiff, FIRST ACCEPTANCE INSURANCE COMPANY, INC., owes no duty to defend and/or indemnify NATASHA LOWMAN for any bodily injury liability claim and/or property damage liability claim arising from the accident of August 15, 2020, under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822;

m. There is no personal injury protection ("PIP") insurance coverage for NATASHA LOWMAN for the accident which occurred on August 15, 2020, under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822;

n. There is no personal injury protection ("PIP") insurance coverage for JAMERIYAH SANDERS for the accident which occurred on August 15, 2020, under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822;

o. There is no personal injury protection ("PIP") insurance coverage for JANIYAH LOWMAN for the accident which occurred on August 15, 2020, under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822;

p. There is no personal injury protection ("PIP") insurance coverage for DELILIAH GORDON for the accident which occurred on August 15, 2020, under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822;

q. There is no personal injury protection ("PIP") insurance coverage for JEMEILLA SANGERS for the accident which occurred on August 15, 2020, under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822;

r. There is no property damage liability insurance coverage for any claimant for the accident which occurred on August 15, 2020, under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822;

s. 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 August 15, 2020, under the policy of insurance issued by Plaintiff, FIRST ACCEPTANCE INSURANCE COMPANY, INC., bearing policy # 29-CSF LXXXXX7822;

t. There is no obligation to provide Personal Injury Protection benefits coverage to Baycare Medical Group, Inc., for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on August 15, 2020, under the policy of insurance issued by Plaintiff, FIRST ACCEPTANCE INSURANCE COMPANY, INC., bearing policy # 29-CSFLXXXXX7822;

u. The Plaintiff, FIRST ACCEPTANCE INSURANCE COMPANY, INC., owes no duty to defend and/or indemnify NATASHA LOWMAN for any bodily injury liability claim and/or property damage liability claim arising from the accident of August 26, 2020, under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822;

v. The Plaintiff, FIRST ACCEPTANCE INSURANCE COM-

PANY, INC., owes no duty to defend and/or indemnify NATASHA LOWMAN for any property damage liability claim by Stephanie Duluc arising from the accident of August 26, 2020, under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822;

w. The Plaintiff, FIRST ACCEPTANCE INSURANCE COMPANY, INC., owes no duty to defend and/or indemnify NATASHA LOWMAN for any property damage liability claim by Courtney Christine Anacleto arising from the accident of August 26, 2020, under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822;

x. There is no personal injury protection ("PIP") insurance coverage for NATASHA LOWMAN for the accident which occurred on August 26, 2020, under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822;

y. There is no personal injury protection ("PIP") insurance coverage for JAMERIYAH SANDERS for the accident which occurred on August 26, 2020, under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822;

z. There is no personal injury protection ("PIP") insurance coverage for JANIYAH LOWMAN for the accident which occurred on August 26, 2020, under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822;

aa. There is no personal injury protection ("PIP") insurance coverage for JEMEILLA SANGERS for the accident which occurred on August 26, 2020, under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822;

bb. There is no property damage liability insurance coverage for Stephanie Duluc for the accident which occurred on August 26, 2020, under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822;

cc. There is no property damage liability insurance coverage for Courtney Christine Anacleto for the accident which occurred on August 26, 2020, under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822;

dd. 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 August 26, 2020, under the policy of insurance issued by Plaintiff, FIRST ACCEPTANCE INSURANCE COMPANY, INC., bearing policy # 29-CSFLXXXXX7822;

ee. There is no obligation to provide Personal Injury Protection benefits coverage to Memorial Hospital of Tampa, for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on August 26, 2020, under the policy of insurance issued by Plaintiff, FIRST ACCEPTANCE INSURANCE COMPANY, INC., bearing policy # 29-CSFLXXXXX7822;

ff. There is no obligation to provide Personal Injury Protection benefits coverage to Physicians Group, LLC, for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on August 26, 2020, under the policy of insurance issued by Plaintiff, FIRST ACCEPTANCE INSURANCE COMPANY, INC., bearing policy # 29-CSFLXXXXX7822;

gg. The Defendant, NATASHA LOWMAN, is excluded from any insurance coverage under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822, for the August 15, 2020 and August 26, 2020 motor vehicle accidents;

hh. The Defendant, DELILIAH GORDAN, a minor, is excluded from any insurance coverage under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822, for the August 15, 2020 and August 26, 2020 motor vehicle accidents;

ii. The Defendant, JAMERIYAH SANDERS, a minor, is excluded from any insurance coverage under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822, for the August 15, 2020 and August 26, 2020 motor vehicle accidents;

jj. The Defendant, JANIYAH LOWMAN, a minor, is excluded from any insurance coverage under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822, for the August 15, 2020 and August 26, 2020 motor vehicle accidents;

kk. The Defendant, JEMEILLA SANDERS, a minor, is excluded from any insurance coverage under the policy of insurance issued by FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822, for the August 15, 2020 and August 26, 2020 motor vehicle accidents;

ll. Stephanie Duluc is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822, for the August 15, 2020 and August 26, 2020 motor vehicle accidents;

mm. Courtney Christine Anacleto is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822, for the August 15, 2020 and August 26, 2020 motor vehicle accidents;

nn. Nelson Pena Hernandez is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822, for the August 15, 2020 and August 26, 2020 motor vehicle accidents;

oo. Baycare Medical Group, Inc. is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822, for the August 15, 2020 and August 26, 2020 motor vehicle accidents;

pp. Memorial Hospital of Tampa, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822, for the August 15, 2020 and August 26, 2020 motor vehicle accidents;

qq. Physicians Group, LLC, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822, for the August 15, 2020 and August 26, 2020 motor vehicle accidents;

rr. There is no insurance coverage for the motor vehicle accident which occurred on August 15, 2020, under the policy of insurance issued by Plaintiff, FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822;

ss. There is no insurance coverage for the motor vehicle accident which occurred on August 26, 2020, under the policy of insurance issued by Plaintiff, FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822;

tt. There is no personal injury protection ("PIP") insurance coverage for the accidents which occurred on August 15, 2020 and August 26, 2020, under the policy of insurance issued by Plaintiff, FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822;

uu. There is no property damage liability coverage for the accidents which occurred on August 15, 2020 and August 26, 2020, under the policy of insurance issued by Plaintiff, FIRST ACCEPTANCE INSURANCE COMPANY, INC., under policy # 29-CSFLXXXXX7822;

vv. Since the policy of insurance issued to the Defendant, NATASHA LOWMAN, bearing policy # 29-CSFLXXXXX7822, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from NATASHA LOWMAN to any medical provider, doctor and/or medical entity is void;

ww. Since the policy of insurance issued to the Defendant, NATASHA LOWMAN, bearing policy # 29-CSFLXXXXX7822, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from NATASHA LOWMAN to Baycare Medical Group, Inc. is void;

xx. Since the policy of insurance issued to the Defendant, NATASHA LOWMAN, bearing policy # 29-CSFLXXXXX7822, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from NATASHA LOWMAN to Memorial Hospital of Tampa is void;

yy. Since the policy of insurance issued to the Defendant, NATASHA LOWMAN, bearing policy # 29-CSFLXXXXX7822, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from NATASHA LOWMAN to Physicians Group, LLC is void;

zz. Since the policy of insurance issued to the Defendant, NATASHA LOWMAN, bearing policy # 29-CSFLXXXXX7822, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from DELILIAH GORDON, a minor, to any medical provider, doctor and/or medical entity is void;

aaa. Since the policy of insurance issued to the Defendant, NATASHA LOWMAN, bearing policy # 29-CSFLXXXXX7822, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from DELILIAH GORDON, a minor, to Baycare Medical Group, Inc. is void;

bbb. Since the policy of insurance issued to the Defendant, NATASHA LOWMAN, bearing policy # 29-CSFLXXXXX7822, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from DELILIAH GORDON, a minor, to Memorial Hospital of Tampa is void;

ccc. Since the policy of insurance issued to the Defendant, NATASHA LOWMAN, bearing policy # 29-CSFLXXXXX7822, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from DELILIAH GORDON, a minor, to Physicians Group, LLC is void;

ddd. Since the policy of insurance issued to the Defendant, NATASHA LOWMAN, bearing policy # 29-CSFLXXXXX7822, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from JAMERIYAH SANDERS, a minor, to any medical provider, doctor and/or medical entity is void;

eee. Since the policy of insurance issued to the Defendant, NATASHA LOWMAN, bearing policy # 29-CSFLXXXXX7822, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from JAMERIYAH SANDERS, a minor, to Baycare Medical Group, Inc. is void;

fff. Since the policy of insurance issued to the Defendant, NATASHA LOWMAN, bearing policy # 29-CSFLXXXXX7822, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from JAMERIYAH SANDERS, a minor, to Memorial Hospital of Tampa is void;

ggg. Since the policy of insurance issued to the Defendant, NATASHA LOWMAN, bearing policy # 29-CSFLXXXXX7822, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from JAMERIYAH SANDERS, a minor, to Physicians Group, LLC is void;

hhh. Since the policy of insurance issued to the Defendant, NATASHA LOWMAN, bearing policy # 29-CSFLXXXXX7822, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from JANIYAH LOWMAN, a minor, to any medical provider, doctor and for medical entity is void;

iii. Since the policy of insurance issued to the Defendant, NATASHA LOWMAN, bearing policy # 29-CSFLXXXXX7822, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from JANIYAH LOWMAN, a minor, to Baycare Medical Group, inc. is void;

jjj. Since the policy of insurance issued to the Defendant, NATASHA LOWMAN, bearing policy # 29-CSFLXXXXX7822, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from JANIYAH LOWMAN, a minor, to Memorial Hospital of Tampa is void;

kkk. Since the policy of insurance issued to the Defendant, NATASHA LOWMAN, bearing policy # 29-CSFLXXXXX7822, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from JANIYAH LOWMAN, a minor, to Physicians Group, LLC is void;

lll. Since the policy of insurance issued to the Defendant, NATASHA LOWMAN, bearing policy # 29-CSFLXXXX7822, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from JEMEILLA SANDERS, a minor, to any medical provider, doctor and/or medical entity is void;

mmm. Since the policy of insurance, issued to the Defendant, NATASHA LOWMAN, bearing policy # 29-CSFLXXXXX7822, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from JEMEILLA SANDERS, a minor, to Baycare Medical Group, Inc, is void;

nnn. Since the policy of insurance issued to the Defendant, NATASHA LOWMAN, bearing policy # 29-CSFLXXXXX7822, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from JEMEILLA SANDERS, a minor, to Memorial Hospital of Tampa is void;

ooo. Slice the policy of insurance issued to the Defendant NATASHA LOWMAN, bearing policy # 29-CSFLXXXXX7822, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from JEMEILLA SANDERS, a minor, to Physicians Group, LLC is void;

ppp. 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.

* * *

Torts—Negligence—Contracts—Plaintiff cannot recover in tort based on acts which were prohibited by contract between the parties—Quasi-contracts—Unjust enrichment claim against two defendants fails where there was no allegation that plaintiff conferred a specific benefit upon these defendants

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, Plaintiff, v. EDUARDO ENRIQUE DIEPPA, III, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-013358-CA-01, Section CA27. May 18, 2021. Oscar Rodriguez-Fonts, Judge. Counsel: Cynthia Ramos, for Plaintiff. Mark A. Goldstein, Miami, for Defendant Jorge Alvarino.

ORDER GRANTING DEFENDANTS, SUPERIOR TITLE OF SOUTH FLORIDA INC., JORGE ALVARINO, AND ANA ALVARINO'S MOTION TO DISMISS AMENDED COMPLAINT

THIS CAUSE came before the Court on Defendants, Superior Title of South Florida, Jorge Alvarino, and Ana Alvarino's Motion to Dismiss the Amended Complaint ("Defendants Motion to Dismiss").

This Court heard this matter on March 1, 2020, and having considered Defendants Motion to Dismiss, Plaintiff's Amended Complaint, and being otherwise fully advised in the premises, hereby finds as follows:

I. **Count 4: Negligence**

It was previously held that the main purpose of Florida's "[e]conomic loss rule is to prevent tort recovery 'when damages flow from a breach of contract unless the tort is independent of the breach of contract.' " *Fun Spot of Fla. Inc. v. Magical Midway of Cent. Fla. Ltd.*, 242 F. Supp. 2d 1183, 1195 (M.D. Fla. 2002).

However, in *Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Companies, Inc.*, 110 So. 3d 399 (Fla. 2013) [38 Fla. L. Weekly S151a], the Florida Supreme Court limited the application of the economic loss ruling that it only applies to product liability cases.

Nevertheless, there is still a separation between contracts and torts. In 2020, the Third District Court of Appeal, in *Island Travel & Tours, Limited Co., v. MYR Independent Inc.*, 300 So. 3d 1236, 1240 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D704a], held,

> [i]t is a fundamental, long-standing common law principle that a plaintiff may not recover in tort for a contract dispute unless the tort is independent of any breach of contract. *See Peebles v. Puig*, 223 So. 3d 1065, 1068 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1080a] ("[F]or an alleged misrepresentation regarding a contract to be actionable, the damages stemming from that misrepresentation must be independent, separate and distinct from the damages sustained from the contract's breach." Because MYR's tort claims are ultimately based on the same underlying conduct giving rise to its contract claim—Island's alleged failure to equally divide "the profit and cost of Island's Operation"—we hold that MYR is, as a matter of law, unable to establish its claims for fraud in the inducement and negligent misrepresentation.

Secondary resources have also followed the Third District Court of Appeal's line of reasoning when reviewing cases that cite to the same facts to establish a breach of contract claim and tort claim. For example, Larry R. Leiby, § *15:1. Negligence and the economic loss rule*, W. Fl. Pract. Series TM, (Oct. 2020 2020-2021 ed.), delineated that there is no viable cause of action when a party argues that the "other party was negligent by improperly or negligently performing duties in a contract . . . . The intentional, willful and outrageous breach of an agreement generally will not create a tort where a tort does not otherwise exist." This source analyzed the Florida's Supreme Court ruling in *Tiarra* and stated, "[w]hile the court announced that the economic loss rule only applied in a products liability setting, it did not recede from the concept that *one may not seek tort recovery for breach of a contractual duty." Id.* (emphasis added).

Defendants Superior Title of South Florida, Jorge Alvarino, and Ana Alvarino argue that Plaintiff's Count IV, Action for damages based on negligence should be dismissed because "[t]his [n]egligence claim adopts all of the preliminary allegations of the Amended Complaint, including the contractual relationship between the parties." Defendants further argue "Plaintiff's claim for Negligence is barred [because] a breach of contractual terms may not form the basis for a claim in tort."

Plaintiff on the other hand argues that it has a viable cause of action for negligence because

> (1) Agents Superior Title, Dieppa and Dieppa Law Firm had a *duty* to perform their closing, escrow and title services in a reasonably prudent and careful manner in order to ensure that the errors and omissions giving rise to these claims did not occur[;] (2) Superior Title, Dieppa and Dieppa Law Firm *breached* their duties because they failed to properly prepare and confirm execution of the documents needed to create the insured interests, failed to close the referenced transactions in accordance with the Insurer's underwriting guidelines and generally accepted principles, and improperly disbursed the funds [;](3) [and] these failures have resulted in loss to [Old Republic].

Pl.'s Amend. Compl. 19-20. Plaintiff further argues that it is not only suing based on the terms of the agreement, as it is also suing based on Defendants responsibility "to conduct [closings] in a reasonably prudent manner. And that's a negligence-based duty. There was a duty to conduct the closing in a reasonably prudent manner for the benefit of the lenders so that they would end up with enforceable instruments." Hr'g T. 10.

The parties "Agreement for Appointment of Policy-Issuing Agent for Old Republic National Title Insurance Company" requires that the Dieppa Law Firm P.A. (referred to as Agent in the Agreement),

> [r]eceive and process applications for title insurance and issue Title Insurance Forms in a timely, prudent and ethical manner with due regard to recognized title insurance underwriting practice and in accordance with the rule and instructions of Insurer, as well as in conformity with federal, state and local laws, rules, regulations and practices; . . . . Keep safely and assume full responsibility for all Title Insurance Forms entrusted to Agent by Insurer [Old Republic], and maintain an accurate, updated register thereof. . . . Comply with al statutes and regulations relating to the licensing and operation of Agent's business[.]

Pl.'s Amend Compl., Ex. A. The Contract further states that Agent is responsible for losses caused by

> "[i]ntentional or negligent failure of Agent to comply with the terms and requirements of this Agreement or of the rules, regulations or instructions given to Agent by Insurer; The improper closing or attempted closing by the Agent, including but not limited to (a) loss or misapplication of customer funds, documents or other things of value received by Agent in a fiduciary capacity or otherwise, resulting in loss to Insurer, (b) failure to disburse property or close in accordance with escrow or closing instructions, and/or (c) misappropriation of escrow or closing funds by Agent; and negligent errors or omissions in: a. the search, or examination of title; b. in the preparation of Title Insurance Forms; or c. in other procedures involved in processing an application for title insurance.

Id. Plaintiff also entered into an agreement with Superior Title of South Florida. Inc., and Eduardo Dieppa, collectively referred as Agent in the Agreement. *Id.* Ex. B. This Contract has the same provision as the provision delineated above. *Id.* Furthermore, Plaintiff also entered an agreement with Acosta & Lichter P.A. *Id.* Ex. C. This Agreement states that Agent (Acosta & Lichter P.A.), will

> [r]eceive and process requests for Title Insurance Products and issue the same in a timely, prudent and ethical manner in accordance with the Laws, the Underwriting Materials and other customary title Insurance underwriting practices; . . . . Comply with all Laws relating to the licensing and operation of Agents Title Insurance Business; . . . . Perform such services and render such assistance as Insurer may reasonably request in connection with (i) any regulatory examination, information request or data call, or (ii) any claim or litigation arising from: (a) a commitment, policy, endorsement or other Title Insurance Product issued by Agent or by Insurer on behalf of Agent, or (b) any conduct of Agent.

The Agreement further states that the Agent is also liable for

> loss resulting from any defalcation, fraud, or dishonest act, failure to comply with the terms and requirements of this Agreement or with the rules, regulations or instructions given to Agent by Insurer, negligent errors or omissions when conducti[ng] search of title, preparing title insurance products; or other produced involved in processing an application for title insurance

Id.

Although Plaintiff argues that it has a viable cause of action for negligence, because it is suing based on the unreasonable conduct that Defendants exhibited, Plaintiff's arguments fail as a matter of contract law. The Agreements specifically delineates that Agents (Defendants)

are liable for performing their job duties in a negligent manner. Because the unreasonable conduct is prohibited by the Agreement itself, Plaintiff cannot rely on "unreasonable conduct" to support its tort claims. Therefore, Defendants' Motion is granted as to Count IV.

II. **Unjust Enrichment**

"The elements of a cause of action for unjust enrichment are: (1) plaintiff has conferred a benefit on the defendant, who has knowledge thereof; (2) defendant voluntarily accepts and retains the benefit conferred; and (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without first paying the value thereof to the plaintiff." *Duty Free World, Inc. v. Miami Perfume Junction, Inc.*, 253 So. 3d 689, 693 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1822a] (quoting *Agritrade, LP v. Quercia*, 253 So. 3d 28, 33 (Fla. 3d DCA Nov. 29, 2017) [42 Fla. L. Weekly D2514a]).

Plaintiff argues that each of the following Defendants received payments (the benefit) as a result of the alleged mortgage frauds: Jorge Alvarino, Jorge Alvarino P.A., Ana Alvarino, Concession Management Group, Home 4 You Investments, Homes 4 You Group, Eduardo Dieppa III, Dieppa Law Firm, and Acosta & Litchter. *See* Hr'g T. 12. Defendants, on the other hand, argue "[t]he Amended complaint does not allege any facts showing specific benefit conferred by the Plaintiff on Jorge Alvarino or Ana Alvarino." Defendants further argue "[i]n this case, all the complaint alleges in terms of facts is that Mr. Alvarino falsely notarized some mortgages, which enabled Mr. Bautista, who is the co-defendant, and Mr. Bautista's companies to walk away with this money." *Id.*

Plaintiff's unjust enrichment claim fails as to Defendant's Jorge Alvarino and Ana Alvarino. The complaint states that Plaintiff only made a demand upon "[Eduardo] Dieppa, Dieppa Law Firm, Superior Title, and Acosta and Litcher to reimburse Old Republic for all costs and expenses it incurred." Pl's Amend. Compl. 15. This is because these individuals acted as title policy issuing agents. Therefore, Plaintiff cannot pursue a claim for unjust enrichment against Jorge Alvarino and Ana Alvarino, because Jorge Alvarino notarized and closed the transactions pertaining to the Six Properties identified in the complaint and Ana Alvarino witnessed these documents. However, both Defendant Jorge Alvarino and Ana Alvarino were not, and did not act as, title policy issuing agents. There is an argument that because Jorge Alvarino oversaw the day to day operations of Superior Title, such as title closings, Jorge Alvarino should also be held liable for unjust enrichment, as it was because of the improper closings that Plaintiff incurred costs. However, this argument fails because Jorge Alvarino was not the sole shareholder of Superior Title or sole proprietor of Superior Title. Eduardo Dieppa was the principal, sole shareholder, and controlling principal of Superior Title and Dieppa Law Firm. Pl.'s Amend. Compl. at 5. It is true that Eduardo Dieppa turned over operations of Superior Title to Jorge Alvarino. *Id.* at 6. However, Defendant Jorge Alvarino and Ana Alvarino were not the owners of Superior Title. It is Superior Title of South Florida, Inc., itself, along with the other title policy issuing agents, who are liable for unjust enrichment. Therefore, Defendants Motion to Dismiss is granted as to this count but only as to Defendant's Jorge Alvarino and Ana Alvarino.

WHEREFORE, it is **ORDERED** and **ADJUDGED** that Defendants' Motion to Dismiss is **GRANTED.**

* * *

Criminal law—Murder—Counsel—Motion to appoint attorney from death penalty registry to act as penalty phase co-counsel for defendant who is represented by private counsel but has been declared indigent for costs is denied—Section 27.52(5)(h) prohibits court from appointing state-paid counsel when defendant is indigent for costs and has privately retained and paid counsel, and Sixth Amendment does not compel appointment of co-counsel

STATE OF FLORIDA, Plaintiff, v. JOAN DE PAZ, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F20-14435, Section (60). April 28, 2021. Miguel M. de la O, Judge. Counsel: Christian Lake, for Justice Administrative Commission, Plaintiff. Joseph Chambrot, for Defendant.

ORDER DENYING MOTION TO APPOINT PENALTY PHASE CO-COUNSEL

THIS CAUSE came before the Court on Defendant, Joan de Paz's ("de Paz"), Motion to Appoint Penalty Phase Co-Counsel ("Motion"). The Court has reviewed the Motion, the Justice Administrative Commission's ("JAC") Response, de Paz's [Supplemental] Memorandum of Law in Support of the Motion ("Reply"), heard argument of counsel, and is fully advised in the premises. The Motion is **DENIED**.

De Paz is charged with First Degree Murder. Although subject to change in the future, at this time, the State intends to ask a jury to recommend the death penalty and the Court to impose it. De Paz has retained private counsel, Joseph Chambrot, to represent him for an agreed upon fee. Notwithstanding his ability to retain private counsel, De Paz has been declared indigent for costs. De Paz now moves this Court to appoint a lawyer off the death penalty registry, Ms. Carmen Vizcaino, to serve as co-Counsel at the State of Florida's expense. Ms. Vizcaino's role would be to handle the penalty phase of de Paz's trial if the jury convicts him during the guilt phase.

JAC objected to the Motion based on the language in Florida Statutes section 27.52(5)(h).

> The court may not appoint an attorney paid by the state based on a finding that the defendant is indigent for costs if the defendant has privately retained and paid counsel.

§ 27.52, Fla. Stat. (2019). The JAC also points to Florida Rule of Criminal Procedure 3.112 which allows for the appoint of co-counsel when "the defendant is not represented by retained counsel." Fla. R. Crim. P. 3.112(e).

Many of the points raised by de Paz are not in dispute. It is undisputed that all defendants against whom the State seeks the death penalty should be represented by two lawyers with distinct roles. It is undisputed that the financial interests of Florida taxpayers would be best served by the Court granting the Motion because otherwise de Paz may choose to dismiss Mr. Chambrot, and avail himself of the services of Regional Counsel[1] or court-appointed private counsel, in order to have two lawyers represent him. Court appointment of two private counsel would likely result in a tremendous additional expenditure of funds by the State compared to paying for only one court-appointed lawyer as de Paz requests. *See* "Death-penalty cases rack up big dollars in Miami-Dade," Miami Herald, October 2, 2016.[2] However, it is equally undisputed that this Court is not the Legislature, and while it can have strong opinions about the wisdom of any particular policy, it is not free to rule in accordance with its personal policy preferences. The Motion is denied in spite of the excellent arguments raised by de Paz because the Legislature has made its policy preference abundantly clear.

In order for this Court to grant the Motion, it must first identify the source of its power to do so. There are two possibilities: either the Legislature has authorized it, or the Constitution requires it. De Paz argues that the Sixth Amendment right to counsel entitles him to a State-funded penalty phase lawyer pursuant to *Wheat v. United States* and *Powell v. Alabama*, 287 U.S. 45 (1932). *Powell* concerns giving defendants a fair opportunity to secure their counsel of choice. *Wheat* observes that the right to counsel of choice is not absolute.

> The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects. . . . a defendant may not insist on representation by an attorney he cannot afford

Wheat v. United States, 108 S. Ct. 1692, 1697 (1988). Neither of these cases can be read to mean that this Court must appoint co-counsel at the State's expense.

De Paz's right to counsel of his choice is intact. He has retained Mr. Chambrot. Doubtless, the better practice is for two lawyers to represent a defendant against whom the State seeks a death sentence. However, de Paz has no constitutional right to Ms. Vizcaino's services at taxpayer expense. In fact, the Florida Supreme Court expressly rejects a requirement that a defendant facing the death penalty always be represented by two lawyers. Fla. R. Crim. P. 3.112(e) ("A court must appoint lead counsel and, *upon written application and a showing of need by lead counsel, should appoint co-counsel* to handle every capital trial in which the defendant is not represented by retained counsel") (emphasis added). The Florida Supreme Court adopted this rule despite the practice of other states.

> The American Bar Association Standards and many other state standards require the appointment of two lawyers at the trial level in every prosecution that could result in the imposition of the death penalty. The committee has modified this requirement by allowing the trial court some discretion as to the number of attorneys . . . .

Fla. R. Crim. P. 3.112, Committee Comments (2020).

Nor does de Paz cite to any case finding that a single lawyer representing a defendant facing a possible death sentence is *per se* ineffective. Indeed, the Comments to Florida Rule of Criminal Procedure 3.112 make clear that failing to follow the standards for Counsel in death penalty cases does not necessarily equate with ineffective counsel. Fla. R. Cr. P. 3.112, Committee Comments ("These standards are not intended to establish any independent legal rights. For example, the failure to appoint co-counsel, standing alone, has not been recognized as a ground for relief from a conviction or sentence.").

Although this Court agrees that de Paz should have two lawyers defending him, and the Court would very much like to appoint Ms. Vizcaino, it cannot find that the Sixth Amendment demands such a result.

Alternatively, de Paz points to *Spaziano v. Seminole County*, 726 So. 2d 772 (Fla. 1999) [24 Fla. L. Weekly S60a], to support his argument that this Court has the authority to appoint co-Counsel at State expense "despite lead counsel being a private attorney." Reply at 6. *Spaziano* does not control the result here for two reasons. First, the issue before this Court is not that Mr. Chambrot is a *private* attorney, it is that he is a *retained* attorney. In *Spaziano*, the defendant's private lawyer was not retained, he was a volunteer (*i.e.*, pro bono).

This distinction is critical because section 27.52(5)(h) specifically bars the appointment of a State funded lawyer as co-counsel to *retained* counsel. Moreover, *Behr v. Gardner*, which binds this Court in the absence of contrary Florida Supreme Court or Third DCA precedent, expressly held that a trial court cannot appoint the public defender as co-counsel when the defendant is represented by privately retained counsel.

> Therefore, we hold that section 27.51, Florida Statutes (1981), although it permits the appointment of the public defender to represent certain indigent defendants, does not permit the appointment of the public defender *as co-counsel* with privately retained counsel. The order sub judice departs from essential requirements of law in appointing the public defender as co-counsel.

Behr v. Gardner, 442 So. 2d 980, 982 (Fla. 1st DCA 1983). The Third DCA subsequently cited *Behr* with approval in *Thompson v. State*, 525 So. 2d 1011 (Fla. 3d DCA 1988), when it quashed a trial court order appointing the public defender as co-counsel to privately retained counsel. *See id*. at 1012 ("the trial court has no statutory authority to appoint the public defender to represent an indigent defendant, as here, as co-counsel with privately retained counsel; such an appointment is subject to quashal on a petition for certiorari"). Importantly, *Behr* and *Thompson* were both issued prior to the adoption of section 27.52(5)(h), which brings us to the second reason *Spaziano* is not controlling here.

Second, in addition to not addressing retained counsel, *Spaziano* predates a significant change in Florida law. Section 27.52(5)(h) ("The court may not appoint an attorney paid by the state based on a finding that the defendant is indigent for costs if the defendant has privately retained and paid counsel.") was enacted by the Florida Legislature on July 1, 2010 and codifies the holdings in *Behr* and *Thompson*. *See* 2010 Fla. Sess. Law Serv. Ch. 2010-162 (C.S.H.B. 5401).

In summary, the Sixth Amendment does not compel granting the Motion, the First and Third DCA have both held that this Court lacks the authority to grant the Motion, the Rules of Criminal Procedure provide that the Court cannot grant the Motion, and the Florida Legislature has enacted a clear mandate prohibiting the Court from granting the Motion. Therefore, although the Reply is correct that in this case such a result is "illogical" (Reply at 4), "non-sensical" (Reply at 5), and "the epitome of form [over] substance" (Reply at 6), this Court is powerless to rule differently.

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[1]De Paz represents to this Court that the public defender has a conflict and cannot represent him.

[2]Located at https://www.miamiherald.com/news/local/crime/article-105286346.html.

* * *

Contracts—Sale of commercial property—Return of deposit upon cancellation of sale—Where purchase and sale agreement plainly and unambiguously conditioned purchaser's obligation to close on seller providing tenant-estoppel certificates containing specific representations bearing on tenants' ability to perform their obligations under their leases, and agreement afforded purchaser unfettered right to terminate agreement and receive back its deposit if certificates were not provided, purchaser was entitled to refund of deposit when required certificates were not provided—Certificates produced by seller, which contained material omissions regarding the tenants' litigation risks and added knowledge and COVID-19 qualifiers, were not in substantially same form and content as required by agreement—Purchaser's right to terminate based on nonconforming estoppel certificate was not limited to showing a breach of seller's representations or warranties—Purchaser was entitled to bargained-for representations from tenants regardless of whether they were consistent with any of seller's representations and warranties—Moreover, seller was permitted to disclaim all representations and warranties regarding tenants—Purchaser's waiver of right to terminate agreement pursuant to inspection period provisions of agreement did not waive purchaser's right to terminate agreement based on non-compliant certificates—Purchaser was not required to show that it was ready, willing and able to close at time it terminated agreement—No merit to argument that purchaser failed to satisfy notice requirement in event of seller's default—Failure to provide compliant certificates was not a default under terms of parties' contract

NEW WT MIAMI, LLC, Plaintiff, v. 100 BISCAYNE OWNER LLC, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-018518-CA-01, Section CA43. May 2, 2021. Michael Hanzman, Judge. Counsel: Michael N. Kreitzer and Jennifer Junger, for Plaintiff. Jose M. Ferrer and Desiree Erin Fernandez, for Defendant.

FINAL SUMMARY JUDGMENT

Before the Court are the parties' cross motions for final summary

judgment. (DE 37, Defendant 100 Biscayne Owner, LLC's ("Purchaser") Mot. for Summary Judgment; DE 49, Plaintiff New WT Miami, LLC's ("Seller") Mot. for Summary Judgment.) The Court considered the parties' thorough briefing and entertained oral argument on April 23, 2021. The Motions are now ripe for disposition. Upon careful review of the record, and for the reasons explained herein, the Court grants Defendant's Motion for Summary Judgment (DE 37) and denies Plaintiff's Motion for Summary Judgment (DE 49).

I. RELEVANT FACTS

Seller sued for declaratory relief and breach of contract after Purchaser declined to close on the sale of a 300,000 square foot commercial retail and office tower and adjacent parking garage located at 100 and 130 Biscayne Boulevard, Miami, Florida 33132 (the "Property").[1] The terms of the transaction were set forth in a Purchase and Sale Agreement ("PSA") dated January 16, 2020.[2] (Complaint, Ex. 1.) The PSA, as amended, provided for a $98,750,000.00 purchase price (Complaint, ¶ 12), of which $5.5 million (the amount in dispute in this case) was paid as an Earnest Money Deposit. It is undisputed that both parties are highly sophisticated, and that they negotiated this exhaustive contract with the assistance of counsel.

Under Section 6(a)(i) of the PSA, Seller disclaimed all "represent[ations] or warrant[ies] that any particular Lease will be in force or effect on the Closing Date or that the tenants will have performed their obligations thereunder and/or that the Leases will be free from default on the part of any such tenants, and [that] none of the foregoing shall be conditions precedent to Purchaser's obligations [t]hereunder." (Complaint, Ex. 1.) Additionally, Section 6(a)(iv) provides that, "[t]he rent roll that is set forth as part of the Schedule of Leases is the rent roll for the Property that Seller has been using to administer the Leases, but Seller makes no representation or warranty whatsoever as to its accuracy." (*Id.*)

Although Purchaser accepted Seller's disclaimers with respect to Leases at the Property, it bargained for an *express* requirement in the PSA that Seller deliver, as a *condition to closing*, estoppel certificates by which 75% of the tenants that leased space within the Property would warrant certain information about their leases.[3] (Complaint, Ex. 1.) Additionally, with respect to *certain* major tenants, like LVMH Moët Hennessy Louis Vuitton ("LVMH"), whose tenancies were key components of the Property's cash flow, Purchaser negotiated an additional requirement that Seller provide estoppel certificates in substantially the form and content as an agreed-upon form that was attached to the PSA as Exhibit F (the "Negotiated Estoppel"). Paragraph 3(c)(ix) of the PSA reflects the parties' agreement with respect to the estoppel certificates:

> **After the expiration of the Inspection Period**, and provided this Agreement has not been terminated in accordance with Section 4(c) hereof, **Seller shall obtain estoppel certificates from tenants comprising no less than seventy-five (75%) percent of the leased space at the Property** (the "Estoppel Requirement"); provided further that **estoppel certificates must be obtained from the following tenants: Zyscovich, Consulate of Israel, LVMH and Cosmetics of France (which may be combined with LVMH)** (the "Estoppel Requirement"), in each case **in substantially the form and content as the estoppel attached hereto and made a part hereof as Exhibit "F"** (provided that if any Lease provides for the form or content of an estoppel certificate, Purchaser shall accept an estoppel letter as called for therein if any Tenant refuses to execute the estoppel letter delivered by Seller), **which estoppel certificates contain no materially adverse deviation from the representations of Seller under this Agreement**. The estoppel certificates meeting the Estoppel Requirement shall be dated no earlier than thirty (30) days prior to Closing, provided that Seller is not required to update any estoppel certificates if Purchaser elects to extend the Closing Date in accordance with the terms and conditions of this Agreement or if the Closing Date is otherwise extended in accordance with the terms and conditions of this Agreement (so long as the estoppel certificates are dated within sixty (60) days of the Closing Date). If Seller does not deliver, for any or no reason, estoppel certificates meeting the Estoppel Requirement prior to the Closing Date, Seller shall not be in default hereunder and the Closing Date shall not be extended provided that (a) Seller shall have a one-time right to extend the Closing Date for up to thirty (30) days in order [to] give Seller additional time to satisfy the Estoppel Requirement and **(b) Seller's failure to satisfy the Estoppel Requirement by the Closing Date** (as the same may be extended pursuant to the preceding clause (a)) **shall entitle Purchaser to terminate this Agreement, in which case the parties hereto shall have no further obligations hereunder** (except for obligations that are expressly intended to survive the termination of this Agreement), **and Purchaser shall receive a return of the Earnest Money, together with interest thereon**.

(Complaint, Ex. 1 at ¶ 3(c)(ix) (emphasis added).)

The estoppel certificate template at Exhibit F of the PSA was a form with blanks for certain lease-specific information, and it also contained a number of affirmative statements required of each tenant. (DE 1 at 74-76, Complaint, Ex. 1.) Among those required representations was the following:

> 15. No actions, whether voluntary or otherwise, are pending against Tenant [or Guarantor] under the bankruptcy laws of the United States or any state **and there are no claims or actions pending against Tenant [and/or Guarantor] which if decided against Tenant [and/or Guarantor] would materially and adversely affect Tenant's [or Guarantor's] financial condition or ability to perform Tenant's [and/or Guarantor's] obligations under, or in respect of, the Lease**.

(*Id.* at 76 (emphasis added).)

Notwithstanding this clear contractual condition to Purchaser's obligation to close, the estoppel certificates Seller secured from Cosmetics of France, Inc. and LVMH Fragrance Brands WHD Inc. (collectively, "LVMH"), provided *only* that "as of the date hereof, no actions, whether voluntary or otherwise, are pending against Tenant under the bankruptcy or insolvency laws of the United States or any state thereof," (DE 2 at 327, Complaint, Ex. 7, Section 14; DE 2 at 482, Complaint, Ex. 9), excising altogether the content of the template estoppel certificate that required the tenants to state that "no claims or actions were pending" that, if decided "against the" tenants, "would materially and adversely affect" the tenants' "financial condition or ability to perform their obligations under their respective leases." (PSA, Ex. F at ¶ 15.) Put simply, the estoppel certificates tendered by Seller completely omitted the representation required by paragraph 15 (i.e., that the tenant was not the subject of any action which, if "decided against tenant . . . would materially and adversely affect" its ability to perform its obligations under the Lease). (Complaint, Ex. 1). The LVMH estoppel certificates also made other changes, such as a reservation of rights and defenses "with respect to the impact of COVID-19" and qualifiers with respect to the tenants' definition of the word "knowledge." (*Id.*)

II. ANALYSIS

The law to be applied here is well settled. As this Court (and others) have said time and time again, "contracts are voluntary undertakings, and contracting parties are free to bargain for—and specify—the terms and conditions of their agreement." *Okeechobee Resorts, LLC v. E Z Cash Pawn, Inc.*, 145 So.3d 989, 993 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1871a]; *City of Pompano Beach v. Beatty*, 222 So. 3d 598, 600 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1556a]; *Sky*

Bell Asset Mgmt., LLC And Sky Bell Select, L.P. v. National Union Fire Ins. Co. of Pittsburgh, P.A., 23 Fla. L. Weekly Supp. 535a (11th Jud. Cir., Dec. 17, 2015); *DePrince v. Starboard,* 23 Fla. L. Weekly Supp. 1022a (11th Jud. Cir., Apr. 7, 2016); *see also Castro v. Mercantil Commercebank, N.A.*, 305 So. 3d 623 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1002a] (quoting *Okeechobee Resorts*, 145 So. 3d at 993). And when parties agree upon the terms of their contract, it is not the Court's prerogative to "substitute [its] judgment for that of the parties in order to relieve one from an alleged hardship of an improvident bargain." *Int'l Expositions, Inc. v. City of Miami Beach*, 274 So. 2d 29, 30-31 (Fla. 3d DCA 1973).

Our appellate court has recently (and repeatedly) held that where the language in an agreement "is clear and unambiguous, [a] trial court [errs] by failing to give effect to the contract as written." *Nuñez v. Aviv Air Conditioning, Inc.*, No. 3D21-44, at *5 (Fla. 3d DCA Apr. 28, 2021) [46 Fla. L. Weekly D982b]; *see also SHEDDF2-FL3, LLC v. Penthouse South, LLC*, No. 3D19-100 (Fla. 3d DCA Nov. 4, 2020) [45 Fla. L. Weekly D2485b] (same)[4]; *Okeechobee Resorts*, 145 So. 3d at 993 (holding that the court's task is "to enforce the contract as plainly written"); *Gulliver Sch., Inc. v. Snay*, 137 So. 3d 1045, 1047 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D457a]. "Accordingly, '[w]hen the language of a contract is clear and unambiguous, courts must give effect to the contract as written and cannot engage in interpretation or construction as the plain language is the best evidence of the parties' intent.' " *Castro*, 305 So. 3d at 626 (quoting *Talbott v. First Bank Fla., FSB*, 59 So. 3d 243, 245 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D652a]). This edict is especially inflexible where, as here, the record reflects that the contract was entered into by sophisticated parties who were represented by able counsel. *Pinero v. Zapata*, 306 So. 3d 1117, at *2 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1981b] (noting that "[t]he parties entered into the Agreement 'freely and voluntarily, with the advice of counsel' " and understood "its terms and consequences." . . . "Accordingly, the trial court was obligated to enforce the [contract] s voluntarily agreed upon by the parties.").

In a desperate (and hopeless) attempt to retain Purchaser's $5.5 million deposit despite abjectly failing to deliver the estoppel certificates called for by the contract, Seller advances five arguments. First, Seller claims that the estoppel certificates were in fact "in substantially the form and content as the estoppel" template attached as Exhibit F of the PSA. (DE 49 at 14 (citing PSA ¶ 3(c)(ix)).) Second, Seller argues that under the Third Amendment to the PSA, Purchaser waived its right to terminate the transaction "even if" Seller delivered nonconforming estoppel certificates. (DE 49 at 9.) Third, Seller argues that "Purchaser had no right to terminate on account of anything it may have learned from the estoppel certificates absent evidence of a breach of a Seller warranty or representation." (DE 49 at 9.) Fourth, although previewed in Seller's motion for summary judgment, Seller argues in its reply brief that "Seller should also be awarded summary judgment if the Purchaser is unable to proffer summary judgement (sic) evidence that it was ready, willing, and able to close." (DE 56 at 2.) Fifth, Seller insists that Purchaser failed to comply with default notice provisions. (*Id.* at 8.) These arguments are completely bankrupt.

A. *The estoppel certificates were not in substantially the form and content as Exhibit F of the PSA.*

The first question is whether the estoppel certificates delivered by Seller were "in substantially the form and content as the estoppel attached" to the PSA "as Exhibit 'F.' " (Complaint, Ex. 1 at ¶ 3(c)(ix).) They clearly were not. The content called for by Exhibit F expressly demands that Seller procure from the tenants a statement that "there are no claims or actions pending against Tenant [and/or Guarantor] which if decided against Tenant [and/or Guarantor] would materially and adversely affect Tenant's [or Guarantor's] financial condition or ability to perform Tenant's [and/or Guarantor's] obligations under, or in respect of, the Lease." Neither that representation, nor *any substantially similar representation*, is contained in the estoppel certificates provided by Seller.

Purchaser admittedly did not bargain for estoppel certificates that had to be *identical* to the language of Exhibit F (subject to filling in minor blanks). However, Purchaser was entitled to receive, and Seller agreed to obtain, estoppel certificates that were at least substantially in the form *and content* of Exhibit F. The content of Exhibit F with respect to non-bankruptcy litigation appears *nowhere* on the face of the delivered certificates. Rather, the language with respect to the tenants' exposure to litigation that could affect their ability to pay rent is *completely* absent from the certificates that Seller tendered. Nor do the estoppel certificates convey the same representation through other language such as, for example, a representation that the tenant is not a party to *any* litigation at all, or a representation that the tenant is not a party to any litigation that could impair its business; two "representations" that likely would have satisfied the contract, even though not in the precise language of Exhibit F. But that is not the case here, as the estoppels secured by Seller are completely silent on the issue.[5]

Apparently acknowledging that conforming estoppel certificates were a condition precedent to closing, Seller cites to *Green Tree Servicing, LLC v. Milam* for the proposition that Florida law requires "substantial performance of conditions precedent in order to authorize a recovery as for performance of a contract." (DE 48 at 25-26 (quoting 177 So. 3d 7, 13 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D1733h] ("In Florida, a party's adherence to contractual conditions precedent is evaluated for substantial compliance or substantial performance.")).) First, this is again not a case turning on an alleged breach of contract where the breaching party may assert "substantial compliance" as a defense. It is a case where a party has a clear right to terminate absent satisfaction of a contractual condition that Purchaser bargained for. Moreover, even if the concept of "substantial compliance" were relevant here (and it is not), Seller did not satisfy the "substantial compliance" standard set forth in *Green Tree Servicing*. The Property is a 30-story building in Downtown Miami that was completed in 1965 and its tenants include various high profile entities. When Purchaser agreed to buy the Property, it was acquiring, among other things, the *cash flows from the tenants' rent payments*. (*See* DE 2 at 72, "Letter to Tenants" ("From and after the date hereof, any and all rent payments, claims, and other correspondence should be addressed to" Purchaser's designee).) For this reason, Purchaser bargained for the right to receive a representation from critical tenants assuring that they were not exposed to litigation that could threaten their ability to pay rent. Purchaser did not receive those representations via the estoppel certificates Seller secured. Without procuring those representations (or substantially equivalent representations) from the tenants, Seller cannot be said to have "substantially complied" with its obligation to tender conforming estoppel certificates.[6]

In addition to the facially material omission with respect to litigation risk, the estoppel certificates added various qualifiers that further distanced the delivered estoppel certificates from the form and content of Exhibit F. For example, the LVMH certificates added a provision that limited any "[r]eference to the knowledge of Tenant" contained in the estoppel certificates strictly to "the present, actual . . . knowledge of the individual executing th[e] Certificate on behalf of Tenant . . . without inquiry or investigation[.]" (DE 2 at 484, Complaint, Ex. 9 at ¶ 19.) The certificates also added a reservation of rights and defenses under "the Lease or any relevant legal authority (whether currently existing or enacted in the future) with respect to the impact of COVID-19." (*Id.* at ¶ 20.) The COVID-19 clause was written as a trump card, expressly applicable "notwithstanding anything to the

contrary contained" elsewhere in the certificate. (*Id.*) When combined with the material nonconformity caused by the omission of the litigation risk language, the knowledge and COVID-19 qualifiers only further distinguish the delivered certificates from the bargained-for certificate set forth in Exhibit F.

B. *Purchaser's right to terminate based on a nonconforming estoppel certificate was not limited to showing a breach of Seller representations or warranties.*

Seller next argues that the estoppel certificates do not contradict a representation or warranty and, for that reason, satisfied the PSA. The Court disagrees. First, Purchaser was entitled to the bargained for representations from tenants regardless of whether they were consistent with any of Seller's representations and warranties. Second, the reason the estoppel certificates do not contradict any representation or warranty of the Seller is because Seller was permitted to *disclaim* all representations and warranties regarding the tenants. (Complaint, Ex. 1 at ¶ 6(a)(i)._ So if the Court accepted Seller's argument, then materially nonconforming estoppel certificates could *never* be a basis for Purchaser to terminate because an estoppel certificate obviously could *never* contradict a nonexistent representation or warranty. *See Bryan v. Dethlefs*, 959 So. 2d 314, 317 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1269b] (holding that interpretations that lead to "absurd results" should be avoided"). Such a reading would render meaningless Seller's obligation to obtain estoppel certificates that conformed with Exhibit F. *See Seabreeze Restaurant, Inc. v. Paumgardhen*, 639 So. 2d 69, 71 (Fla. 2d DCA 1994) ("An interpretation of a contract which gives a reasonable, lawful and effective meaning to all of the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect."). Again, if Seller were correct, then it could satisfy its obligation by delivering a blank sheet of paper and calling it an "estoppel certificate," as blank certificates would not contradict non-existent representations/warranties. The Court declines to adopt such an interpretation.

In fact, Seller's argument only supports Purchaser's insistence on receiving conforming estoppel certificates. While Purchaser agreed in the PSA that "Seller makes no representation or warranty whatsoever as to [the] accuracy" of "the rent roll for the property," Purchaser did not go blindly into this deal. (Complaint, Ex. 1 at ¶ 6(a)(iv).) Instead, Purchaser substituted Seller's representations and warranties for Seller's obligation, as an express condition precedent to closing, to obtain the *tenants'* representations as to litigation risk. When Seller came up short with nonconforming estoppel certificates, Purchaser lacked its bargained-for visibility into the strength of the cash flows (*i.e.*, rent payments) that it was purchasing along with the Property, and therefore decided not to close. (DE 37 at 9.) The fact that Seller disclaimed these representations and warranties is *precisely* why the conforming estoppel certificates were so important to Purchaser. Finally, paragraph 27(b) of the PSA provides that Purchaser's obligation to close "is expressly conditioned upon the fulfillment by and as of the Closing Date of each of the conditions listed below," including the following: "Seller shall have executed and delivered to Purchase[r] all of the documents to be delivered by Seller at the Closing," which include conforming estoppel certificates. (Complaint, Ex. 1 at ¶ 27(b).)

C. *Purchaser did not waive its right to terminate the transaction "even if" Seller Delivered nonconforming estoppel certificates.*

Next, Seller argues that "even if" Seller failed to deliver conforming estoppel certificates, Purchaser waived its right to terminate the PSA through a February 6, 2020 Third Amendment to the contract. (DE 2 at 222, Complaint, Ex. 4.) Seller's position is that Purchaser waived its right to demand compliance with the Estoppel Requirement by agreeing in the Third Amendment to waive its right to terminate the PSA in exchange for a discount of $3,250,000 from the original purchase price of the Property.[7] This argument is, to put it mildly, disingenuous.

Under paragraph 4(c) of the PSA, at any time during the Inspection Period, Purchaser had "the unconditional right to elect to proceed to Closing (and waive its right to terminate th[e] Agreement) by delivering written notice of such election (the 'Election Notice') to Seller and Escrow Agent as provided [t]herein." (Complaint, Ex. 1 at ¶ 4(c).) In other words, the possible outcomes of the Inspection Period were binary: the deal could either terminate or Purchaser could elect to proceed to Closing. By executing the Third Amendment, Purchaser elected to proceed to closing and waived its right to terminate the PSA "in accordance with Section 4(c) of the [PSA]." (DE 54 at 4.) This, however, has absolutely nothing to do with Seller's obligation to deliver the estoppel certificates—an obligation that did not even arise until "after expiration of the Inspection Period." (Complaint, Ex. 1 at ¶ 3(c)(ix) ("Purchaser hereby agrees and acknowledges that Seller shall have no obligation to contact tenants under the Leases with respect to the estoppel certificates or seek or disseminate any estoppel certificates prior to the expiration of the Inspection Period.").) Put simply, the PSA contemplated that Seller's affirmative obligation to obtain estoppel certificates would commence *after* the Inspection Period. This makes perfect sense, as the parties would only have an ongoing relationship after the Inspection Period if Purchaser elected to proceed to Closing. The PSA also provided Seller with a "one-time right to extend the Closing Date for up to thirty (30) days in order [to] give Seller additional time to satisfy the Estoppel Requirement" and "Seller's failure to satisfy the Estoppel Requirement by the Closing Date . . . shall entitle Purchaser to terminate this Agreement . . . ." (*Id.*) That language further establishes that the Estoppel Requirement was a condition precedent to Closing that Purchaser could only insist upon *after* Purchaser elected to proceed to Closing at the end of the Inspection Period.

The Third Amendment's language stating that Purchaser "waive[d] its right to terminate th[e] [PSA]" pursuant to the Inspection Period provisions of paragraph 4(c), waived the Purchaser's ability to terminate and avoid closing *based on any information it obtained during the Inspection Period*. Under the plain text of the PSA, the effect of the election to close in the Third Amendment was to *trigger*, not waive, Seller's obligation to satisfy the Estoppel Requirement and deliver the other documents required at closing. Indeed, paragraph 3(c)(ix), which sets forth the Estoppel Requirement, expressly cross references the waiver of termination language in paragraph 4 ("Inspection Period"), and Paragraph 3(b) of the PSA states, with respect to Closing, that the "Purchase Price shall be paid and *all documents necessary for the consummation of this transaction shall be executed and delivered on or prior to the Closing Date* . . . ." (Emphasis added.) Paragraph 3(c) goes on to provide that "[a]t Closing Seller shall deliver the following [19] documents." The estoppel certificates are one category on that list.

By arguing that the Third Amendment obligated Purchaser to close even absent compliance with the Estoppel Requirement, Seller is taking the bizarre position that it had no further obligation to deliver documents whatsoever after the Inspection Period. That nonsensical interpretation reads all preconditions to closing out of the PSA, including the Seller's obligation to deliver any of the 18 other items identified in paragraph 3(c) which were required to be tendered at Closing. For instance, and to go straight to the heart of the matter, paragraph 3(c) also required Seller to deliver a Special Warranty Deed conveying the Property to Purchaser. (Complaint, Ex. 1 at ¶ 3(c)(i).) Similarly, paragraph 3(c) obligated Seller to deliver "[l]etters to tenants at the [Property] instructing the tenants to pay rent at the direction of Purchaser and to recognize Purchaser as landlord under

their respective leases . . . ." (Complaint, Ex. 1 at ¶ 3(c)(v).) Accepting Seller's argument, none of these documents were required because Purchaser waived its right to terminate through the Third Amendment. Taking this argument to its logical extreme bares its fallacy.

In this nearly $100 million transaction, the "Closing" process was not left to guesswork. The agreement painstakingly detailed how the parties would carry on from the end of the Inspection Period to Closing. Although Purchaser could no longer terminate the PSA *based on the results of Purchaser's inspection*, Seller was not let off the hook with respect to its own pre-closing obligations. Seller was obviously still obligated to deliver the bargained-for estoppel certificates and all the other items required by the PSA, and Purchaser never waived the right to insist upon compliance with the contract.

D. *Purchaser did not need to show that it was ready, willing, and able to close at the time Purchaser terminated the transaction.*

Seller next argues, without any citation, that even though the mandated estoppel certificates were not provided, Purchaser could not terminate the PSA and receive its Earnest Money deposit back without proof that it was ready, willing, and able to close. This claim also borders on frivolity. It is no doubt true that in cases involving a claim for specific performance of a contract for the sale of land, the purchaser must prove that it was ready, willing, and able to close. *See, e.g.*, *Taylor v. Richards*, 971 So. 2d 127, 129 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1538b] (holding that purchasers seeking specific performance of a real estate contract generally must prove that they were ready, willing, and able to close). Here, however, the Purchaser is not suing for specific performance or damages, or even claiming that Seller breached the contract at all. Rather, Purchaser is simply exercising its *contractual* right not to close absent the bargained-for estoppel certificates. And because Seller was unable to deliver the bargained-for estoppel certificates that were the *sine qua non* of Purchaser's obligation to close, Purchaser's ability (or lack of ability) to close is completely irrelevant.

Moreover, even if this case turned on a party's default (and it does not), Paragraph 13 ("Default") provides separate mechanisms for addressing defaults depending on whether Seller or Purchaser defaults. Under paragraph 13(a), if Purchaser defaults in the performance of its obligations, then Seller may keep the Earnest Money as long as "Seller is ready, willing, and able to close in accordance with the terms" of the PSA. By contrast, Purchaser's rights with respect to *Seller's* default are not constrained by Purchaser's readiness, willingness, and ability to close—such a constraint appears in the PSA *only* with respect to Seller exercising its rights in the event of Purchaser's default. (*Compare* Complaint, Ex. 1 at ¶ 13(a) *with id.* ¶ 13(b).) The Court declines to write into the PSA an obligation on Purchaser that the parties agreed to apply only to Seller. *See Shumrak v. Broken Sound Club, Inc.*, No. 4D03-5032, at *0 (Fla. 4th DCA Jan. 5, 2005) [30 Fla. L. Weekly D694a] ("It is a fundamental principle of contract construction, known as *expressio unius est exclusio alterius*, that 'the expression of one thing is the exclusion of the other.' ").

E. *Purchaser did not fail to comply with the default notice requirement.*

Finally, the Court also disagrees with Seller's argument that Purchaser failed to comply with a default notice requirement. Paragraph 13 of the PSA provides the cure procedures with respect to either party's default under the PSA. Paragraph 13(b), which applies in the event the Seller defaults, provides that:

> If Seller shall default in the performance of (i) Seller's obligations to be performed on the Closing Date under this Agreement, or (ii) Seller's obligations prior to the Closing Date, and with respect to this subsection (ii), Seller fails to cure the same within ten (10) days' notice from Purchaser . . . Purchaser [may] (B) terminate this Agreement, whereupon the Earnest Money, plus interest, shall be refunded to Purchaser by Escrow Agent upon demand . . . .

(Complaint, Ex. 1 at ¶ 13(b).) But neither party defaulted. In fact, the PSA expressly provides that "Seller ***shall not be in default*** hereunder" for failing to "deliver, for any or no reason, estoppel certificates meeting the Estoppel Requirement." (DE 56 at 8 (emphasis added in Seller's Reply Brief).) Rather, the contract grants Seller "a one-time right to extend the Closing Date for up to thirty (30) days in order to give Seller additional time to satisfy the Estoppel Requirement" and again expressly provides that "Seller's failure to satisfy the Estoppel Requirement by the Closing Date . . . shall entitle Purchaser to terminate this agreement . . . and Purchaser shall receive a return of the Earnest Money, together with interest thereon." (Complaint, Ex. 1 at ¶ 3(c)(ix).) In other words, all roads lead to compliance with the Estoppel Requirement or, absent that, Purchaser's right to terminate. That right was not triggered by any "default" on the part of the Seller. It arose because the Seller did not deliver certificates that were a condition to Purchaser's obligation to close.

Moreover, even if the failure to provide the estoppel certificates was a "default" (and it was not), Seller's right to extend the Closing Date for 30 days defeats Seller's argument that Purchaser failed to give 10-days' written default notice with respect to the nonconforming estoppel certificates. Purchaser objected to the LVMH estoppel certificates, which were provided on May 22, 2020, immediately upon receipt of same. (Complaint at ¶ 21, Exs. 6-9.) On May 22, 2020 at 9:58 AM, Purchaser's counsel sent an email to Seller's counsel stating that "the estoppels provided by Cosmetics of France and LVMH are unacceptable to [Purchaser]" for various reasons, including the absence of language with respect to the tenants' litigation exposure. (DE 9 at 24, Counterclaim Ex. B.) As of May 22, 2020, it was incumbent upon Seller to cure the default within 10 days or 30 days, depending on whether Seller elected to extend the Closing Date, which the Seller did not do.

III. CONCLUSION

This is not a difficult case. These sophisticated parties, represented by sophisticated counsel, negotiated a contract that plainly and unambiguously conditioned Purchaser's obligation to close upon receipt of agreed upon tenant estoppel certificates to be provided by Seller. Those certificates were required to contain specific representations bearing on the ability of certain tenants to perform their obligations under their Leases (i.e., representations going to the stability of the "cash flow" Purchaser was buying). And the PSA, in no uncertain terms, afforded Purchaser the unfettered right to terminate the agreement, and receive back its deposit, if the estoppel certificates were not forthcoming. (*See, e.g.*, Complaint, Ex. 1 at ¶3(c)(ix) ("Seller's failure to satisfy the Estoppel Requirement by the Closing Date . . . shall entitle Purchaser to terminate this Agreement . . . and Purchaser shall receive a return of the Earnest Money, together with interest thereon.").) Seller did not deliver the required estoppel certificates and Purchaser exercised its right to terminate. It is just that simple, and if Seller did not want Purchaser to have a right to terminate based upon the absence of conforming estoppel certificates, "the time to say so [was] at the bargaining table." *Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 695, 660 N.E.2d 415, 421 (1995).

For the foregoing reasons it is hereby **ORDERED**:

1. Defendant's Motion for Final Summary Judgment (DE 37) is **GRANTED**.

2. Plaintiff's Motion for Final Summary Judgment (DE 49) is **DENIED**.

3. Final Judgment is hereby entered in favor of Purchaser. The Escrow Agent is **ORDERED** to release to Purchaser the Earnest Money with interest within ten (10) days of entry of this Final Judgment.

4. The Court retains jurisdiction to entertain any post-judgment motions including, but not limited to, timely and authorized motions for attorney's fees and costs.

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[1]On September 23, 2020, Purchaser filed a three-count counterclaim against Seller for breach of contract, promissory estoppel, and declaratory relief. (DE 9.) The parties' cross-counts for declaratory relief are dispositive and both turn on whether Seller satisfied the Estoppel Requirement, as explained below.

[2]Unless otherwise noted, the Court's references to the PSA incorporate the amendments thereto. The PSA was amended by the (a) Amendment to Purchase and Sale Agreement dated January 31, 2020 (the "First Amendment"),

(b) Second Amendment to Purchase and Sale Agreement dated February 4, 2020, (the "Second Amendment"), (c) Third Amendment to Purchase and Sale Agreement dated February 6, 2020 (the "Third Amendment"), and (d) Fourth Amendment to Purchase and Sale Agreement dated March 24, 2020 (the "Fourth Amendment").

[3]*See* Black's Law Dictionary 572 (7th ed. 1999) (defining an "estoppel certificate" as "[a] signed statement by a party (such as a tenant or mortgagee) certifying for another's benefit that certain facts are correct, as that a lease exists, that there are no defaults, and that rent is paid to a certain date. A party's delivery of this statement estops that party from later claiming a different state of facts.").

[4]In *SHEDDF2-FL3, LLC*, this Court relieved a party from the consequences of a contract (a forbearance agreement) in order to prevent a lender from receiving what the Court believed would be an obscene windfall. Reversing, our appellate court held that because sophisticated parties freely entered into the contract, with the advice of counsel, this Court erred in not strictly enforcing their bargain. Here, unlike was the case in *SHEDDF2-FL3, LLC*, enforcing the contract results in no windfall or even arguably inequitable result. Purchaser is returned its own funds (i.e., the deposit) and the parties go their separate ways, just as they agreed to do.

[5]The Court rejects Seller's specious argument that Purchaser could not rely upon conforming certificates had they been produced, and therefore the failure to comply with this contractual condition was somehow immaterial. (DE 48 at 22.) Specifically, Seller claims that the tenants were asked to make statements"promising the results of any future or pending claims," which would be speculative and unreliable. (*Id.* at 22, 24.) The estoppel certificates were required to state that the tenants were not subject to litigation that would materially affect their ability to perform under the leases *if* that litigation was decided against the tenant. The tenants were not asked to handicap the likelihood of losing that litigation, and there is nothing unusual (or unreliable) about this bargained for representation. In any event, the issue here is not one of "reliance" or "materiality." This is not a fraud case or even a breach of contract case. It is a case where the Court is called upon to do no more than enforce the parties' bargain, as written. Seller was contractually obligated to deliver conforming estoppel certificates and it failed to do so. Purchaser therefore had the right to terminate. And this Court is not at liberty to re-write the parties' agreement by concluding that the representations Purchaser bargained for are really not "important/material." Nor is the Court concerned with the extent to which Purchaser "could/should" rely upon the representations it bargained for. If these representations were not "reliable" that would be Purchaser's problem. But Purchaser bargained for the right to receive them, and Seller agreed to provide them as a condition to Purchaser's obligation to close. That is all that matters.

[6]In an attempt to excuse its failure to deliver the contractually bargained for estoppel certificates, Seller also advances the absurd argument that it should be relieved of this obligation because it could not force these tenants to execute conforming estoppels. (*See* DE 48 at 26 (citing *Twiss v. Kury,* 25 F.3d 1551, 1555 (11th Cir. 1994) ("[a] person has no duty to control the conduct of another.")).) *Twiss* was a negligence case in which the defendant had no duty to protect a tort victim from a third party's misconduct. That is markedly different from this contract case where Seller expressly agreed that it "shall obtain estoppel certificates from tenants" and "Seller's failure" to do so "shall entitle Purchaser to terminate this Agreement . . . ." (Complaint, Ex. 1 at ¶ 3(c)(ix).) Although the tenants were third parties to the PSA, Seller expressly assumed a contractual duty with respect to those third parties for the benefit of Purchaser. If Seller could not deliver the required certificates, even due to no fault of its own, Purchaser had the right to terminate the PSA and get its Earnest Money deposit back. Whether Seller could "force" its tenants to deliver conforming certificates is of no moment, as the contract did not require "best-efforts"—it required actual delivery of the estoppels.

[7]For the reasons explained below, it appears that Seller benefitted from agreeing to a $3,250,000 discount because in exchange for that discount Purchaser agreed to not terminate the PSA at the conclusion of the Inspection Period, as was Purchaser's right to do.

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose household resident age 15 and older

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. SYLVIA COLLAZO and JESUS COLLAZO, Defendants. Circuit Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 20-CA-9803, Division F. May 10, 2021, Jennifer X. Gabbard, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Jesus Collazo, Pro se, Lakeland, Defendant.

ORDER ON PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AGAINST THE DEFENDANT, JESUS COLLAZO

THIS CAUSE having come before this Court at the hearing on April 6, 2021, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendant, JESUS COLLAZO, 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 named insured Defendant, Sylvia Collazo, and the Defendant, Jesus Collazo, regarding the policy rescission as a result of the insured's material misrepresentation on the application for insurance dated March 10, 2020. Plaintiff rescinded the policy of insurance on the basis that Sylvia Collazo failed to disclose that she lived with her son, Alfred Ortiz, at the time of policy inception and had she disclosed this information the Plaintiff would not have issued the policy on the same terms; namely, Plaintiff would have charged a higher premium to issue the policy.

Ms. Sylvia Collazo initially completed an application for a policy of automobile insurance from Direct General Insurance Company on March 10, 2020. Ms. Sylvia Collazo failed to list her son, Alfred Ortiz, as a household member/resident when completing the application for insurance. Ms. Sylvia Collazo answered "NO" to the following application question, which provides:

> Have you failed to disclose any household residents, age 15 and older, whether licensed or nor, including but not limited to children away from home or in college?

In addition, the insured, Ms. Sylvia Collazo, signed and initialed the Applicant's Statement on 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 the 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 change as noted above.

Plaintiff determined that had Sylvia Collazo 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 Sylvia Collazo. 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 Sylvia Collazo, 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.

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 February 2, 2021, the named insured, Sylvia Collazo, entered into a Stipulation for Consent Judgment, confirming that she lived with her son, Alfred Ortiz at the time of application for insurance. Specifically, Sylvia Collazo admitted the following information in her Stipulation for Consent Judgment:

On March 10, 2020, I, SYLVIA COLLAZO, failed to disclose on the application for insurance that my son, Alfred Ortiz, was a household member residing with me at the policy address ([Editor's note: address redacted], Plant City, Florida 33565).

On March 10, 2020, I understood all of the questions on the application for insurance and I signed the application for insurance.

On April 6, 2021, this Court entered an Order granting the Plaintiff, Direct General Insurance Company's Motion for Final Consent Judgment against Sylvia Collazo.

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(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 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, Alfred Ortiz, as a household member living at the policy address at the time of the application. Therefore, it is irrelevant whether the undisclosed household member, Alfred Ortiz, were involved in the subject motor vehicle accident on September 4, 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 Sylvia Collazo, 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 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 (Sylvia Collazo) to disclose her son, Alfred Ortiz 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 (Sylvia Collazo) 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 Sylvia Collazo on the application for insurance. Since the Carrier relied on the representations by Sylvia Collazo 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 Sylvia Collazo subsequently claimed that the "agent did not ask" the questions on the application since Sylvia Collazo signed the application which is a legal contract and thus, Sylvia Collazo is bound by the terms and conditions of the contract. Further, the Defendant, Sylvia Collazo, did not establish any proof of coercion, duress, and/or fraud in the inducement during the application process.

In addition, since Sylvia Collazo 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.

Conclusion

This Court finds that the Plaintiff, Direct General Insurance Company's application for insurance unambiguously required Defendant, Sylvia Collazo, to disclose her son, Alfred Ortiz, as a household member living at the policy garaging address, that Plaintiff provided the required testimony to establish said that Defendant, Sylvia Collazo's 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 against Defendant, JESUS COLLAZO, is hereby **GRANTED**.

b. This Court ***hereby enters final judgment*** for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendant, JESUS COLLAZO.

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, the Stipulation for Consent Judgment by Sylvia Collazo, the Motion for Final Summary Judgment and in the Affidavit of Rose Chrustic, are not in dispute, which are as follows:

e. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # XXXXXX8181, 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, SYLVIA COLLAZO, stipulated that she failed to disclose her son, Alfred Ortiz, as an additional household resident 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 # XXXXXX8181, issued by DIRECT GENERAL INSURANCE COMPANY;

h. The material misrepresentation of Defendant, SYLVIA COLLAZO on the application dated March 10, 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 # XXXXXX8181, issued by DIRECT GENERAL INSURANCE COMPANY;

i. There is no insurance coverage for JESUS COLLAZO for any bodily injury liability coverage, property damage liability coverage,

personal injury protection coverage, collision coverage, comprehensive (called "other than collision") coverage, rental reimbursement coverage, and towing and labor coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8181;

j. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, JESUS COLLAZO, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8181;

k. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify JESUS COLLAZO for any bodily injury liability claim for Odolphe Geel arising from the accident of September 4, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8181;

l. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify JESUS COLLAZO for any property damage liability claim for 3 Stars Auto Sales & Service Inc. arising from the accident of September 4, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8181;

m. There is no collision coverage for JESUS COLLAZO for the accident which occurred on September 4, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8181;

n. There is no comprehensive (called "other than collision") coverage for JESUS COLLAZO for the accident which occurred on September 4, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8181;

o. There is no towing and labor coverage for JESUS COLLAZO for the accident which occurred on September 4, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8181;

p. There is no rental reimbursement coverage for JESUS COLLAZO for the accident which occurred on September 4, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8181;

q. The Defendant, JESUS COLLAZO, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8181, for the September 4, 2020 accident;

r. There is no insurance coverage for the motor vehicle accident which occurred on September 4, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8181;

s. There is no personal injury protection ("PIP") insurance coverage for the accident which occurred on September 4, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8181;

t. There is no property damage liability coverage for the accident which occurred on September 4, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8181;

u. There is no bodily injury liability coverage for the accident which occurred on September 4, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8181;

v. There is no collision coverage for the accident which occurred on September 4, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8181;

w. There is no comprehensive (called "other than collision") coverage for the accident which occurred on September 4, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8181;

x. There is no towing and labor coverage for the accident which occurred on September 4, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8181;

y. There is no rental reimbursement coverage for the accident which occurred on September 4, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8181;

* * *

Trusts—Trustees—Discharge—Breach of trust—Limitation of actions—Circuit court has jurisdiction of trustee's complaint seeking judicial approval of trustee's resignation and discharge of trustee from liability for its services—Trustee's motion for judicial resignation and discharge of liability for its services as trustee granted—Trustee served on trust beneficiaries periodic statements and final accounting disclosing creation of decanted trust, purchase of re-engineered life insurance policies, and payment to insurance consultant, and none of beneficiaries filed suit within six-month limitation period available for action against a trustee for breach of trust with respect to a matter that was adequately disclosed in a trust disclosure document—No merit to argument that trust beneficiaries' civil action claims against trustee that were filed 18 months after trustee's disclosure should be exempted from discharge—Successor trustee appointed—Reasonable attorney's fees and costs awarded to trustee's counsel, to be paid from trusts—Reservation of jurisdiction to determine amount of fees and costs

IN RE: 2015 WINSTON C. SMITH FAMILY DESCENDANTS TRUST and EMMET C. SMITH, JR. FAMILY DESCENDANTS TRUST. BESSEMER TRUST COMPANY OF FLORIDA, TRUSTEE Plaintiff, v. EMMET C. SMITH, JR.; WINSTON C. SMITH; EMMET C. SMITH; and MARTINE SMITH, Defendants. Circuit Court, 15th Judicial Circuit in and for Palm Beach County, Probate Court. Case No. 502019CP004611XXXXMB. October 23, 2020. Order Denying Motion to Amend Final Judgement, April 7, 2021. Renatha S. Francis, Judge. Counsel: James G. Pressly, Jr., Pressly, Pressly, Randolph & Pressly, P.A., Palm Beach, for Plaintiff.

FINAL JUDGMENT

This matter came before the Court for a non-jury trial on October 5, 2020. The Court having reviewed the pleadings and evidence, memorandum of counsel, and having heard counsels' arguments, and taken judicial notice of pleadings in the pending civil action, *Smith, et al. v. Bessemer Trust Company and Jo Ann Engelhardt,* case number 502017CA009042XXXXMB, the Court now makes the following findings of fact and conclusions of law:

I. INTRODUCTION

The remedy sought in this matter is twofold: (1) judicial approval of the resignation of Bessemer Trust Company of Florida, as Trustee of the *2015 Winston C. Smith Family Descendants Trust* and *2015 Emmet C. Smith Jr. Family Descendants Trust* ("Bessemer") in accordance with section 736.0705, Florida Statutes, with appointment of a successor trustee; and (2) discharge of Bessemer as Trustee. Upon the former, the parties agree. Upon the latter, they do not.

Specifically, in their joint Answer and Counterclaim filed in this case, the Smiths argue that Bessemer should not be completely discharged from liability for its services as Trustee for reasons articulated in the pending civil case: namely, the monitoring of *Bessemer Trust Company (Cayman)* as Trustee of a Cayman Island Trust, titled the "Gabriel Trust." According to those allegations, Bessemer Trust Company of Florida and Jo Aim Engelhardt negligently supervised a "re-engineering[*]" of the life insurance policies held by the Gabriel Trust in the Cayman islands; the decanting by the

Gabriel Trust into the instant Florida Domestic Trusts; and the purchase of the life insurance policies insuring Winston and Emmet Jr. that is the corpus of the Winston and Emmet Trusts, They further allege that Bessemer and Jo Ann Englehardt negligently recommended the payment of approximately $80,000 by the Trusts to insurance consultant Richard Flah in connection with the re-engineering of the insurance policy. *Complaint* ¶¶ 87, 93.

Based on all those allegations, the Smiths argue here that personal liability may accrue to the Trustee in the civil action, and so this Court's order approving the resignation of the Trustee "shall necessarily include language appropriate to carve-out any limitations or otherwise impose any conditions upon said resigning Trustee as the Court may deem appropriate for the protection of the Trusts in light of the claims pending in the civil action. §736.0705(2), Fla. Stat." *Counterclaim* p. 5, ¶ 20.

So the issue that had to be determined at trial in the instant matter was strictly a legal one: what's the scope of the judgement approving Bessemer's resignation as Trustee of each of the Winston's and Carter's Trusts?

II. FACTS

Bessemer, at all pertinent times has been the sole Trustee of each of the 2015 Winston C. Smith Family Descendants Trust ("Winston Trust") and 2015 Emmet C. Smith Jr. Family Descendants Trust ("Carter Trust," collectively "Trusts"). ¶2(b), Jt. Stip. Upon accepting the trusteeship, Bessemer purchased the re-engineered life insurance policies on the life of Winston and Emmet, Jr. from John Hancock Insurance Company with funds decanted from the Gabriel Trust. Importantly, Bessemer disclosed its actions, including the payment of approximately $80,000 in insurance consulting fees to Flah&Company. With each disclosure, Bessemer included limitation notices pursuant to section 736.1008(4)(c), Florida Statutes, regarding the six-month limitations period to sue. It continued to disclose the limitations period in the statements sent out each month or quarter.

Upon request, Bessemer agreed to resign as Trustee of the Trusts; thereafter, Bessemer filed its Trustee's Complaint for Judicial Resignation seeking judicial resignation *and* discharge of liability for its services as Trustee (Complaint, D.E. No. 1), as well as for its attorney's fees. The co-Defendants filed an Answer and Counterclaim for Judicial Intervention (D.E. No. 6). ¶2(c), Jt. Stip.

The parties agree as to the entry of an order, pursuant to section 736.0705 (1)(b), Florida Statutes, judicially approving Bessemer's resignation as Trustee of each of Winston's Trust and Carter's Trust. ¶2(d), Jt. Stip.

Bessemer served its Interim Accounting for the period March 1, 2019 through August 31, 2019, for each of the Trusts on October 8, 2019 (D.E. No. 4); the limitations period pursuant to section 736.1008, Florida Statutes, has expired. ¶2(e), Jt. Stip.

In accordance with Article IV (D) of each of the Trusts, Colette K. Meyer, Esq., a resident of Palm Beach County, Florida and qualified to act as a trustee, has been selected to serve as Successor Trustee of each of Winston's Trust and Carter's Trust, which appointment shall take effect upon the entry of this Court's order approving Bessemer's resignation as Trustee of the Trusts. ¶2(f), Jt. Stip.

III. LAW AND ANALYIS

A. Jurisdiction

As an initial matter, the Smiths assert here that the Court lacks jurisdiction because Bessemer's Complaint failed to comply with Florida Rule of Civil Procedure 1.110(b).

The Court rejects this argument. Jurisdiction is conferred upon this Court by virtue of section 736.0203, Florida Statutes, which provides that "[t] he circuit court has original jurisdiction in this state of all proceedings arising under this Code." Additionally, section 736.0201(2), Florida Statutes, provides that "[t]he court may intervene in the administration of a trust to the extent the court's jurisdiction is invoked by an interested person . . . ."). The Plaintiff, as Trustee, is an interested person entitled to invoke the Court's jurisdiction to review and settle interim or final accounts or determine any other matters involving Trustees and beneficiaries as provided in §736.0201(4)(d) and (g), Florida Statutes.

The Trustee's Complaint for Judicial Resignation alleges that Bessemer Trust Company of Florida served as Trustee of the Trusts at the request of Defendants from inception through the date of the Complaint; has served on the qualified beneficiaries from inception through the date of the Complaint statements for the Trust including limitation notices with no timely filing of actions for breach of Trust; and prays that this Court enter Judgment approving resignation, discharging Plaintiff from liability for its services as Trustee and granting attorneys' fees and costs as provided by section 736.1005, Florida Statutes. These allegations of fact are sufficient to invoke the jurisdiction of this Court to grant the relief requested. *See e.g. Hankins v. Title & Trust Company of Florida,* 170 So.2d 454 (Fla. 1st DCA 1965) ("[u]nder the Florida Rules of Civil Procedure a pleading which sets forth a claim for relief, such as in a complaint, must state a cause of action and *must contain allegations of fact* sufficient to show the jurisdiction of the court. Applying the requirements of this rule to the complaint as amended, it is concluded that plaintiffs have sufficiently alleged a cause of action." (Emphasis added.) Here, Bessemer Trust Company alleged facts sufficient to invoke this Court's jurisdiction over Bessemer's resignation and discharge.

Also, by definition, the Florida Trust Code applies to all express Trusts and the Winston C. Smith and Emmet C. Smith, Jr. Family Descendants Trusts are express Trusts. *See* §736.0102(1), Fla. Stat; *See also* §736.0106, Fla. Stat. (providing that the common law of trust and principles of equities supplement the Code except as modified). In *Schroeder v. Gebhart,* 825 So. 2d 442, 445 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D1652a], *review den.,* 845 So.2d 892 (Fla. 2003). In *Gebhart* the trial court granted reformation of a Trust even though reformation had not been requested in the pleadings and the DCA affirmed the trial court on the grounds of the equity jurisdiction authorizing the court's broad jurisdiction to administer full, complete, and final relief in a Trust case.

Finally on this issue, The Smiths concede jurisdiction when in their Counterclaim the Smiths allege at ¶s18-20 and in their Wherefore clause that it is only the scope of the release of the Trustee that is at issue, not whether release should be granted.

B. Analysis

Turning to the issues before the Court, first with respect to Bessemer's resignation: pursuant to section 736.0705, Florida Statutes, the Court now judicially authorizes and approves Bessemer Trust Company of Florida's resignation as Trustee of the 2015 Winston C. Smith Family Descendants Trust and Emmet C. Smith, Jr. Family Descendants Trust. Colette K. Meyer, Esq., appointed by the qualified beneficiaries of the Trusts, is now appointed Successor Trustee, to take effect immediately.

Second, with respect to Bessemer's request for discharge: the Court grants the request, and discharges Bessemer Trust Company of Florida as Trustee of the Trusts, and releases them from any and all liability for its services as Trustee from inception of the Trusts on June 1, 2015 to the present, including acceptance of the decanted Trust and its assets from the Grantor Bessemer Trust Company (Cayman) Limited as Trustee of the Gabriel Trust, and purchase and maintenance of life insurance policies on the life of Winston and Emmet, Jr. and payment to Flah and Company of $43,425 in each Trust.

Bessemer Trust Company of Florida served on the qualified beneficiaries of the Trusts, periodic statements, with six months

statute of limitations disclosures disclosing the creation of the decanted Trust with Bessemer Trust Company (Cayman) Limited as Trustee of the Gabriel Trust as Grantor, the purchase and maintenance of the life insurance policies and the payment to Flah & Company, without the qualified beneficiaries having timely filed suit within the six months statute of limitations created by section 736.1008(2) and (4)(c), Florida Statutes.

The six months statute of limitations created by Bessemer Trust Company of Florida's compliance with sections 736.1008(2), and (4)(c), Florida Statutes, bars any claim by the Smiths with regard to the creation and funding of the Trusts, purchase of the re-engineered life insurance policies, and payment to Flah & Company.

As an additional bar to any claim by the qualified beneficiaries that Bessemer Trust Company of Florida should not be fully discharged, is the fact that Bessemer filed a Final Accounting disclosing the continued existence of the re-engineered life insurance policies, the qualified beneficiaries filed no law suit against Bessemer within six months of service of the Final Accounting, and the Final Accounting disclosed the Trust's ownership of the re-engineered life insurance policies.

In their Counterclaim, the Smiths assert that Bessemer Trust Company of Florida should be relieved of liability, subject to the Civil action. Allegations by the Smiths in *Smith v. Bessemer/Engelhardt* case number 502017CA009042XXXXMB regarding the purchase of the re-engineered insurance policies and payments to Flah & Company as the insurance consultant should not be excepted from this Court's discharge of Bessemer as Trustee, because the Smiths did not file *Smith v. Bessemer* until August 20 17, eighteen (18) months after Bessemer's service of statements disclosing the creation of the decanted Trusts, purchase of the life insurance policies, and payment to Flah & Company, triggering the Florida Trust Code's special six months statute of limitations in section 736.1008(2) and (4)(c), Florida Statutes.

The Smiths assert essentially that Bessemer should be released except for a caveat carving out from the release the Civil Action claims. The Court denies the Smiths' assertion that the Civil Action claims should be excepted from Bessemer's discharge.

IV. CONCLUSION

WHEREFORE, the Court enters Judgment is entered in favor of Plaintiff, Bessemer Trust Company of Florida, as Trustee and against Winston Smith, et al. as Defendants and Counterclaimants. Bessemer Trust Company of Florida is fully discharged from liability for accepting Trusteeship of the decanted Trusts, and the Trustee's purchase of the John Hancock re-engineered life insurance policies on life of Winston and Emmet, Jr. and payments of $43,425 to insurance consultant Mr. Flah by each Trust, and for all of its services as Trustee of the 2015 Winston C. Smith Family Descendants Trust and Emmet C. Smith, Jr. Family Descendants Trust as reported on its Trust statements. The resignation is approved, and Colette K. Meyer, Esq. is appointed Successor Trustee, and Bessemer Trust Company as Trustee shall deliver the Trusts' assets to the Successor Trustee. This Court awards reasonable attorneys' fees and costs to counsel for Plaintiff/Counter-Defendant Bessemer Trust Company of Florida to be paid from the Trusts, and reserves jurisdiction for determination of a reasonable amount.

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[*] The re-engineering in the form of decanting the Gabriel Trust into the domestic trusts of Winston and Emmet, occurred in June 2015. The civil complaint was not filed until August 2017.

ORDER DENYING MOTION TO AMEND FINAL JUDGMENT

On March 19, 2021, this Court heard the Smith Defendants' Motion to Amend Final Judgment. Upon reviewing the Motion, the Response filed by Bessemer Trust Company of Florida, the Memorandum in Opposition to Defendants' Motion to Amend Final Judgment filed by Bessemer Trust Company of Florida, and having heard arguments of counsel and reviewed the record in this cause, this Court **ORDERS and ADJUDGES**:

The Motion to Amend Final Judgment requests the Court to add to the decretal portion of the Judgment the words "as and in its capacity as Trustee" and "as Trustee" after references to "Bessemer Trust Company of Florida." Movants' argument is that Bessemer Trust Company of Florida as an individual entity should not be fully discharged from liability as currently provided in the decretal portion of the Final Judgment.

Movants have not questioned any other provisions of the Final Judgment, which is significant because the Analysis section of the Final Judgment is consistent with the wording in the Wherefore clause and the seven paragraphs in the Analysis at pages 5 through 7 directly support the wording as it is.

The issue to be tried as framed by the Complaint was Bessemer Trust Company of Florida's request to be discharged from liability for its services as Trustee. In the Complaint Bessemer alleged that it had served monthly statements on the Smiths, as beneficiaries, and filed its Final Accounting, alleging that under section 736.1008, Florida Statutes, a beneficiary is barred from bringing an action against a trustee for breach of trust for a matter disclosed in an accounting if not filed within six months, and in its prayer for relief expressly requested that this Court enter Judgment discharging Bessemer from liability for its services as Trustee.

In response, the Smiths as Defendants and Counterclaimants, requested the Court to determine "the language necessary and appropriate to be included within any such release in light of the Counterplaintiff's breach of fiduciary duty action against Trustee within . . . *Emmet Carter Smith v. Bessemer Trust Company of Florida* . . ., case number 502017CA009042 presently pending in the circuit civil division of this Court." The breach of fiduciary duty action against the Trustee within the civil division case has already been disposed of by virtue of the determination of no breach of fiduciary duty as a result of the six months statute of limitation which establishes pursuant to section 736.1008(2), Florida Statutes, that "[a] beneficiary is barred from bring an action against a Trustee for breach of trust with respect to a matter that was adequately disclosed in a trust disclosure document . . ." A breach of fiduciary duty within the Trust accounting proceeding does in fact determine the personal liability of the Trustee as provided in Trust Code sections 736.1001(1), and 736.1002, Florida Statutes, providing for money damages against the Trustee for breach of trust, and detailing the money damages against the Trustee individually for breaches of Trust, respectively. When these provisions are read in conjunction with section 736.1008(2), Florida Statutes, which bars a beneficiary's action against a Trustee for breach of trust if not filed within six months, the result is that the Trustee is discharged from personal liability for all transactions disclosed in the Trust accounting.

The Court's Final Judgment specifically ruled on page 5 that, "The six months statute of limitations created by Bessemer Trust Company of Florida's compliance with §§736.1008(2) and (4)(c), Fla. Stat. bars any claim by the Smiths with regard to the creation and funding of the Trusts, purchase of the reengineered life insurance policies, and payment to Flah & Company." Note that these are the breach of fiduciary duty claims made against Bessemer in the civil action. The Court denies movant's arguments that the Final Judgment was misused by Bessemer in the civil action. Bessemer's use of the Final Judgment is consistent with this Court's ruling on pages 5 and 6:

In their Counterclaim, the Smiths assert that Bessemer Trust

Company of Florida should be relieved of liability, subject to the civil action. Allegations by the Smiths in *Smith v. Bessemer/Engelhardt* . . . regarding the purchase of the reengineered insurance policies and payments to Flah & Company as the insurance consultant should not be excepted from this Court's discharge of Bessemer as Trustee, because the Smiths did not file *Smith v. Bessemer* until August 2017, 18 months after Bessemer's service of statements disclosing the creation of the decanted Trust, purchase of the life insurance policies, and payment to Flah & Company, triggering the Florida Trust Code's special six months statute of limitations in §736.1008(2) and (3)(c), Fla. Stat.

The Smiths assert essentially that Bessemer should be released except for a caveat carving out from the release the civil action claims. The Court denies the Smiths' assertion that the civil action claims should be excepted from Bessemer's discharge.

In denying the Counterclaim on the grounds that the Smiths had not timely filed their civil action within six months, this Court imposed no restriction on Bessemer's use of the Final Judgment in the civil action. Because this Court expressly rejected the Counterclaimants' demand that the Final Judgment impose restrictions on the use of the Final Judgment in the civil action, the Court must reject the assertion that the Final Judgment has been misused by Bessemer in the civil action. As noted in ¶5 of the Court's Final Judgment, "In their Counterclaim, the Smiths assert that Bessemer Trust Company of Florida should be relieved of liability, subject to the civil action" and this relief was denied thereby causing the Court not to limit the scope of its discharge:

Wherefore, . . . Bessemer Trust Company of Florida is fully discharged from liability for accepting Trusteeship of the decanted Trusts, and the Trustee's purchase of a John Hancock reengineered life insurance policies on life of Winston and Emmet, Jr. and payments of $43,425 to insurance consultant, Mr. Flah, by each Trust and for all of its services as Trustee of the 2015 Winston C. Smith Family Descendants Trust and Emmet C. Smith, Jr. Family Descendants Trust as reported on its Trust statements.

Contrary to the Smiths' argument that Bessemer is misusing or "creating mischief" with the Final Judgment, the precise issue that was tried was whether the Final Judgment in this case could be used in the civil action ("whether the civil action should be carved out") and the Court rejected that assertion by the Smiths on the basis that the allegations in their civil action were for impropriety in the re-engineered life insurance policies, purchase of the new policies, and payment to the consultant, all of which causes of action for breach of fiduciary duty were barred by section 736.1008(2), Florida Statutes. Therefore, Bessemer did not use the Final Judgment improperly in the civil division case, because the issue that was presented to this Court at trial was whether Bessemer should be prohibited from using the Final Judgment in this case in the civil action and the Court refused to grant that relief to the Smiths.

In summary, in the pleadings and at trial the Smiths contended for limitations on the applicability of the Florida Trust Code's six months statute of limitations discharging a Trustee from personal liability for money damages for breach of trust and this Court expressly denied these assertions by the Smiths and fully discharged Bessemer Trust Company of Florida from any liability for accepting Trusteeship of the decanted Trusts, purchase of the life insurance policies and payments to the insurance consultant.

WHEREFORE, the Court denies the Smith Defendants' Motion to Amend Final Judgment.

* * *

Insurance—Declaratory actions—Insured is not entitled to declaratory relief as to meaning of "wear and tear, marring, [or] deterioration" as used in policy where terms are capable of common understanding and not ambiguous—Insured is not entitled to declaratory relief on question of whether coverage should have been afforded for her claim where that issue is covered by count for breach of contract

MICHELE RICHTER, Plaintiff, v. STATE FARM FLORIDA INSURANCE COMPANY, Defendant. Circuit Court, 15th Judicial Circuit in and for Palm Beach County, Civil Division AF. Case No. 2020CA012730AXX. April 20, 2021. John S. Kastrenakes, Judge. Counsel: Benjamin A. Richter, GED Lawyers, LLP, Boca Raton, for Plaintiff. Jeffrey W. Golovin, Dutton Law Group, P.A., Ft. Lauderdale, for Defendant.

ORDER ON DEFENDANT'S S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

THIS CAUSE came before the Court on April 19, 2021 on Defendant's Motion to Dismiss Plaintiff's Amended Complaint, and the Court having reviewed the Motion, Plaintiff's Response in Opposition, having reviewed the court file and record, including the operative Complaint, having heard argument of counsel, and after being otherwise duly advised in the premises, finds as follows:

In Count 2, Plaintiff seeks Declaratory Relief. To establish a cause of action for Declatory Relief, Plaintiff must allege in the complaint as analyzed in conjunction with the insurance policy that there exists a *bona fide* actual, present, or practical need for the declaration. In that regard, the Plaintiff must demonstrate in the complaint or from the insurance policy that the plaintiff is in doubt as to some right or status that the party is entitled to have that doubt resolved by the Court. *See Kelner v. Woody*, 399 So. 2d 35, 37 (Fla. 3d DCA 1981).

In that regard, Plaintiff stated in her Amended Complaint that she is in doubt as to the meaning of "wear and tear, marring, [or] deterioration" as the policy does not define these terms. *See* Amended Complaint ¶¶ 31 and 32. The Court finds that these terms are capable of common understanding and are not ambiguous deserving of court interpretation and declatory relief. *See Ergas v. Universal Property & Casualty Insurance Co.*, 114 So. 3d 286 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D900a]. The only other matter the Plaintiff claims warrants declatory relief is whether coverage should have been afforded to the insured's claim of damages. This claim is covered by the breech of contract claim reflected in count 1. As there are no issues for which declaratory relief is required, this matter is properly heard as a Breach of Contract case and Count 2 of the Plaintiff's Amended Complaint is dismissed. **WHEREFORE**, it is hereby

ORDERED and ADJUDGED that Defendant's Motion to Dismiss Plaintiff's Amended Complaint is **GRANTED IN PART** as follows:

1. As to Count 1 of the Amended Complaint for Breach of Contract, the Motion to Dismiss is **DENIED**. Plaintiff shall file a copy of the insurance policy in the court file. Defendant shall have ten (10) days from the date of this Order to file its answer to the Amended Complaint.

2. As to Count 2 of the Amended Complaint for Declaratory Relief, the Motion to Dismiss is **GRANTED**. Count 2 is **DISMISSED WITH PREJUDICE**.

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose that insured vehicle was being used for business purposes and insured's correct marital status

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. JORGE EPIFANIO CASTRO SR. and ODALYS SANTANA LOPEZ, Defendants. Circuit Court, 20th Judicial Circuit in and for Lee County. Case No. 21-CA-231. April 30, 2021. James R. Shenko, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Odalys Santana Lopez, Pro se, Lehigh Acres, Defendant.

ORDER ON PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AGAINST THE DEFENDANT, ODALYS SANTANA LOPEZ

THIS CAUSE having come before this Court at the hearing on April 19, 2021, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendant, ODALYS SANTANA LOPEZ, 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 named insured Defendant, Jorge Epifanio Castro Sr., and the Defendant, Odalys Santana Lopez, regarding the policy rescission as a result of the insured's material misrepresentation on the application for insurance dated July 4, 2020. Plaintiff rescinded the policy of insurance on the basis that Jorge Epifanio Castro Sr. failed to disclose that that the insured vehicle was being utilized for business purposes of providing home healthcare services and failed to disclose his correct marital status 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 not have accepted the risk nor issued the policy had it known of the business use for the insured vehicle.

Mr. Jorge Epifanio Castro Sr. initially completed an application for a policy of automobile insurance from Direct General Insurance Company on July 4, 2020. Mr. Jorge Epifanio Castro Sr. failed to disclose that the insured vehicle was being utilized for business purposes of providing home healthcare services and failed to disclose his correct marital status when completing the application for insurance. Mr. Jorge Epifanio Castro Sr. 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 (examples include, but are not limited to pizza, newspaper or mail delivery), or emergency response type vehicles or vehicles used for emergency response purposes?

In addition, the insured, Mr. Jorge Epifanio Castro Sr., signed and initialed the Applicant's Statement on 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.

Plaintiff determined that had Jorge Epifanio Castro Sr. provided the proper information at the time of the insurance application then Plaintiff would not have assumed the risk nor issued the insurance policy due to the unacceptable risk. Therefore, Direct General Insurance Company declared the policy void *ab initio* due to material misrepresentation and returned the paid premiums to Jorge Epifanio Castro Sr. 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 Epifanio Castro Sr., 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.

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 February 8, 2021, the named insured, Jorge Epifanio Castro Sr., entered into a Stipulation for Consent Judgment, confirming that he failed to disclose that the insured vehicle was being utilized for business purposes of providing home healthcare services at the time of the application for insurance dated July 4, 2020. In addition, Jorge Epifanio Castro Sr., stipulated that he failed to disclose his correct marital status at the time of the application for insurance. Specifically, Jorge Epifanio Castro Sr. admitted the following information in his Stipulation for Consent Judgment:

> On July 4, 2020, I, JORGE EPIFANIO CASTRO SR., failed to disclose that the insured vehicle was being utilized for the business purposes of providing home healthcare services and failed to disclose my correct marital status at the time of the application for insurance.
>
> On July 4, 2020, I understood all of the questions on the application for insurance and I signed the application for insurance.

On February 10, 2021, this Court entered an Order granting the Plaintiff, Direct General Insurance Company's Motion for Final Consent Judgment against Jorge Epifanio Castro Sr.

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. 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 undisclosed business use as the terms were unambiguous within the application.

Analysis Regarding Whether the Undisclosed Business or Commercial Use 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 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 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, 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 Epifanio Castro Sr., 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 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 (Jorge Epifanio Castro Sr.) to disclose the business use of the insured vehicle and his correct marital status at the time of the policy inception. In addition to providing a "NO" response to application question #8, the applicant (Jorge Epifanio Castro Sr.) 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 Jorge Epifanio Castro Sr. on the application for insurance. Since the Carrier relied on the representations by Jorge Epifanio Castro Sr. 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 Jorge Epifanio Castro Sr. subsequently claimed that the "agent did not ask" the questions on the application since Jorge Epifanio Castro Sr. signed the application which is a legal contract and thus, Jorge Epifanio Castro Sr. is bound by the terms and conditions of the contract. Further, the Defendant, Jorge Epifanio Castro Sr., did not establish any proof of coercion, duress, and/or fraud in the inducement during the application process.

In addition, since Jorge Epifanio Castro Sr. 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.

Conclusion

This Court finds that the Plaintiff, Direct General Insurance Company's application for insurance unambiguously required Defendant, Jorge Epifanio Castro Sr., to disclose that the insured vehicle was being used for business purposes (and to disclose his correct marital status), that Plaintiff provided the required testimony to establish that Jorge Epifanio Castro Sr.'s failure to disclose the business use of the insured vehicle and his correct marital status was a material misrepresentation because Plaintiff would not have assumed the risk nor issued the insurance policy, and thus Plaintiff properly rescinded the subject policy of insurance. Consequently, Plaintiff properly denied coverage for the loss at issue.

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

a. Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against Defendant, ODALYS SANTANA LOPEZ, is hereby **GRANTED**.

b. This Court ***hereby enters final judgment*** for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendant, ODALYS SANTANA LOPEZ.

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, the Stipulation for Consent Judgment by Jorge Epifanio Castro Sr., the Motion for Final Summary Judgment and in the Affidavit of Rose Chrustic, are not in dispute, which are as follows:

e. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # XXXXXX2089, 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, JORGE EPIFANIO CASTRO SR., stipulated that he failed to disclose the business use of the insured vehicle and that he failed to disclose his correct marital status at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # XXXXXX2089, issued by DIRECT GENERAL INSURANCE COMPANY;

h. The Defendant, JORGE EPIFANIO CASTRO SR., failed to disclose and failed to report any business use or commercial use of the insured vehicle and failed to disclose correct marital status at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # XXXXXX2089, issued by DIRECT GENERAL INSURANCE COMPANY;

i. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # XXXXXX2089, is rescinded and is void *ab initio*;

j. The material misrepresentation of Defendant, JORGE EPIFANIO CASTRO SR. on the application for insurance dated July 4, 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 # XXXXXX2089, issued by DIRECT GENERAL INSURANCE COMPANY;

k. There is no insurance coverage for the named insured, JORGE EPIFANIO CASTRO SR. for any bodily injury liability coverage, property damage liability coverage, personal injury protection benefits coverage, comprehensive coverage and collision coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

l. There is no insurance coverage for the Defendant, ODALYS SANTANA LOPEZ, for any bodily injury liability coverage, property damage liability coverage, personal injury protection benefits coverage, comprehensive coverage and collision coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

m. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, JORGE EPIFANIO CASTRO SR., for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

n. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the Defendant, ODALYS SANTANA LOPEZ, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

o. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ODALYS SANTANA LOPEZ, for any bodily injury claim for Ammi Santana Isaac arising from the accident of August 17, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

p. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ODALYS SANTANA LOPEZ, for any bodily injury claim for Ruth Isaac, a minor, arising from the accident of August 17, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

q. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ODALYS SANTANA LOPEZ, for any bodily injury claim for Victor Lee Gutierrez arising from the accident of August 17, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

r. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ODALYS SANTANA LOPEZ, for any bodily injury claim for Irma Morales Jose arising from the accident of August 17, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

s. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ODALYS SANTANA LOPEZ, for any bodily injury claim for Ana Jose, a minor, arising from the accident of August 17, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

t. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ODALYS SANTANA LOPEZ, for any bodily injury claim for Carlos Cruz, a minor, arising

from the accident of August 17, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

u. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ODALYS SANTANA LOPEZ, for any bodily injury claim for Jessica Ann Busse arising from the accident of August 17, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

v. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ODALYS SANTANA LOPEZ, for any property damage claim for Mary Ann Josephine Rivera arising from the accident of August 17, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

w. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ODALYS SANTANA LOPEZ, for any property damage claim for Irma Morales Jose arising from the accident of August 17, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

x. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ODALYS SANTANA LOPEZ, for any property damage claim for Jessica Ann Busse arising from the accident of August 17, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

y. There is no personal injury protection ("PIP") insurance coverage for ODALYS SANTANA LOPEZ, for the accident which occurred on August 17, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

z. There is no collision insurance coverage for ODALYS SANTANA LOPEZ for the accident which occurred on August 17, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

aa. There is no comprehensive insurance coverage for ODALYS SANTANA LOPEZ for the accident which occurred on August 17, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

bb. 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 August 17, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # XXXXXX2089;

cc. There is no obligation to provide Personal Injury Protection benefits coverage to Bonett Medical Center, Corp. for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on August 17, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # XXXXXX2089;

dd. There is no obligation to provide Personal Injury Protection benefits coverage to Cleveland Radiology Center, Inc. for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on August 17, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # XXXXXX2089;

ee. The Defendant, ODALYS SANTANA LOPEZ, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089, for the August 17, 2020 accident;

ff. There is no insurance coverage for the motor vehicle accident which occurred on August 17, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

gg. There is no personal injury protection ("PIP") insurance coverage for the accident which occurred on August 17, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

hh. There is no bodily injury liability coverage for the accident which occurred on August 17, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

ii. There is no property damage liability coverage for the accident which occurred on August 17, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

jj. There is no comprehensive coverage for the accident which occurred on August 17, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

kk. There is no collision coverage for the accident which occurred on August 17, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2089;

ll. Since the policy of insurance issued to the Defendant, JORGE EPIFANIO CASTRO SR., bearing policy # XXXXXX2089, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from ODALYS SANTANA LOPEZ, Ammi Santana Isaac, and Ruth Isaac, a minor, to any medical provider, doctor and/or medical entity is void;

mm. Since the policy of insurance issued to the Defendant, JORGE EPIFANIO CASTRO SR., bearing policy # XXXXXX2089, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from ODALYS SANTANA LOPEZ, Ammi Santana Isaac, and Ruth Isaac, a minor, to Bonett Medical Center, Corp. is void;

nn. Since the policy of insurance issued to the Defendant, JORGE EPIFANIO CASTRO SR.,bearing policy # XXXXXX2089, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from ODALYS SANTANA LOPEZ, Ammi Santana Isaac, and Ruth Isaac, a minor, to Cleveland Radiology Center, Inc. is void.

* * *

Criminal law—DUI manslaughter—Evidence—Statements of defendant—Defendant's responses to questions asked after *Miranda* warnings were given and defendant had agreed to answer questions are admissible—No merit to claim that DUI investigator did not advise defendant that he was conducting criminal investigation—Furthermore, it was not necessary to specifically advise defendant that accident investigation was over and criminal investigation was beginning where *Miranda* warnings had been given—Fact that DUI investigator asked some questions that had also been asked during accident investigation did not amount to impermissible two-step interrogation technique where there was no intent to deliberately undercut requirements of *Miranda*—No merit to claim that defendant was coerced into answering DUI investigator's questions because he was led to believe that he would not be arrested if he answered question where investigator only advised that defendant was not under arrest at that time, and defendant was released from scene without arrest that night—Questions necessary to administration of field sobriety exercises were not designed to elicit incriminating responses—Motion to suppress denied

STATE OF FLORIDA, Plaintiff, v. GLENN WILLIS BRIMMER, Defendant. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2018-CF-028322-AXXX-XX. January 2, 2021. Robin C. Lemonidis, Judge. Counsel: Ben Fox, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Stuart Hyman, Orlando, for

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS CONFESSIONS, STATEMENTS, AND ADMISSIONS

THIS CAUSE came before the Court upon the Defendant's Motion to Suppress Confessions, Statements and Admissions filed April 11, 2019. Testimony and evidence pertaining to this Motion, as well as to a number of other motions, were presented over the course of four hearing dates held on December 6, 2019, January 16, 2020, October 21, 2020, and November 24, 2020. Closing Arguments on the Motion were presented on November 24, 2020. Having considered said Motion, and having considered the testimony, evidence, and arguments presented on the Motion, and being otherwise fully advised in the premises, the Court finds as follows.

The instant case is a DUI Manslaughter case arising out of a traffic crash in which the Defendant allegedly crashed into a bicyclist on A1A in Cape Canaveral in Brevard County. The instant Motion is based on alleged violations of the *Miranda* custodial interrogation doctrine and the accident report privilege.

As to the issue of custody, the Court finds that based on the totality of circumstances, the Defendant was never in custody at the scene of the investigation. A person is "in custody" for purposes of the Florida and United States Constitution "if a reasonable person placed in the same position would believe that his or her freedom of action was curtailed to a degree associated with actual arrest." *Traylor v. State,* 596 So.2d 957, 966, n.16 (Fla. 1992). This can also be referred to as "the functional equivalent of a formal arrest." *See, e.g., M.W.H. v. State,* 958 So.2d 1022, 1024 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D1410a]. Because the Defendant was never arrested or subjected to treatment that would amount to the "the functional equivalent of a formal arrest," he was never in custody during his interactions with law enforcement that night. *See, e.g., Young v. State,* 270 So.3d 471 (holding that defendant was not in custody even though he was held at gunpoint after high speed chase).

Although Deputy Kennedy, the first law enforcement officer to arrive on scene, pulled the Mr. Brimmer off of the victim and asked the Defendant to move out of the street to a nearby sidewalk, this does not amount to "the functional equivalent of a formal arrest." In fact, once the Defendant walked to the sidewalk, no show of authority was ever made by Deputy Kennedy, particularly not of the type that could be deemed the functional equivalent of arrest.

The Court finds the same conclusion applies to all other law enforcement officers in this case.

With regard to the interrogation issue and the impact of the accident report privilege, the State has conceded that Deputy Lakeman's questioning of the Defendant is not admissible because those questions were asked and the answers were given explicitly for purposes of the accident investigation. However, as to Agent's Haas's questioning of the Defendant, the Defendant was read *Miranda* warnings and agreed to answer questions. Thus, those answers were obtained in compliance both with *Miranda* and with the requirements of the accident report privilege.

As to any questions asked by Lt. Moros when requesting and administering the field sobriety exercises, none of these questions were designed to elicit an incriminating response; rather, they were part of the "necessarily attendant to the legitimate police procedure" of the field sobriety exercises. *See, Pennsylvania v. Muniz,* 496 U.S. 582, 605 (1990) (questions asked during field sobriety tests and breath test regarding whether defendant understood instructions and wished to submit to the tests constituted "limited and focused inquiries" that were "necessarily attendant to the legitimate police procedure, [citation omitted], and were not likely to be perceived as calling for any incriminating response."). (Internal quotations omitted)

Defendant also argues that despite providing *Miranda* warnings, Agent Haas never told the Defendant that the accident investigation was over and the criminal investigation was beginning; therefore, according to the Defendant, the accident report privilege was violated. This Court disagrees. Agent Haas did tell the defendant that he was taking over the investigation and that he knew that the Defendant had talked to Deputy Lakeman about the crash but that Haas was "doing more of a criminal investigation." His next act was to read the Defendant his *Miranda* rights.

In any event, although the customary practice is to advise the accident investigation is "over" and a criminal investigation has begun, these exact words need not be used as long as *Miranda* warning are provided before the questions are asked for criminal investigation purposes and the defendant is not led to believe that he must answer those questions. For example, in *State v. Norstrom,* 613 So.2d 437 (Fla. 1993), the officer told the defendant that she was "gonna kinda change hats" but did not explain to the defendant what that term meant, even though she testified that the "changing hats" remark was a way to "signify to [the defendant] that she was going from the accident portion of the investigation into the criminal portion of the investigation." 613 So.2d at 439. Additionally, the defendant's statements were made "while the investigating officer was proceeding in the accident investigation phase of the incident, as distinguished from the criminal investigation of the incident." *Id.* The Florida Supreme Court noted that the district court of appeal below had ruled, similar to what the Defendant contends in the instant case, that "the *Miranda* warnings alone did not change the nature of the investigation from accident to criminal to allow for the admission of Norstrom's statements." *Id.* But the Supreme Court disagreed, stating:

> As noted by the district court, the record reflects that Norstrom was never advised that he had to answer questions regarding the accident. Further, there is no evidence in this record that Norstrom believed he had to answer questions to provide accident information to the investigating officer. In fact, rather than being told that he must provide accident information to the investigating officer, Norstrom was informed of his *Miranda* rights, which included the right to remain silent. The record establishes that Norstrom expressly waived his right to remain silent.

Id. at 440.

Norstrom is directly on point. As in *Norstrom,* here: (1) the Defendant was never advised by Agent Haas that he had to answer questions regarding the accident; (2) there is no evidence in this record that the Defendant believed he had to answer questions to provide accident information to Agent Haas; and (3) rather than being told that he must provide accident information to Agent Haas, the Defendant was informed a criminal investigation was now taking place, punctuated by the reading of his *Miranda* rights, which included the right to remain silent.

Defendant also argues that because Agent Haas asked some questions during his criminal investigation that Deputy Lakeman had already asked during his crash investigation, that such actions amounted to an impermissible "two-step question-first, warn-later policy." *See, e.g., Jump v. State,* 983 So.2d 726 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D1494a]; *Tengbergen v. State,* 9 So.3d 729 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D808a]. However, both of these cases make it clear that *post-Miranda* statements will not be suppressed unless the two-step interrogation technique was used in a calculated manner to deliberately undercut the requirements of *Miranda.* Here, the officers did exactly what they were supposed to do in accordance with the requirements of the accident report privilege: First, questions were asked during the accident investigation which the State has conceded are not admissible pursuant to the accident

report privilege. Then, questions were asked by a different deputy during the criminal investigation, and only after *Miranda* warnings were provided and the Defendant agreed to answer questions. There was no intent to deliberately undercut the requirements of *Miranda.* Agent Haas even went so far as to not ask Deputy Lakeman anything about what Deputy Lakeland had asked or learned during his accident investigation questions.

Finally, the defendant argues that he was coerced into answering Agent Haas's questions. His argument focuses on the claim that Agent Haas led the Defendant to believe that he was not going to be arrested if he answered the questions. However, this is a misconstruction of the actual conversation. The Defendant asked at one point: "Am I being arrested?"—as opposed to "Am I *going* to be arrested." (Emphasis added). Agent Haas answered the question correctly by saying: "You're not being arrested." The Court finds that there was no intent to mislead the Defendant. In fact, consistent with Agent Haas's answer, the Defendant was released from the scene and was not arrested that night.

Based on the totality of the circumstances, the Court finds the statements to Agent Haas were made freely and voluntarily.

THEREFORE, it is **ORDERED AND ADJUDGED** that the Defendant's Motion to Suppress Confessions, Statements and Admissions is **DENIED**.

* * *

Criminal law—DUI manslaughter—Search and seizure—Investigatory stop—Defendant who fatally struck bicyclist with his vehicle was not seized for Fourth Amendment purposes when deputy moved defendant to side of road to calm him down and prevent him from throwing himself back on top of victim being worked on by EMS where deputy was not investigating crash at time and did not question defendant about crash or his level of impairment—Deputy's actions were reasonable community caretaking function—Deputy's subjective thought that he wanted to keep defendant on scene for crash investigation did not result in seizure where thought was not conveyed to defendant—If moving defendant to side of road was seizure, seizure was justified by reasonable suspicion that defendant was driver, inferred from totality of circumstances—Deputy response to defendant affirming that defendant needed to fill out police report, did not result in seizure; but, if it did, deputy had reasonable suspicion warranting seizure at that time based on defendant's spontaneous admission that he had "run somebody over...today"—Blood draw—Agent had probable cause to order blood draw where eyewitness observed defendant drinking and stumbling in bar and driving dangerously and crashing thereafter, deputies observed that defendant had multiple indicia of impairment, and crash caused death of victim—Determination of extent to which defendant was at fault in accident was not prerequisite to blood draw—Exigent circumstances permitted warrantless blood draw where crash resulting in death occurred at night in midst of street party that caused significant delays in processing scene, and preparation of affidavit and obtaining warrant at night would have resulted in additional delay in obtaining blood draw—No basis to suppress field sobriety exercises to which defendant consented and which were performed after probable cause for blood draw was established—Seizure of beer bottle from defendant's vehicle was lawful where defendant authorized deputies to enter vehicle to retrieve his phone and ID, and bottle was in open view in vehicle—Motion to suppress denied

STATE OF FLORIDA, Plaintiff, v. GLENN WILLIS BRIMMER, Defendant. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2018-CF-028322-AXXX-XX. January 2, 2021. Robin C. Lemonidis, Judge. Counsel: Ben Fox, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Stuart Hyman, Orlando, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE came before the Court upon the Defendant's Motion to Suppress filed April 11, 2019. Testimony and evidence pertaining to this Motion, as well as to a number of other motions, were presented over the course of four hearing dates held on December 6, 2019, January 16, 2020, October 21, 2020, and November 24, 2020. Closing Arguments on the Motion were presented on November 24, 2020. Having considered said Motion, and having considered the testimony, evidence, and arguments presented on the Motion, and being otherwise fully advised in the premises, the Court finds as follows.

The instant case is a DUI Manslaughter case arising out of a traffic crash in which the Defendant allegedly crashed into a bicyclist on A1A in Cape Canaveral in Brevard County. The instant Motion is based on search and seizure grounds and specifically raised a number of separate theories based on Fourth Amendment principles.[1] This Order will address each ground separately.

I. Defendant's argument that Defendant was seized without reasonable suspicion to detain him

Defendant contended that he was seized by law enforcement and that the seizure was not supported by reasonable suspicion. Defendant argued that the evidence of impairment was insufficient to rise to the standard of reasonable suspicion and that the State never presented any evidence that the Defendant was the driver of a vehicle, other than the statements made by the Defendant which, according to the Defendant, were protected by the accident report privilege.

With regard to the evidence of impairment, the Court disagrees with the Defendant that the State's evidence was insufficient. Deputy Kennedy, who was the first law enforcement officer on scene, testified that he smelled an odor of alcohol coming from the Defendant's person, that Defendant had trouble standing at times—and in fact, had to use the lamp post at the edge of the road to maintain his balance—and that the Defendant had glassy eyes.[2] These factors were more than sufficient to provide reasonable suspicion of impairment. *See, e.g., Origi v. State,* 912 So.2d 69 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a] (reasonable suspicion where defendant was speeding, smelled of alcohol, and had bloodshot eyes); *State v. Jimoh,* 67 So.3d 240, 241 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D2469a] (reasonable suspicion where defendant observed sitting in the driver's seat of her parked car with the engine running and the headlights on, "slumped over" steering wheel, driver's side window was open and the deputies detected a strong odor of alcohol coming from the car); "); *Carder v. State of Fla., Dep't of Highway Safety & Motor Vehicles,* 15 Fla. L. Weekly Supp. 547a, n. 2 (Fla. 9th Cir. Ct. Sept. 4, 2007) (stating that combination of defendant's bloodshot, glassy eyes and odor of alcohol provided reasonable suspicion to request that Carder submit to field sobriety tests, even if her speech was not slurred); *Lynch v. Dep't of Highway Safety & Motor Vehicles,* 14 Fla. L. Weekly Supp. 328b (Fla. 9th Cir. Ct. Feb. 8, 2007) (holding that "the combination of sluggish movements, sluggish speech, and speeding are sufficient to provide the trooper with reasonable suspicion that Petitioner was driving under the influence").

With regard to the driving element, the State pointed out in its closing argument that the Defense in its initial closing argument had failed to even mention the eyewitness, Jose Frias. Mr. Frias's audiotaped sworn statement was introduced into evidence during Agent Haas's testimony. Mr. Frias saw the Defendant drinking, stumbling, and acting unruly in the bathroom of the Cocoa Beach Pier. He then saw the Defendant leave the Cocoa Beach Pier at about the same time he did, observed the Defendant driving a vehicle in a dangerous manner, and saw the Defendant's driving pattern right up

until the point where the crash occurred. He also saw the Defendant trying to leave in his damaged vehicle, but his vehicle got blocked from leaving by other vehicles. At that point, he saw the Defendant get out of his vehicle and start to shake the man lying in the road trying to pick him up.

In rebuttal closing argument, the Defense argued that Mr. Frias had no relevance to this discussion because he didn't testify at the hearing and was not subject to cross-examination. Further, the Defense argued that nothing showed that Mr. Frias was a credible witness and that he may have been acting out of unhappiness due to the confrontation he had with the defendant earlier at the Cocoa Beach Pier. The Court is unpersuaded by the Defense arguments regarding Mr. Frias. Hearsay is admissible in a suppression hearing. *See, Hayward v. State,* 24 So. 3d 17, 37 (Fla. 2009) [34 Fla. L. Weekly S486a] (statement of witness to police that the assailant was a black man with a bleeding left hand who fled the murder scene in direction of rooming house, together with victim's statement that he had shot his assailant provided probable cause to arrest defendant; Court explained that "[h]earsay can be used to establish probable cause to arrest, even though it may not be used at trial."); *Taylor v. State,* 845 So. 2d 301, 303 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D1184a] ("The content of a [BOLO] dispatch is often relevant at a pretrial suppression hearing to help establish that an officer acted with reasonable suspicion or probable cause, but it typically plays no role in establishing the elements of the offense at trial."). *See also, State v. Littles,* 68 So.3d 976, 978 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D1952b] ("We also note that 'hearsay evidence is admissible in suppression hearings.' *J.D. v. State,* 920 So.2d 117, 118 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D296b] (*citing Lara v. State,* 464 So.2d 1173, 1177 (Fla.1985); *State v. Cortez,* 705 So.2d 676, 679 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D324a])).

Moreover, because Mr. Frias provided his name and contact information and spoke to Agent Haas in person, he qualifies as a citizen informant, whose credibility and reliability are presumed. *State v. Evans,* 692 So.2d 216, 219 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D912a]; *Castella v. State,* 959 So.2d 1285, 1290 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1784a]. *See also, Baptiste v. State,* 995 So.2d 285, 291 (Fla. 2008) [33 Fla. L. Weekly S662a] ("[A] face-to-face tip may be viewed as more reliable because the officers who receive the tip have the opportunity to observe the demeanor and evaluate the credibility of the person offering the information.").

Defendant argued nevertheless that he was seized when he was initially contacted by Deputy Kennedy and that the seizure was not supported by reasonable suspicion that the Defendant was the driver of the vehicle involved in the crash. In response, the State argued that Defendant was not seized by Deputy Kennedy *for Fourth Amendment purposes,* and that even if he were, the seizure was supported by reasonable suspicion that Defendant was the driver based on the totality of the circumstances. These opposing arguments require a close evaluation of the testimony and evidence relating to Deputy Kennedy.

Deputy Kennedy testified that on March 2, 2018, at about 7:42 p.m., he was driving southbound on A1A in Cape Canaveral when he saw a group of cars stopped in the middle of the road. He then parked his patrol vehicle in the middle of the road and got out to see what was going on. He walked southbound toward the group of cars where people were standing outside their vehicles. He asked what was going on and the group told him that there was an accident, although he couldn't see any cars that were involved in an accident. The group told him that it happened a little further down the road, so he continued to walk southbound.

Deputy Kennedy then observed a vehicle with a windshield "busted in" but nobody was in the immediate vicinity of the vehicle. As he continued to walk, people told him there was someone who had been hit by a vehicle a little further down A1A. People told him that the vehicle with the busted windshield was the vehicle that had hit the person. He continued to walk further south and came across a group of people huddled around someone lying on the ground. People were saying that this was the person who had been hit. They were also saying he wasn't breathing, so Deputy Kennedy ran back to his vehicle to retrieve his AED (Automated Electronic Defibrillator).

However, Deputy Kennedy was unable to make use of the AED because there was someone (whom Deputy Kennedy later identified as the Defendant, Glenn Brimmer) laying on top of the man who had been hit. Deputy Kennedy told the Defendant to get off the man but the Defendant did not listen. The Defendant was distraught and upset, and crying over the man on the ground. Knowing that the man on the ground might not be breathing, Deputy Kennedy then had to pull the Defendant off the man who was lying in the middle of the road.

Deputy Kennedy tried to calm the Defendant down because he was very emotional.[3] At this time, Deputy Kennedy and the Defendant were still in the middle of the road and cars were piling up at the location. Based on this concern, and in order to ensure that the Defendant would not go back to where the man was lying in the road, Deputy Kennedy asked the Defendant to move out of street, due to increasing commotion around the crash. They walked to the nearest sidewalk, which happened to be a corner, about 25 feet from where the man was lying in the road. Deputy Kennedy was not investigating anything at that point, but he was told over his radio that crash investigators would be coming to the scene. EMS units quickly arrived and began working on the man lying on the ground. Other law enforcement officers also arrived on scene but most were dealing with traffic control. Deputy Kennedy testified that he was standing with the Defendant at the sidewalk for about an hour or so. The Deputy documented this time spent with Mr. Brimmer by activating his pocket digital recorder, which remained active throughout the time spent standing on this corner together. During this time, the Defendant was rambling on to Deputy Kennedy about various topics, but mostly about his love of surfing and his philosophy on life.[4]

Because Deputy Kennedy was not investigating the crash, he did not ask any questions that were pertinent to the crash or to the Defendant's level of impairment. During this 54 minute rambling, the Defendant spontaneously made the following two admissions: (1) when he came in from surfing on that day, he went up on the pier and started drinking and got a "good buzz on" and (2) "you run somebody over like I did today, you . . . pick 'em up."[5]

Based on the totality of these facts, the Court finds that Deputy Kennedy never seized the Defendant for any Fourth Amendment purpose. The test for whether a person has been seized for Fourth Amendment purposes is "whether the officer's words and actions would have conveyed to a reasonable person that he or she was not free to leave." *State v. Jenkins,* 616 So.2d 173, 174 (Fla. 2d DCA 1993) (citing *United States v. Mendenhall,* 446 U.S. 544 (1980)). This is an objective test that "look[s] to the reasonable man's interpretation of the [police] conduct in question." *State v. Gentry,* 19 So.2d 389, 391 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D1276b] (quoting *Michigan v. Chesternut,* 486 U.S. 567, 574 (1988).

Here, other than the possible issue of taking the Defendant away from the victim (which issue will be addressed later in this Order), the Defendant was never seized by Deputy Kennedy for Fourth Amendment purposes. Rather, Deputy Kennedy merely stood next to the Defendant while the Defendant rambled on and on. Deputy Kennedy, an obviously young, medium height, slim-build mild-mannered deputy, never displayed any show of authority during this time. As Deputy Kennedy testified, the only questions he asked were innocuous ones just to keep the Defendant's "mind off everything that was going on." Deputy Kennedy never brought up the crash or any role the

Defendant might have had in it. Thus, nothing Deputy Kennedy said while the two stood on the sidewalk reasonably demonstrated that Defendant was required to remain there.

The Defendant argued that Deputy Kennedy acknowledged that he wanted to keep the Defendant on scene until the investigators arrived and further acknowledged that according to Deputy Kennedy, the Defendant wasn't "free to go to anywhere" because of the impending crash investigation. However, these subjective thoughts in Deputy Kennedy's mind were never communicated to the Defendant. Thus Deputy Kennedy presented no "words or actions" that "conveyed to a reasonable person that he or she was not free to leave." *Jenkins, supra. See also, Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *G.M. v. State,* 19 So.3d 973 (Fla. 2009) [34 Fla. L. Weekly S568a] (officers' activating emergency lights when stopping behind juvenile's vehicle was not a seizure because juvenile was unaware that lights were on; juvenile only became aware of police when officer actually appeared at the vehicle's window, and seizure did not occur until officer identified himself and ordered juvenile to spit out marijuana, by which point officer had witnessed juvenile in possession of marijuana and thus probable cause existed for an arrest); *Snead v. State,* 913 So.2d 724, 726 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2486a] ("The proper inquiry is not the unarticulated plan of the law enforcement officers, but rather how a reasonable person in the suspect's position would have perceived the situation.").

Defendant also argued that he reasonably believed that he was seized by Deputy Kennedy because the recording introduced into evidence shows, according to Defendant, that Kennedy repeatedly told the Defendant that they had to wait because officers were doing investigations. However, this is a mischaracterization of the recording. This Court's review of the recording demonstrates that Deputy Kennedy never told the Defendant that they, or the Defendant himself, had to wait at the scene. It is true that late in the audio, near the 41 minute mark, the Defendant asked, perhaps in response to all the law enforcement traffic control activity going on in the area, "do I have to fill out a police report at some point?" and Deputy Kennedy responded, "yeah, someone's going to be over here; you're gonna be able to fill something out." However, the Court finds that the Defendant's question and Deputy Kennedy's answer[6] did not convert the interaction into a detention for Fourth Amendment purposes. Rather, it supports the State's argument that the Defendant had a duty to report an accident in which he had been involved pursuant to section 316.062 and 316.027, Florida Statutes (2018), and the Defendant was merely inquiring about this duty.

Moreover, even assuming that this question and answer about filling out a police report does create a detention for Fourth Amendment purposes, Deputy Kennedy had objectively developed reasonable suspicion that the Defendant was the driver in the crash because approximately 6 minutes before this question and answer, the Defendant had spontaneously told Deputy Kennedy that he had "run somebody over . . . today."[7]

As to Deputy Kennedy's taking the Defendant away from the victim, the Court finds that this action was a reasonable community caretaking function, even without a reasonable suspicion of criminal activity, based on Deputy Kennedy's concern for the safety of both the victim and the Defendant. *See, Gentles v. State,* 50 So.3d 1192, 1198 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2900a] (even without reasonable suspicion of criminal activity, a temporary detention may be based on an officer's discharge of his "community caretaking" duties) (citing *Cady v. Dombrowski,* 413 U.S. 433, 441 (1973) and *Lightbourne v. State,* 438 So.2d 380, 388 (Fla.1983)); *Shively v. State,* 61 So.3d 484, 486 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1111b] (off-duty sheriff's deputy's instruction to defendant to back out of exit lane of parking garage and pull over against garage wall did not constitute an investigatory stop and, thus, was not required to be supported by reasonable suspicion; deputy, who was providing security in the parking garage, was exercising a "community caretaking" function, in that he was summoned when defendant had trouble using the token machine and exiting the garage, which impeded the traffic flow); *Castella v. State,* 959 So.2d 1285, 1292-93 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1784a] (deputies were justified in stopping defendant's boat even without a reasonable suspicion of criminality based on the community caretaking doctrine; officers needed to obtain any information they could about boating accident, its location, and its aftermath to rescue injured and to protect public from dangers resulting from accident, although defendant's boat itself may not have represented danger, it was instrumental to resolving a potential danger, and "law enforcement could reasonably believe that its interest in protecting public safety by obtaining additional information necessary to manage the aftermath of the potentially life-threatening accident outweighed Castella's interest in being free from arbitrary governmental interference").

In the instant case, the Defendant was in the middle of the road, distraught and upset, clinging to and crying over the victim lying on the ground who was reported to be not breathing. Cars were piling up at the location. Faced with this obvious public safety concern, Deputy Kennedy's action of moving the Defendant onto a nearby sidewalk was a reasonable exercise of community caretaking. Deputy Kennedy's action could properly ensure that the Defendant would not go back to where the victim was lying in the road, where he could be treated by EMS personnel and could properly prevent Defendant from getting hit by a passing vehicle. Such concerns and actions outweighed Fourth Amendment interests under such circumstances. Additionally, these actions were temporary (*see, Gentles, supra,* at 50 So.3d 1198 ("a *temporary* detention may also be based on an officer's discharge of his 'community caretaking' duties)), and as previously explained, no further words or actions thereafter by Deputy Kennedy "conveyed to a reasonable person that he or she was not free to leave." *Jenkins, supra.*

In any event, even assuming that Deputy Kennedy did "seize" the Defendant for Fourth Amendment purposes when he escorted the Defendant 25 feet away from the victim, this Court finds that Deputy Kennedy did have reasonable suspicion to believe that the Defendant was the driver at that time based on the totality of the circumstances. Reasonable suspicion is "a less demanding standard than that for probable cause, and considerably less than proof of wrongdoing by a preponderance of the evidence." *Johnson v. State,* 696 So.2d 1271, 1273, n.2, (Fla. 5th DCA 1997) [22 Fla. L. Weekly D1650b], *citing United States v. Sokolow,* 490 U.S. 1, 7 (1989). As stated by the Fifth District Court of Appeal: "Although not precisely delineated, the minimum level of justification for an investigatory stop has been described as something more than a 'mere hunch.' " *Wallace v. State,* 8 So.3d 492, 494 (Fla. 5th DCA 2009) [34 Fla. L. Weekly D925b], *citing, U.S. v. Arvizu,* 534 U.S. 266, 274 (2002) [15 Fla. L. Weekly Fed. S81a].

Here, Deputy Kennedy knew that the vehicle with the "busted in" windshield had struck the man lying in the road, but nobody was in the immediate vicinity of that vehicle. He saw the Defendant in the middle of the road, distraught and upset, hugging and crying over the victim lying on the ground. It was objectively reasonable for Deputy Kennedy to infer, and "more than a mere hunch" that the Defendant was the person who had left that vehicle and approached the dying victim and react in such an overly emotional state. While it is possible to infer innocent explanations, such as perhaps the Defendant was a friend or family member of the victim, "[a] determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct." *United States v. Arvizu,* 534 U.S. 266, 277

(2002) [15 Fla. L. Weekly Fed. S81a]. Accordingly, Deputy Kennedy's actions were reasonable and warranted. *See also, State v. Jimoh,* 67 So.3d 240 ("innocent behavior will frequently provide the basis for a showing of probable cause; . . . in making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts. That principle applies equally well to the reasonable suspicion inquiry." (citing *United States v. Sokolow,* 490 U.S. 1, 9-10 (1989)) (internal quotations omitted).[8]

Accordingly, for all these reasons, this Court rejects the Defendant's argument that he was seized by law enforcement and that the seizure was not supported by reasonable suspicion.

Probable cause for the blood draw

Defendant contended that Agent Haas did not have probable cause to order the Defendant's blood draw. This Court disagrees.

Probable cause requires only that "a reasonable officer could conclude" that "there was a 'substantial chance of criminal activity.' " *District of Columbia v. Wesby,* 138 S.Ct. 577, 578 (2018) [27 Fla. L. Weekly Fed. S37a], quoting *Illinois v. Gates,* 462 U.S. 213, 244, n. 13 (1983). By the time the blood draw was ordered in this case, law enforcement officers already possessed abundant evidence of impairment. This included eyewitness Frias's observations of Defendant drinking and stumbling in the bathroom of the Cocoa Beach Pier and carrying a Corona beer bottle, Defendant's dangerous driving pattern, and a distant view of the crash itself. Moreover, law enforcement officers made their own observations of Defendant's many signs of impairment, including Defendant's smell of alcohol, glassy eyes, difficulty standing at times (including leaning on the lamp post for support), and a constantly changing wide range of emotions (chatty, aggressive, euphoric, laughing, crying, etc.). These indicators of impairment, plus the preliminary knowledge of the circumstances of the crash easily satisfy the standard of probable cause to draw blood. *See, DHSMV v. Possati,* 866 So.2d 737 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D375a] (smell of alcohol on driver's breath, his observably bloodshot and watery eyes, and fact that driver had just crashed his car into a parked police vehicle, were more than sufficient to establish probable cause of DUI); *State v. Palazzotto,* 988 So.2d 123 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D1854a] (Court found probable cause to draw blood based on speed that defendant was driving, violent behavior at the hospital, and odor of alcohol); *Jackson v. State,* 771 So.2d 916 (Fla. 1st DCA 1984); *Silver v. State,* 498 So.3d 580 (Fla. 4th DCA 1986) (police officer had probable cause to order blood draw based on smell of alcohol on driver's breath and knowledge of circumstances of the crash that resulted in a death, notwithstanding that the driver did not appear to be intoxicated and notwithstanding the officer's personal belief that she did not have probable cause to arrest him).

The State has also properly pointed out that though a full investigation was still ongoing regarding the extent to which the Defendant was at fault in the crash, such determination of "fault" is not necessary the purpose of probable cause to draw blood under Florida Statute section 316.1933 (2018). In *State v. Quintanilla,* 276 So.3d 941 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1764a], the Court explained:

> The statute requires "a law enforcement officer [to have] probable cause to believe that **a motor vehicle** driven by or in the actual physical control of a person under the influence of alcoholic beverages . . . **caused** the death or serious bodily injury of a human being," prior to compelling a blood draw. § 316.1933(1)(a), Fla. Stat. (2019) (emphasis added). By the plain statutory language, the motor vehicle, rather than 'the person driving or in actual physical control of the motor vehicle,' must have caused the death or serious bodily injury. Accordingly, the statute is devoid of any requirement that the State establish a nexus between driver fault and the death or serious bodily injury, prior to the blood draw."

276 So.3d at 948 (emphasis by the Court). In the instant case, it was clear that the vehicle with the smashed windshield had caused the death or serious injury to the victim, even though a full determination of "fault" was ongoing.

Law enforcement's failure to obtain a search warrant prior to obtaining the blood draw

Defendant contended that the failure of the deputies to obtain a search warrant prior to ordering the blood draw violates the Defendant's Fourth Amendment right. The State submitted exigent circumstances justified the lack of a search warrant. Based on the totality of the circumstances, this Court agrees with the State.

Here, the crash occurred at about 7:42 p.m. Agent Haas arrived at 8:53 p.m. Lt. Moros arrived at 9:01 p.m. Both Lt. Moros and Agent Haas testified to the chaotic scene that was ongoing at the time. Lt. Moros testified that this was a major crash investigation that occurred on State Road A1A, the main thoroughfare, right in front of Friday Fest in Cape Canaveral. Traffic control was a major undertaking. Seven blocks of A1A had to be blocked off to conduct the investigation; and deputies from both the East Precinct and the Canaveral Precinct were required to control the scene and still leave enough officers to handle regular duty. A scheduled "street party" was in progress. Numerous units were involved from different departments, including crime scene units, a crash investigator, and traffic homicide investigators. Lt. Moros also testified that there was a huge number of people who purported to be witnesses, but it took extra time to weed out witnesses who actually had relevant information from witnesses who thought they had relevant information but it would turn out to be irrelevant, such as "I saw the ambulance."

Agent Haas testified that upon his arrival, time had to be taken to assess the scene and give assignments to the individual deputies and investigators, including his own interview of witness Jose Frias. Time also had to be taken to get medical personnel to return to the scene to draw blood. Agent Haas was still interviewing the Defendant when blood was drawn. By the time paramedic Gabriel Kaufman drew the Defendant's blood, it was 9:53 p.m.—more than two hours after the crash.

More significantly, Agent Haas testified to the time delays associated with obtaining a search warrant from an on-call judge. First, time has to be taken to prepare the affidavit in support of the search warrant and the search warrant itself. This requires an explanation of the full circumstances, including all material facts. Second, BCSO policy requires that Agent Haas obtain approval of same from a supervisor. Next, BCSO policy requires that the documents be sent to an on-call prosecutor for review. If the prosecutor approves, the affidavit and search warrant may then be sent to the on-call judge. Even with the ability to email the documents, and even assuming no problems in the entire process and that no corrections to the paperwork were required anywhere along the way, Agent Haas estimated that the entire process normally takes about three hours to obtain a daytime search warrant and it would have taken even longer for a nighttime warrant.

Under such circumstances, this Court finds that the State has met its burden of establishing exigent circumstances. *See, Goodman v. State,* 229 So.3d 366 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1669a] (exigent circumstances permitted warrantless blood draw from defendant; defendant absented himself from scene for over an hour and then returned but went to hospital for treatment of his own injuries before investigators found victim's vehicle and body in canal, by the time homicide investigator arrived and went to hospital, nearly four hours had passed since time of crash, and investigator testified that it would have taken an additional two hours to obtain a search warrant); *Aguilar v. State,* 239 So.3d 108 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D309a] (exigent circumstances existed to justify warrantless blood test after defendant was involved in multi-vehicle

accident that resulted in death of one person at scene and serious bodily injury to two others; accident occurred at scene of prior accident, further complicating accident scene investigation, defendant himself was seriously injured, taken to hospital for treatment, and induced into coma and intubated, at both accident scene and later at hospital, defendant smelled of alcohol and exhibited symptoms consistent with drunkenness, blood sample was taken about 90 minutes after accident, and testimony provided by State was that warrant would have taken at least four hours to obtain from time process began).

Aguilar also pointed out that in *Schmerber v. California,* 384 U.S. 757 (1966), "the Court reasoned that because the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system, there was no time to secure a warrant *due to the time to take the accused to a hospital and investigate the accident scene*." 239 So.3d at 111. (Emphasis added) (internal quotations omitted). On the other hand, *Missouri v. McNeely,* 569 U.S. 141, (2013) [24 Fla. L. Weekly Fed. S150a] was an ordinary, non-crash case where the evidence of exigent circumstances was the dissipation of alcohol in the blood, and *McNeely* determined this was insufficient. Thus, the Court in *Aguilar* stated: "Factually, the instant case is akin to *Schmerber* and not to *McNeely*." *Id.* The Court finds the same is true in the instant case.

The State has also pointed that the exigency in this case is even more justified because of the death of the victim. *See, Welsh v. Wisconsin,* 466 U.S. 740 (1984) (holding that "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made"); *State v. Rodriguez,* 156 P.3d 771 (Utah, 2007) ("One fact dominates all others with respect to its relevance to whether the warrantless blood draw was reasonable: *that [the victim] was expected to succumb to her injuries. The severity of the possible alcohol-related offense bears directly on the presence or absence of an exigency sufficient to justify a blood draw without a warrant*.").

Finally, the fact that law enforcement was unaware of the *McNeely* case and was thus unaware of the warrant requirement is of no consequence because the determination of exigency is based on objective factors, not the subjective knowledge of the officers. *See, State v. Rodriguez,* 156 P.3d 771, 781 (Utah, 2007) (although the Court found the officer's failure to consider the warrant requirement to be a "constitutional blind spot," it found that this omission did not "doom" the "State's quest for exigency" because "the subjective assessment about the need for a warrant is largely irrelevant to our totality of the circumstances analysis. It is an objective analysis in which the thought processes of any particular officer plays no role.").

The Court finds the totality of the circumstances justified a warrantless blood draw.

Field sobriety exercises

The Defendant contended that the deputies did not have probable cause or reasonable suspicion of DUI to require the Defendant to submit to field sobriety exercises. The Court notes that the field sobriety exercises in this case were administered *after* the Defendant's blood was drawn. Because this Court has already determined that there was probable cause to compel a blood draw, there was also probable cause (or reasonable suspicion) to request field sobriety exercises.

The Court finds that the Defendant agreed to the field sobriety exercises. The Defendant stated to Lt. Moros, "If I can surf, I can do that, let's get it on!"

Search of the Defendant's vehicle

Lastly, the Defendant sought to suppress the bottle of Corona beer that was found in the Defendant's vehicle. In this case, Agent Haas testified that the Defendant could not find his phone and it was suspected that he might have left it in his vehicle. The Defendant also indicated that his work ID was in his vehicle, which was being impounded for further processing. Thus, the Defendant consented to the deputies entering his vehicle to retrieve his phone and ID. When the deputies looked for these items, the Corona bottle was observed in open view. Under such circumstances, there was no violation of Defendant's Fourth amendment rights. *See, e.g., Ensor v. State,* 403 So.2d 349 (Fla. 1981) (Officer, who stopped automobile occupied by driver and defendant pursuant to valid traffic arrest and who saw firearm protruding from under the left side of the passenger floormat in "open view" through open car door, had probable cause to believe that felony of possessing a concealed weapon was being committed in his presence, and was justified in seizing the firearm from automobile without a warrant, in light of the "automobile exception" to warrant requirement).

The State stipulated to the exclusion of the glass pipe found.

The parties agreed the Horizontal Gaze Nystagmus motion will be heard at a later date.

Based on the foregoing, it is **ORDERED AND ADJUDGED** that the Defendant's Motion to Suppress is **DENIED**.

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[1]Although the instant Motion also contains grounds for suppressing Defendant's statements, those grounds overlap with the grounds raised in Defendant's Motion to Suppress Confession, Statements and Admissions (also filed on April 1, 2019). Accordingly, all grounds for suppressing statements are addressed in this Court's separately filed Order Denying Defendant's Motion to Suppress Confession, Statements and Admissions.

[2]Moreover, the testimony of Deputy Lakeman and Agent Haas added the additional observation of Defendant's constant mood swings; and the State points out the digital recordings of all three officers' interactions with the Defendant, which were introduced into evidence during at the hearing, confirmed the constant mood swings by the Defendant: chatty, aggressive, euphoric, laughing, crying, etc. However, even without this additional observation, Deputy Kennedy's testimony supplied the necessary reasonable suspicion of impairment.

[3]Deputy Kennedy also testified to the signs of impairment he observed as to the Defendant, but this Court has already determined that those observations were sufficient to show reasonable suspicion of impairment.

[4]Deputy Kennedy did not testify to the substance of Defendant's rambling statements at the hearing. However, shortly after Deputy Kennedy and the Defendant got to the sidewalk, Deputy Kennedy turned on his digital recording device and began recording the conversation. That 54 minute audio recording of Defendant's rambling statements was introduced into evidence during Deputy Kennedy's testimony.

[5]The statement about the drinking and having a "good buzz on" occurred shortly after the 18 minute mark of the audio recording. The statement about running over somebody like the Defendant did that day occurred shortly after the 35 minute mark during one of the Defendant's rambling comments concerning his philosophy of life. Specifically, the context was as follows: "To be the force behind everything that's good, there is nothing else that matters. Nothing else matters, but being better, being good. Helping your fellow man. Ya know, if somebody falls, pick 'em up. Somebody's hurting, *you run somebody over like I did today, you run somebody over, pick 'em up* and hey, are you gonna be okay? If you're not, anything you want, I will give you, I will help you. Because that's the world we live in, not the world you think you live in. I'm living in a world that wants to help you." (Emphasis added).

[6]In closing argument, the Defense indicated that Deputy Kennedy's answer was, "yeah, someone's gonna be over here; you *gotta* fill something out." (Emphasis added). As stated above, the Court's review of the audio reflects that latter portion of the answer was "you're *gonna be able* to fill something out." (Emphasis added).

[7]As previously stated, the question and answer about filling out a police report occurred shortly before the 41-minute mark on the recording; and as noted in footnote 5, *supra,* at page 5, the spontaneous statement about running someone over today occurred shortly before the 35-minute mark on the recording.

[8]As to Deputy Lakeman, regardless of whether the Defendant was seized or not, by the time of Deputy Lakeman's encounter with Defendant, law enforcement already possessed reasonable suspicion as to the Defendant being the driver. This was so, both based on the Defendant's spontaneous statements made to Deputy Kennedy and based on the sworn statement of witness Jose Frias. Additionally, Deputy Lakeman testified that prior to meeting the Defendant, he had been informed that the driver in the crash was at a specific location, in particular, at the corner of Filmore and A1A. Deputy Lakeman then saw the Defendant standing at that exact location standing next to Deputy Kennedy.

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COUNTY COURTS

Insurance—Automobile—Windshield replacement or repair—Limitation of liability—Prevailing competitive price—Appropriate test for determining prevailing competitive price is what service would cost in competitive market in normal, arms' length non-insurance transaction from competent and conveniently located non-network windshield shop—Prevailing competitive price cannot be price set in an agreement between insurer and particular provider, a lower price insurer alone could obtain through a non-open-market transaction, or "an 'arbitrary price' or a price that has been 'negotiated with no one' "—Evidence demonstrated that plaintiff-assignee's replacements of insured customers' windshields were covered losses, that customers assigned insurance benefits and claims to plaintiff, that plaintiff was a competent and conveniently located repair facility, that plaintiff used like-kind and quality parts to replace customers' damaged windshields, and that insurer paid less than plaintiff's invoiced amounts—Affirmative defenses—Insurer failed to prove by greater weight of evidence that it paid prevailing competitive price for services at issue, that it paid any particular amount that would equate to prevailing competitive price, or that plaintiff's invoiced amounts exceeded prevailing competitive price—Discussion of insurer's "Glass Pricing Letter" setting forth pricing parameters for glass repair or replacement, its "Claims History" spreadsheet, and insurer's various witnesses—Judgment entered in favor of plaintiff-assignee

SUPERIOR AUTO GLASS OF TAMPA BAY, INC., a/a/o Jean Fontaine, Gabor Geszti, Angelique Matheson, Gerald Alicea, and Gary Booker, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case Nos. 17-CC-041286, 15-CC-031318, 17-CC-022972, 17-CC-040522, 17-CC-041264, Division M. July 20, 2021. Miriam Valkenburg, Judge. Counsel: David M. Caldevilla, de la Parte & Gilbert, P.A., Tampa; Anthony T. Prieto, Morgan & Morgan, Tampa; and Christopher P. Calkin and Mike N. Koulianos, The Law Offices of Christopher P. Calkin, P.A., Tampa, for Plaintiff. Lindsey R. Trowell, Steven E. Brust, Ariane J. Smith, and Chloe A. Orta, Smith, Ambrell & Russell, LLP, Jacksonville, for Defendant.

FINAL JUDGMENT

THIS CAUSE came before this Court on April 20 and 21, 2021, for a non-jury trial utilizing "Zoom" video conferencing. After observing and assessing the demeanor and credibility of the witnesses, weighing the evidence, considering the arguments of counsel, and being otherwise advised in the premises, this Court finds as follows:

Introduction

1. This Court conducted a non-jury trial concerning Case No. 17-CC-041286 (the "***Fontaine* case**") on April 20 and 21, 2021.

2. The parties have stipulated that the material facts, circumstances, and legal issues are, for all intents and purposes, identical in the *Fontaine* case, and in Case No. 15-CC-031318 (the "***Geszti* case**"), Case No. 17-CC-022972 (the "***Matheson* case**"), Case No. 17-CC-040522 (the "***Alicea* case**"), and Case No. 17-CC-041264 (the "***Booker* case**"), and that this Court's determinations in the *Fontaine* case would also apply equally to the other four cases, with the exception of the amount of damages, if any, to be awarded in each case.

3. Each of these five cases involves the same Plaintiff, Superior Auto Glass of Tampa Bay, Inc. ("**Superior**"), and the same Defendant, Geico General Insurance Company ("**Geico**"). In each case, it was undisputed there was a covered loss under the policy of insurance, Superior's customer was insured by Geico. Superior replaced each insured customer's windshield, and pursuant to an assignment of benefits, billed Geico directly for each windshield replacement.

4. For each claim, Geico paid less than Superior's invoiced amount. Superior then sued Geico for breach of contract, seeking damages measured by the difference between Superior's invoiced amount and the amount paid by Geico.

5. As affirmative defenses, Geico asserted that it paid the "prevailing competitive price" authorized by the limitation of liability provision contained in the insured customers' insurance policies, and that Superior waived its right to recover any more insurance benefits. Geico argued that Superior knew, or should have known of Geico's agreed pricing, and based upon Superior's acceptance of the job, it waived its right to pursue/collect more than Geico paid.

6. The insurance policy issued by Geico to the insured customers agrees to pay for damaged windshield glass without a deductible. Geico's "prevailing competitive price" defense to Superior's breach of contract claim is based on the insurance policy's separate "Limitation of Liability" provision, which states:

> LIMIT OF LIABILITY
> The limit of our liability for loss:
> . . . Will not exceed the prevailing competitive price to repair or replace the property at the time of loss, or any of its parts, including parts from non-original equipment manufacturers, with other of like kind and quality and will not include compensation for any diminution of value that is claimed to result from the loss. Although you have the right to choose any repair facility or location, the limit of liability for repair or replacement of such property is the prevailing competitive price which is the price we can secure from a competent and conveniently located repair facility. At your request, we will identify a repair facility that will perform the repairs or replacements at the prevailing competitive price.

Testimony & Evidence Presented at the Non-Jury Trial

7. The Court heard the testimony of the following witnesses and determined the credibility of such witnesses based on their demeanor, experience, background, and overall testimony:

i. Linda Rollinson, Superior's corporate representative;
ii. Susanna Eberling, GEICO's corporate representative; and
iii. Dr. James McClave, Ph.D., GEICO's retained expert witness.

8. At trial, Superior called Linda Rollinson as its sole witness. Ms. Rollinson is Superior's owner, operator, and records custodian since 2007. Ms. Rollinson is in charge of the daily operation and oversees all aspects of Superior's business including managing the day-to-day operations, ordering the glass and related material, scheduling, preparing work orders, billing, setting prices and is the direct contact between the shop and customers.

9. Ms. Rollinson holds several certifications, is highly experienced in the field of windshield repair and replacement, and is a member and officer of various windshield industry trade organizations and committees. Specifically, Ms. Rollinson is chair of the Steering Committee for the National Windshield Repair Association and is on the board of the Auto Glass Safety Council. Additionally, she acts as a consultant for numerous insurance carriers where she is retained to determine pricing and to review bills in an effort to identify fraudulent billing practices. Further, Ms. Rollinson serves as an independent windshield loss appraiser for insurance companies and glass shops.

10. Ms. Rollinson testified that she sets Superior's pricing based upon several factors including the overall cost of the glass, molding, labor cost and hours, urethane kit(s), clips, and disposal fees. She utilizes the National Auto Glass Specifications (NAGS) as a benchmark in establishing Superiors pricing along with analyzing the cost of glass repairs and replacements in the market.

11. Geico called two witnesses, Susanna Eberling and James McClave, Ph.D. Ms. Eberling is Geico's corporate representative, who is assigned to glass litigation claims. Dr. McClave was presented

as an expert witness in the field of econometrics.

12. Ms. Eberling testified that she is familiar with Geico's business and claims processes. She is currently assigned to Geico's glass litigation department where she testifies as Geico's corporate representative in all litigated cases. Ms. Eblerling testified that it is the general practice of Geico to create a work order once an insured contacts Geico to setup a glass claim. The work orders authorize the vendor/shop to conduct the work at the parameters outlined within the work order. Although, Ms. Eberling testified that work orders was created in this case, Geico could not find or produce the work order nor could Ms. Eberling offer a reasonable explanation as to how and why the work order was missing.

13. During cross-examination Ms. Eberling acknowledged that once Geico received the invoices from Superior, they tendered partial payment pursuant to Geico's "payment parameters." These payment parameters are set by Geico and are not included as part of the policy language.[1] Further, Ms. Eberling admitted that she did not have any independent knowledge as to what factors were used by Geico in setting or creating their pricing parameters, but testified that the pricing parameters set by Geico consists of paying up to 50% of the NAGS list price for the windshield, $40 per hour for labor and $15 per kit. Notably, Ms. Eberling had no information that the market played any role in determining Geico's pricing. Further there was no testimony that a market analysis was conducted prior to Geico instituting the payment parameters.

14. Ms. Eberling further explained that Superior is considered a non-network and non-affiliate member and that Geico did not have a set pricing agreement in place with Superior at the time the windshield was repaired/replaced.

15. Geico further presented the testimony of an expert, Dr. McClave. Dr. McClave was retained to review Geico's glass claims files and to analyze the glass repair and replacement market in order to tender an opinion on whether Geico pays the claims at the prevailing competitive price. Dr. McClave relied upon Geico's transaction data and information relayed to him by Ms. Eberling.

16. The following exhibits were admitted into evidence:

i. Plaintiff's Exhibit 1—policy of insurance issued to Jean Fontaine;

ii. Plaintiff's Exhibit 2—a composite of Superior's invoice submitted to GEICO in this claim;

iii. Plaintiff's Exhibit 3—a composite of Superior's work order submitted to GEICO in this claim;

iv. Plaintiff's Exhibit 4—the assignment of benefits Superior obtained from the insured;

v. Plaintiff's Exhibit 5—a copy of the claim payment check and breakdown issued to Superior for the subject claim;

vi. Plaintiff's Exhibit 7—a January 31, 2012 "pricing letter" sent by GEICO; and

vii. Defendant's Exhibit 7—an excerpt from GEICO's 2013 Glass Claims History, containing all transactions for windshield replacements performed by Non-Affiliate shops located in the Tampa Bay area.

Governing Law

17. To prevail on a breach of contract claim, the plaintiff generally has the burden to prove that: (a) a contract existed, (b) the contract was breached, and (c) damages flowed from that breach. *See, e.g., A.R. Holland, Inc. v. Wendco Corp.*, 884 So.2d 1006, 1008 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D2209a]. In the context of this case, where the contract is an insurance policy, that burden requires the plaintiff to prove the windshield claim is a covered loss and was not paid in full. *See, e.g., Government Employees Ins. Co. v. Superior Auto Glass of Tampa Bay, Inc., a.a.o. Matthew Dick*, 28 Fla. L. Weekly Supp. 785a (Fla. 13th Cir. Ct. App. Div. Oct. 2, 2020) ("*Dick II*").

18. As explained in *Dick II*, once the insured has met its preliminary burden, the burden shifts to Geico to "prove that payment was made in accordance to its policy." "[W]here GEICO contends its limitation of liability supports the payment, GEICO must show that it paid in accordance with those limits." *Id.; see also, Government Employees Ins. Co. a.a.o. David Gilbo*, 28 Fla. L. Weekly Supp. 787a (Fla. 13th Cir. Ct. App. Div. Oct. 13, 2020) ("*Gilbo*").

19. With respect to Geico's burden of proving its "prevailing competitive price" defense, this Court is bound by the controlling appellate decisions in *Government Employees Ins. Co. v. Superior Auto Glass of Tampa Bay, Inc., a.a.o. Matthew Dick,* 26 Fla. L. Weekly Supp. 876a (Fla. 13th Jud. Cir. Ct. App. Div. March 27, 2018) ("*Dick I*"), *Dick II,* and *Gilbo*. Each of those three appellate decisions held that "the test" for determining the prevailing competitive price "is what the service would cost in a competitive market in a normal, arms' length non-insurance transaction" from a competent and conveniently located non-network windshield shop, and that the prevailing competitive price cannot be "the price set in an agreement between GEICO and a particular provider" or "a lower price [Geico] alone could obtain through a non-open-market transaction." *Id.* Nor can the prevailing competitive price be an "arbitrary price" or a price that has "been negotiated with no one." *Id.*[2]

Findings of Fact & Conclusions of Law

20. With respect to Geico's waiver defense, "waiver" is the voluntary and intentional relinquishment of a known right. *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So.2d 707, 711 (Fla. 2005) [30 Fla. L. Weekly S115a]; *Bueno v. Workman*, 20 So.3d 993, 998 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2227a]; *Winans v. Weber*, 979 So.2d 269, 274 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2954a]. The elements necessary to establish waiver are: (a) the existence of a right, privilege, or advantage; (b) the actual or constructive knowledge thereof; and (c) an intention to relinquish that right, privilege, or advantage. *Bueno*, 20 So.3d at 998; *Winans*, 979 So.2d at 274.

21. The court notes that Geico did not dispute the following: (a) Superior's replacements of the insured customer's windshields were covered losses (b) Superior was a competent and conveniently located repair facility, that Superior used like-kind and quality parts to replace the insured customers' damaged windshields.

22. While Geico contested the validity of the Assignment of Benefits (AOB) at trial, Geico tendered partial payment in reliance on the AOB and did not challenge it upon receipt of the invoices. As such, Geico has effectively admitted the validity of the AOB.[3]

23. Therefore, based on the demeanor and credibility of the witnesses and the weight of the evidence, this Court finds the greater weight of the evidence demonstrates that Superior's replacements of the insured customer's windshields were covered losses, that the insured customers assigned their insurance benefits and claims to Superior, that Superior was a competent and conveniently located repair facility, that Superior used like-kind and quality parts to replace the insured customers' damaged windshields, and that Geico paid less than Superior's invoiced amounts. Thus meeting Superior's burden in this action, as such, the Court turns to Geico's affirmative defenses.

24. As noted in *Dick II*, "[w]hat constitutes the prevailing competitive price is intensely factual." With regard to Geico's limitation of liability/prevailing competitive price affirmative defense, the Court as the trier of fact, having the opportunity to observe and assess the demeanor and credibility of the witnesses, finds Geico failed to prove by the greater weight of the evidence that it paid the prevailing competitive price for the services at issue in accordance with its limitation of liability. Geico further failed to prove that it paid any particular amount that would equate to the prevailing competitive price for the services at issue or that Superior's invoiced amounts

exceeded the prevailing competitive price for the services at issue.[4]

25. Overall, with respect to the controlling "test" established by *Dick I, Dick II,* and *Gilbo,* Geico presented no evidence of any relevant transactions involving competent and conveniently located non-network windshield shops. Instead, all of Geico's evidence involved transactions in which its payments were based exclusively on discounted payment parameters derived by Geico. Again, the Court notes that Ms. Eberling offered no explanation of how Geico derived its payment parameters and offered no indication that the open market played any role in establishing same. Payments under these parameters have been accepted by special agreements between Geico, Safelite, and affiliated shops, but the evidence did not identify any non-affiliated windshield shops (competent or otherwise) that would have accepted payment under Geico's parameters for the same services provided by Superior, or that payment under Geico's parameters is the amount the service would cost in a competitive market in a normal arms' length transaction.

26. A key piece of evidence in this case is the "GEICO Glass Pricing Agreement" letter dated January 2012. The letter demonstrates that Geico created certain pricing parameters. According to Ms. Eberling, this letter established the prices Geico was willing to pay on all glass repair/replacement. Further Ms. Eberling testified that the pricing parameters set-out in the letter are not part of the policy and are not disclosed to their insured's at the time a glass repair/replacement is reported and setup by Geico's claims department.

27. Further, Geico did not present any testimony or evidence as to how the prices Geico pays, as shown on the 2012 "GEICO Glass Pricing Agreement" letter, were set. However, each of the *Dick I, Dick II,* and *Gilbo* appellate decisions specifically held that the prevailing competitive price cannot be based on such prices. Additionally, Superior was not a party to that pricing agreement and never agreed to accept those prices. Geico failed to prove that the discounted payment parameters described in the 2012 "GEICO Glass Pricing Agreement" letter are not arbitrary, or that they are based on competitive open-market transactions, or that anyone other than Geico could purchase the same parts and services for those same discounted prices. Based upon the evidence, it appears that Geico is using this letter as an addendum to its' limit of liability provision found within the policy. Essentially attempting to circumvent the general "prevailing competitively price" language without making a change or amendment to the actual policy.

28. Geico's only exhibit was the "Claims History" spreadsheet. The Claims History spreadsheet is exclusively comprised of data concerning windshield claims submitted only to Geico and does not include any non-insurance or open-market transactions. Neither of Geico's witnesses created or generated the Claims History spreadsheet. None of the data listed on the Claims History spreadsheet was adequately verified as being accurate or corroborated with any of the underlying billing and payment records summarized therein. Geico also failed to present any credible evidence that any of the windshield shops listed on the Claims History spreadsheet were competent, conveniently located, and in a position to perform any of the insured customers' windshield replacement jobs at the time, date and place requested by the insured customers. Moreover, according to Geico, all of the transactions listed in the Claims History spreadsheet were paid by Geico using the same discounted payment parameters described in the "GEICO Glass Pricing Agreement" letter. Further, there was no information regarding whether the amounts paid were ever contested by the receiving company or whether any additional payment was subsequently issued by Geico.

29. Geico's expert witness, Dr. McClave, did not credibly establish that his analysis was based on adequate, relevant, and accurate data. Dr. McClave's testimony was based solely upon Geico's Claims History spreadsheet and conversations with Geico's corporate representative, Ms. Eberling. Overall, Dr. McClave's testimony amounted to the "opinion of an economist who points to no open market transactions," which *Gilbo* squarely held does not satisfy the prevailing competitive price test. Dr. McClave's opinions were exclusively based upon non-open market insurance transactions involving only Geico, rather than the type of "open market transactions" required by *Dick I, Dick II,* and *Gilbo*. Dr. McClave did not analyze the competitive open market, the components of Geico's discounted pricing parameters, or any data that was used in setting those discounted pricing parameters.[5] Moreover, Dr. McClave did not reasonably confirm the accuracy of the data identified on Geico's Claims History spreadsheet, and he did not determine or verify the component prices that comprise the total billed amounts and total payment amounts that are identified on the Claims History spreadsheet.

30. Based on the demeanor and credibility of the witnesses and the weight of the evidence, this Court also finds that Geico failed to prove by the greater weight of the evidence that Superior waived its rights to recover full payment under the terms of the insurance policy. There was no credible evidence presented to demonstrate that Superior ever had any intention of waiving its right to recover full payment for the windshield replacements services provided for the insured customers. To the contrary, the greater weight of the evidence affirmatively demonstrated that Superior fully intended to collect its charged amount, sent a pre-suit letter to Geico demanding full payment, and has repeatedly sued Geico to enforce its rights.

31. In support of the affirmative defense of waiver, Geico attempted to admit documents and testimony associated with "work orders" submitted to Superior in unrelated windshield claims, containing alleged pricing parameters, although no work order existed in this case. Notwithstanding, simply receiving a "work order" in the past from Safelite or Geico, that contained the pricing parameters derived by Geico, and set forth in Geico's January 31, 2012 "GEICO Glass Pricing Agreement," does not constitute a waiver to pursue payment as provided in the relevant insured's policy. Further, there is no indication that Superior agreed to the payment parameters in lieu of its right to payment of the prevailing competitive price under the insurance policy.[6]

32. Because Superior proved that the windshield replacements it performed for the insured customers were covered losses and that its invoices were not paid in full, and Geico failed to prove either of its affirmative defenses by showing that its payment was made in accordance with the policy's limitation of liability provision (the prevailing competitive price) or that Superior waived its rights to recover additional payment, this Court finds that Geico breached the insurance policies by paying less than Superior's invoiced amounts, and that Superior incurred damages which are measured by the difference between its invoiced amounts and Geico's payment amounts.

33. In the *Fontaine* case, the date of service was February 21, 2013, the billed amount was $1,057.16, and Geico paid $559.88, leaving an unpaid balance of $497.28.

34. In the *Geszti* case, the date of service was May 28, 2014, the billed amount was $1,595.14, and Geico paid $697.93, leaving an unpaid balance of $897.21.

35. In the *Matheson* case, the date of service was January 10, 2013, the billed amount was $770.03, and Geico paid $417.92, leaving an unpaid balance of $352.11.

36. In the *Alicea* case, the date of service was January 9, 2013, the billed amount was $690.02, and Geico paid $396.65, leaving an unpaid balance of $293.37.

37. In the *Booker* case, the date of service was November 27, 2012,

the billed amount was 844.98, and Geico paid $451.38, leaving an unpaid balance of $393.60.

Based on the foregoing findings of fact and conclusions of law, it is hereby **ORDERED AND ADJUDGED**:

A. Final judgment is entered in favor of the Plaintiff, Superior Auto Glass of Tampa Bay, Inc., and against the Defendant, Geico General Insurance Company, as follows:

(1) In the *Fontaine* case, Case No. 17-CC-041286, Superior is awarded and shall recover from Geico damages in the amount of $497.28, plus pre-judgment interest since February 21, 2013 through the date of this judgment, plus post-judgment interest on the combined amount, at the interest rates established pursuant to Section 55.03(1), Florida Statutes, for all of which, let execution issue.

(2) In the *Geszti* case, Case No. 15-CC-031318, Superior is awarded and shall recover from Geico damages in the amount of $897.21, plus pre-judgment interest since May 28, 2014 through the date of this judgment, plus post-judgment interest on the combined amount, at the interest rates established pursuant to Section 55.03(1), Florida Statutes, for all of which, let execution issue.

(3) In the *Matheson* case, Case No. 17-CC-022972, Superior is awarded and shall recover from Geico damages in the amount of $352.11, plus pre-judgment interest since January 10, 2013 through the date of this judgment, plus post-judgment interest on the combined amount, at the interest rates established pursuant to Section 55.03(1), Florida Statutes, for all of which, let execution issue.

(4) In the *Alicea* case, Case No. 17-CC-040522, Superior is awarded and shall recover from Geico damages in the amount of $293.37, plus pre-judgment interest since January 9, 2013 through the date of this judgment, plus post-judgment interest on the combined amount, at the interest rates established pursuant to Section 55.03(1), Florida Statutes, for all of which, let execution issue.

(5) In the *Booker* case, Case No. 17-CC-041264, Superior is awarded and shall recover from Geico damages in the amount of $393.60, plus pre-judgment interest since November 27, 2012 through the date of this judgment, plus post-judgment interest on the combined amount, at the interest rates established pursuant to Section 55.03(1), Florida Statutes, for all of which, let execution issue.

B. The Clerk of the Court is directed to file a copy of this final judgment in each of the above-styled cases.

C. This Court hereby reserves jurisdiction to determine claims for reasonable attorneys' fees and costs, and "Superior's Motion to Determine Whether Geico Presented False Testimony at Trial, and if so, to Impose Sanctions" dated April 25, 2021.

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[1]See paragraph 6 above quoting the relevant policy language.

[2]The Court notes the difficulty this trio of appellate cases, which establish the "test" and the respective burdens with regard to prevailing competitive price, has caused. This has caused great confusion not only with the parties, but also on the trial court, in determining precisely what evidence is sufficient in establishing the prevailing competitive price. In particular, the reference to "non-insurance" transactions, and what would constitute same, has proven to be subject of much debate—especially in light of the apparent lack of a non-insurance market when it comes to windshield glass repair or replacement—with the parties vehemently disagreeing as to the meaning and what can be considered.

[3]*See Dick II* indicating "coverage [was] effectively admitted because GEICO paid some amount in direct response to the claim."

[4]*Compare, Auto Glass America, LLC, a.a.o. Clinton Edwards v. Geico Indem. Co.,* 26 Fla. L. Weekly 681a (Broward County Ct. Sept. 24, 2018) (finding that "Geico did not even establish what the 'prevailing competitive price' is, let alone that [the] invoiced price exceeded it").

[5]As noted previously, there was no indication in any of the evidence presented that, in setting the Geico pricing parameters, the open market was considered at all. The only witness that indicated that pricing was set with consideration of the market was Superior's witness, Ms. Rollinson, when discussing how Superior set its pricing.

[6]The Court also notes that there is no indication in the evidence that notice of these parameters was given to Geico insureds or that the parameters were made part of the insurance policy or replaced the prevailing competitive price policy language.

* * *

Criminal law—Driving under influence—Discovery—Medical records—Investigative subpoena—Request for medical records of fire and rescue department and hospital for defendant charged with DUI is granted—Indicators of possible impairment establish relevancy of records sought as they relate to criminal investigation and compelling state interest sufficient to override privacy rights

STATE OF FLORIDA, Plaintiff, v. JOSHUA WAYNE WILLIS, Defendant. County Court, 4th Judicial Circuit in and for Nassau County. Case No. 45-2020-CT-000360-CTAY, Criminal Traffic Division. May 6, 2021. Jenny Higginbotham Barrett, Judge. Counsel: Ruth Ann Hepler, for Defendant.

ORDER OVERRULING DEFENDANT'S OBJECTION AND GRANTING THE STATE'S REQUEST FOR MEDICAL RECORDS SUBPOENA

THIS CAUSE came to be heard on April 23, 2021, on the Defendant's Objection to State's Notice of Issuance of Subpoena to Nassau County Fire and Rescue Department, and Baptist Medical Center Nassau for Defendant Joshua Willis. The Court, having considered the arguments presented, and being advised, finds as follows:

Pursuant to Fla. Sta. Section 395.3025(4)(d), the State of Florida provided notice of intent to subpoena medical records for Joshua Willis from Nassau County Fire and Rescue Department ("NCFR") and Baptist Medical Center Nassau ("BMCN"). The Defendant objected to releasing the medical records.

The State of Florida argues the Nassau County Arrest and Booking Report as well as information provided by Trooper Thomason provides a sufficient basis to show a compelling state interest in Joshua Willis's medical records, and that the records may likely contain information relevant to their ongoing criminal investigation of the charge of DUI, citing *McAlevy v. State,* 947 So.2d 525 (Fla. 4th DCA 2006) [32 Fla. L. Weekly D80c].

Defendant argues the State of Florida is unable to meet their burden by showing a nexus between the medical records and a theory that is substantive to the case citing to *Gomillion v. State*, 267 So.3d 502 (Fla. 2DCA 2019) [44 Fla. L. Weekly D758a]. In *Gomillion*, the Court held the State failed to advance any theory that made the medical records relevant to their case as the charge involved Leaving the Scene of an Accident. The Court held the State failed to show any relevance the medical records have to the charge of Leaving the Scene of an Accident by saying a toxicologist report would not be relevant to prove the elements of the crime.

In the instant case, the Defendant has been charged with Driving Under the Influence. Unlike the criminal charge in the *Gomillion* case, the State of Florida argues the medical records are necessary and relevant to the continuing criminal investigation to determine if the records show the Defendant to be impaired which is relevant to the charge Driving under the Influence.

Thus, the Court finds as follows:

Pursuant to the Arrest and Booking report, Trooper Thomason was dispatched to a crash at Brooke Street and Alene Road. Upon arrival, Trooper Thomason made contact with the Defendant and observed the Defendant with an odor of alcoholic beverage from his breath, slurred speech and unsteadiness on his feet. Upon concluding the crash investigation, Trooper Thomason advised the Defendant he would be conducting a criminal investigation and requested for Defendant to complete the Field Sobriety Exercises. The Defendant refused and Trooper Thomason arrested Defendant for DUI.

The Court finds the Arrest and Booking report contains sufficient indicators of possible impairment. Moreover, based on the argument of both parties, the DUI Video shows NCFR was dispatched to the crash scene. Additionally, Trooper Thomason advised the State of Florida that he took the Defendant to BMCN prior to booking him into the Nassau County Jail. The Court finds the indicators of possible

impairment establish the relevancy of the medical records from NCFR and BMCN as it relates to the criminal investigation of the DUI and compelling state interest sufficient to override his right to privacy under the statute. It is, therefore,

ORDERED AND ADJUDGED:

1. Defendant's objections to the subpoenas are **OVERRULED**.

2. The State may proceed with the service of the subpoenas on Nassau County Fire and Rescue Department and Baptist Medical Center Nassau regarding records related to Joshua Willis on March 13, 2020.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Motion to dismiss medical provider's action for PIP benefits based on default judgment entered in declaratory action that determined insured's policy to be void *ab initio* is denied where provider was not party to declaratory action

ADVENTIST HEALTH SYSTEM/SUNBELT, INC., d/b/a ADVENTHEALTH WINTER GARDEN, a/a/o Yure Desir, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2020-SC-023998-O. May 17, 2021. Brian F. Duckworth, Judge. Counsel: David B. Alexander, Bradford Cederberg, Orlando, for Plaintiff. Stephen D. Strong, for Defendant.

ORDER DENYING DEFENDANT'S AMENDED MOTION TO DISMISS; GRANTING PLAINTIFF'S MOTION TO COMPEL DEPOSITION OF DEFENDANT'S CORPORATE REPRESENTATIVE; GRANTING PLAINTIFF'S MOTION TO COMPEL RESPONSES TO PLAINTIFF'S FIRST REQUEST TO PRODUCE TO DEFENDANT; GRANTING PLAINTIFF'S MOTION TO COMPEL VERIFIED ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANT; AND GRANTING DEFENDANT'S MOTION FOR EXTENSION OF TIME TO RESPOND TO DISCOVERY

THIS MATTER having come before this Honorable Court on 1) Defendant's Amended Motion to Dismiss (COS: 8/27/2020); 2) Plaintiff's Motion to Compel Deposition of Defendant's Corporate Representative (COS: 7/9/2020); 3) Plaintiff's Motion to Compel Responses to Plaintiff's First Request to Produce to Defendant (COS: 7/9/2020); 4) Plaintiff's Motion to Compel Verified Answers to Plaintiff's First Set of Interrogatories to Defendant (COS: 7/9/2020); and 5) Defendant's Motion for Extension of Time to Respond to Discovery (COS: 7/7/2020), and this Honorable Court having heard arguments of counsel on April 29, 2021, reviewed the Court file and authority filed by the parties, and being otherwise fully advised in the premises, finds as follows,

1. This is a breach of contract action arising out of a motor vehicle collision that occurred on December 10, 2019.

2. The Plaintiff in this matter is ADVENTIST HEALTH SYSTEM/SUNBELT, INC. d/b/a ADVENTHEALTH WINTER GARDEN as assignee of Yure Desir.

3. The Plaintiff provided emergency medical services and care to Yure Desir on December 10, 2019 immediately following the December 10, 2019 automobile accident. Pursuant to the assignment of benefits executed by Yure Desir in favor of Plaintiff, Plaintiff submitted its emergency medical services and care bill to the Defendant for payment. Defendant received Plaintiff's medical bill on or about December 23, 2019. The Defendant refused to pay Plaintiff's medical bill. Subsequently, Plaintiff sent Defendant a Notice of Intent to Initiate Litigation. Again, Defendant refused to pay Plaintiff's medical bill. Thereafter, on June 1, 2020, Plaintiff filed Plaintiff's Complaint in the instant action seeking damages.

4. On July 7, 2020, Defendant in the instant action filed its Motion to Dismiss or, Alternatively, To Abate and Incorporated Memorandum of Law.

5. On August 27, 2020, Defendant in the instant action filed its Amended Motion to Dismiss.

6. It is Defendant's position that Plaintiff's Complaint in the instant action should be dismissed based upon a default final judgment, executed on July 9, 2020, in the declaratory action of *Direct General Ins. Co. v. Desir,* Fifth Jud. Cir. Ct., in and for Lake County, Case No. 2020-CA-000346. Said default final judgment in part states that "[t]he Insurance Contract, as specifically described in the Complaint, is hereby declared *void ab initio*, and Plaintiff has no duty to defend or indemnify any named insured or omnibus insured on the Insurance Contract for any claim(s) for benefits that have been or will be made by any claimants under the Insurance Contract." *See Direct General Ins. Co. v. Desir,* Fifth Jud. Cir. Ct., in and for Lake County, Case No. 2020-CA-000346 (default final judgment, executed on July 9, 2020). It is Plaintiff's position that Plaintiff's Complaint in the instant action cannot be dismissed and this matter must proceed forward to conclusion on its merits. This Court finds Defendant's arguments unpersuasive and agrees entirely with Plaintiff's position.

7. The declaratory action relied upon by Defendant in support of its Amended Motion to Dismiss is not controlling in the present matter. In *Direct General Ins. Co. v. Desir,* Fifth Jud. Cir. Ct., in and for Lake County, Case No. 2020-CA-000346, the Plaintiff, Direct General Insurance Company, brought a declaratory action against a single Defendant, Yure Desir. Direct General Insurance Company filed its declaratory action on or about February 21, 2020, well after Plaintiff's medical bill that is the subject of the instant lawsuit was overdue pursuant to Fla. Stat. §627.736. At the time Direct General Insurance Company filed its complaint in the declaratory action relied upon it had direct knowledge of the overdue claim submitted by Plaintiff at issue in the instant matter. Notwithstanding same, Direct General Insurance Company failed to name Plaintiff as a party in the declaratory action and failed to serve Plaintiff in the instant action with any paper regarding the declaratory action, including but not limited to, failure to provide Plaintiff in the instant action with notice of hearing upon Direct General's motion for entry of default final judgment. Importantly, the default final judgment was entered due to Direct General's motion for entry of default final judgment that relied entirely upon a clerk's default against Yure Desir.

8. When considering a motion to dismiss the Court is not permitted to entertain matters outside the four corners of the Complaint at issue. "The primary purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal." *See Fox v. Professional Wrecker Operators of Florida, Inc.,* 801 So. 2d 175 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D2824a]. *Also see Provence v. Palm Beach Taverns, Inc.,* 676 So. 2d 1022 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1490c]. "In making this determination, the trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations." *Id.* "The question for the trial court to decide is simply whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested." *See Cintron v. Osmose Wood Preserving, Inc.,* 681 So. 2d 859, 860-861 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D2249d]. "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 Mutual Auto. Ins. Co.,* 679 So. 2d 836, 837 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D2010c].

9. Fla. Stat. §86.091 reads in its entirety as follows:

> Parties.—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.** In any proceeding concerning the validity of a county or municipal charter, ordinance, or franchise, such county or municipality shall be made a party and shall be entitled to be heard. If the statute, charter, ordinance, or franchise is alleged to be unconstitutional, the Attorney General or the state attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and be entitled to be heard. *See Fla. Stat.* §*86.091* (emphasis added).

10. Considering Plaintiff in the instant matter was not a party in the matter of *Direct General Ins. Co. v. Desir,* Fifth Jud. Cir. Ct., in and for Lake County, Case No. 2020-CA-000346, "[n]o declaration shall prejudice the rights" of Plaintiff in the instant matter. *See Fla. Stat.* §*86.091.* Due process requires that a person's rights not be trampled upon. Defendant's position would require violation of due process rights and permit declarations to prejudice the rights of persons without their knowledge or notice. A party must "be given . . . a real opportunity to be heard and defend in an orderly procedure, before judgment is rendered against him." *See VMD Fin. Services, Inc. v. CB Loan Purchase Assoc., LLC,* 68 So. 3d 997, 999 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1970a].

11. Even if Plaintiff in the instant matter had been named as a party in the declaratory action, the case law is clear that a defaulted co-defendant does not affect the rights of non-defaulted co-defendants. "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." *See Kelly v. Torres,* 260 So. 3d 410, 412 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2625a]. "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.' " *Id.* Simply put, a default final judgment cannot be entered against a non-defaulted co-defendant. *See Khazaal v. Browning*, 717 So. 2d 1124, 1125 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D2240a] (". . .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."). "The default of one defendant, although an admission by him of the allegations of the complaint, does not operate as an admission of such allegation as against a contesting co-defendant." *See Dade County v. Lambert,* 334 So. 2d 844 (Fla. 3d DCA 1976), *also see Kotlyar v. Metropolitan Cas. Ins. Co.,* 192 So. 3d 562 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1182a]. "[W]e had previously determined in our dismissal order of Ming's appeal that the default against Severine 'did not operate against [Ming] as an admission of the allegations covered by the default.' " *See Ming Properties, Inc. v. Stardust Marine S.A.,* 741 So. 2d 554 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1766a] *citing State Farm Mutual Auto. Ins. Co. v. Clark,* 544 So. 2d 1141, 1142 (Fla. 4th DCA 1989). "Since Ming was not given the opportunity to litigate this issue, the entry of summary judgment was reversible error." *See Ming Properties, Inc. v. Stardust Marine S.A.,* 741 So. 2d at 556. "A judgment by default only admits for the purposes of the action the legality of the demand or claim in suit; it does not make the allegations of the declaration or complaint evidence in an action upon a different claim." *See Blanchard v. Stribling,* 24 So. 2d 713 (Fla. 1946).

12. Recently, this issue was addressed by Judge Brownlee in the Ninth Jud. Cir. Ct. case of *State Farm Mutual Auto. Ins. Co. v. Poon,* Ninth Jud. Cir. Ct., in and for Orange County, Cir. Ct. Case No. 2016-CA-010480-O [29 Fla. L. Weekly Supp. 88a]. In an Order executed April 5, 2021, the Court denied State Farm Mutual Auto. Ins. Co.'s motion for reconsideration of the Court's denial of State Farm's motion for summary judgment re: all claims for PIP benefits under the Jontaie Poon policy. State Farm in *Poon* attempted to obtain judgment against Good Health, a medical provider, that was seeking PIP benefits under Poon's policy. It was Good Health's position that the default judgment obtained by State Farm against Poon, the insured, could not affect the rights of non-defaulted Good Health. Judge Brownlee agreed with Good Health and denied State Farm's motion for reconsideration of the Court's denial of State Farm's motion for summary judgment. *See State Farm Mutual Auto. Ins. Co. v. Poon,* Ninth Jud. Cir. Ct., in and for Orange County, Cir. Ct. Case No. 2016-CA-010480-O (order executed April 5, 2021, Judge Brownlee, Cir. Ct. Judge) [29 Fla. L. Weekly Supp. 88a].

It is hereby, ORDERED AND ADJUDGED that:

1) Defendant's Amended Motion to Dismiss (COS: 8/27/2020) is hereby **DENIED**. This matter shall proceed forward on its merits. Defendant shall file an Answer to Plaintiff's Complaint within twenty (20) days from the date of this Order. Plaintiff shall have twenty (20) days from the filing of Defendant's Answer to file Plaintiff's Reply to Defendant's Answer.

2) Plaintiff's Motion to Compel Deposition of Defendant's Corporate Representative (COS: 7/9/2020) is **GRANTED**. The deposition of Defendant's Corporate Representative, pursuant to the Notice of Taking Telephonic Deposition Duces Tecum attached to Plaintiff's Motion to Compel Deposition of Defendant's Corporate Representative (COS: 7/9/2020), shall be coordinated within thirty (30) days from the date of this Order and shall occur within ninety (90) days from the date of this Order.

3) Plaintiff's Motion to Compel Responses to Plaintiff's First Request to Produce to Defendant (COS: 7/9/2020) is **GRANTED**. Plaintiff's Motion to Compel Verified Answers to Plaintiff's First Set of Interrogatories to Defendant (COS: 7/9/2020) is **GRANTED**. Defendant's Motion for Extension of Time to Respond to Discovery (COS: 7/7/2020) is **GRANTED**. Defendant shall respond to Plaintiff's First Request for Admissions to Defendant and Plaintiff's First Request to Produce to Defendant within forty-five (45) days from the date of this Order. Defendant shall provide verified answers to Plaintiff's First Set of Interrogatories to Defendant within forty-five (45) days from the date of this Order.

* * *

Insurance—Automobile—Windshield repair—Appraisal—In ruling on motion to dismiss complaint for additional windshield repair benefits, court cannot consider letter from insurer invoking policy appraisal provision where letter is neither attached to complaint nor impliedly incorporated in complaint and does not affect plaintiff's standing—Argument that plaintiff failed to satisfy condition precedent invoked by letter is properly raised as affirmative defense and argued in motion for summary judgment, not motion to dismiss—Complaint is nonetheless dismissed where policy contains mandatory appraisal provision, insurer has invoked appraisal by filing motion to dismiss, policy requires appraiser to determine amount of loss, and insurer did not waive appraisal right by invoking appraisal at start of litigation—Prohibitive cost doctrine is not applicable—No merit to argument that plaintiff's right of access to courts is violated by appraisal provision—Plaintiff relinquished that right by contractually agreeing to provision—No merit to argument that requiring plaintiff to pay costs associated with appraisal would violate statutory bar to deductible being applied to windshield damage—Compliance with appraisal provision is also condition precedent to maintaining declaratory action regarding underpayment of claim

PROMOTIONS USA INC., d/b/a PREMIER 1 AUTO GLASS, a/a/o Jalicce Smith, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2020-SC-009303-O.

May 3, 2021. Carly S. Wish, Judge. Counsel: John Z. Lagrow and Imran Ebrahim Malik, Malik Law P.A., Maitland, for Plaintiff. Elisa Z. Morales, Progressive PIP House Counsel, Maitland; Alexis Gilmartin, Progressive PIP House Counsel, Tampa; and Jessica L. Pfeffer, Progressive PIP House Counsel, Fort Lauderdale, for Defendant.

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

THIS MATTER is before the Court on "Defendant's Motion to Dismiss, or Alternatively, Defendant's Motion to Abate or Stay and Motion to Compel Appraisal" filed on April 24, 2020. On February 3, 2021, the Court held a hearing on the instant Motion. After hearing argument of both Plaintiff and Defendant, as well as reviewing the instant Motion and applicable case law, Defendant's Notice of Filing filed on January 19, 2021, Plaintiff's Response and two (2) Notices of Filings filed on January 25, 2021, and Plaintiff's Supplemental Brief filed on February 23, 2021, as well as this Court's reconsideration of its prior Order entered on April 19, 2021, the Court finds as follows[1]:

This case involves a claim for comprehensive windshield insurance benefits by Plaintiff, an assignee. The Complaint alleges a breach of contract and an action for declaratory relief pursuant to Chapter 86, Florida Statutes. In the Court's prior Order, the Court took into consideration a document which it now finds it impermissibly relied on in dismissing the Complaint. Subsequent to the hearing in this case, the parties have argued additional motions on the same issues, and provided new case law and raised additional arguments as to this very issue, which this Court finds merit reconsideration of its prior ruling. The Court wishes to clarify for the parties its reasoning in dismissing the Complaint.

When ruling on a motion to dismiss for failing to state a cause of action, the Court is confined to the four corners of the complaint and any documents attached thereto or incorporated within. The law is well settled that a motion to dismiss a complaint is not a motion for summary judgment at which time the court may rely on facts adduced in depositions, affidavits, or other proofs. On a motion to dismiss, the trial court is necessarily confined to the well-pled facts alleged in the four corners of the complaint and contrary to Defendant's argument, is not authorized to consider any other facts, including, as here, other claimed facts asserted by defense counsel relating to unpled affirmative defenses, even if argued by counsel for the parties on the motion to dismiss. *See Lewis v. Barnett Bank of South Florida, N.A.*, 604 So. 2d 937 (Mem) (Fla. 3d DCA 1992). A complaint does not need to anticipate a defendant's affirmative defenses. Rather, any affirmative defenses, with few exceptions, which do not apply here, should be raised by the defendant in an answer, not in a motion to dismiss. In deciding whether a cause of action is stated, this Court must not consider any affirmative defenses raised by the defendant or any evidence likely to be produced by either side, only what is contained within, or attached to the Complaint.

In this case, Defendant filed a Notice of Filing Certified Business Records in Support of Defendant's Motion. The filing contained a Certification of Business Records containing the Policy at issue, as well as a letter to the Plaintiff invoking appraisal based on the Policy. The Court finds it can consider the Policy as it is incorporated by reference into the Complaint and Plaintiff's standing to bring suit is premised on the terms of the Policy. However, the Court cannot rely on the letter as it is neither attached to, nor referenced in the Complaint. Defendant's reliance on *One Call Property Services Inc. v. Security First Ins. Co.,* 165 So. 3d 749 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1196a], that the letter is impliedly incorporated in the Complaint is misplaced. In that case, the Fourth District Court of Appeal found "where the terms of a legal document are impliedly incorporated by reference into the complaint, the trial court may consider the contents of the document in ruling on a motion to dismiss."

In *One Call Property Services Inc.*, the appellate court found the lower court did not err in considering the contents of the insurance policy because the policy was referred to in the complaint. *See also Veal v. Voyager Prop. & Cas. Ins. Co.,* 51 So. 2d 1246 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D164a]. However, the letter in this case is not impliedly incorporated into the Complaint, nor does it affect Plaintiff's standing to bring suit. The Complaint in this case merely alleges the Defendant "improperly invoked appraisal" and gives no additional facts to support its assertion, nor does it reference the letter at all. Accordingly, this Court is prohibited from considering it on a motion to dismiss despite its existence. It appears from the bevy of case law in Florida, Defendant's argument that Plaintiff has failed to comply with a condition precedent invoked by a letter prior to suit being filed is more properly raised as an affirmative defense and argued on a motion for summary judgment. But, this is a motion to dismiss, and the Court is not permitted to consider the letter, and if it did, it would be reversible error. *Stucchio v. Huffstetler*, 690 So. 2d 753 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D876a] (holding court impermissibly considered matters outside the four corners of the complaint in deciding the motion to dismiss. . . while the ruling may ultimately prove correct, it was error to decide the merits of the case on a dismissal motion). *See also Cazares v. Church of Scientology of California, Inc.,* 444 So. 2d 442 (Fla. 5th DCA 1983). Additionally, defenses to the action may not be considered in deciding a motion to dismiss. *Pizzi v. Central Bank & Trust Co.,* 250 So. 2d 895 (Fla. 1971). *See also Enlow v. E.C. Scott Wright, P.A.*, 274 So. 3d 1192 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D1543a]. Therefore, because this Court previously relied on the letter in finding Defendant invoked appraisal prior to the lawsuit being filed, the Court erred. However, this does not change the result.

In the instant Motion, Defendant contends Plaintiff's Complaint should be dismissed for failure to comply with the Policy's appraisal provision, which is a mandatory condition precedent to both the filing and maintaining of the subject lawsuit. Alternatively, Defendant asserts the case should be abated or stayed and this Court should enforce the appraisal provision of the Policy.

In response, Plaintiff asserts Defendant's Motion improperly invites the Court to consider documents outside the four corners of the Complaint, which is reversible error, and a court is confined to the four corners of the complaint when considering a motion to dismiss. While this is true, the Complaint in this case specifically states:

> [a]t all times material hereto, the Insured was insured under a policy of motor vehicle insurance coverage issued by the Defendant, a for profit corporation (the "Insurance Policy"). Said Insurance Policy is well known to the Defendant, a copy of which is in the possession of the Defendant and the said Insurance Policy ***is incorporated herein by reference***.

Therefore, this Court can consider the Policy at issue as it has been incorporated by Plaintiff in its Complaint. In the alternative, Defendant requests this Court abate and stay the case and compel appraisal as required by the Policy. There are three (3) elements for courts to consider in ruling on a motion to compel appraisal: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived. *Heller v. Blue Aerospace, LLC,* 112 So. 3d 635 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D930a]. The Court finds the existence of all three (3) elements.

The Policy contains an Appraisal Clause, as well as a Legal Action Against Us Clause which state:

APPRAISAL

If we cannot agree with you on the amount of a loss, then we or you may demand an appraisal of the loss. However, mediation, if desired, must be requested prior to demanding appraisal. Within 30 days of any demand for an appraisal, each party shall appoint a competent and impartial appraiser and shall notify the other party of that appraiser's identity. The appraisers will determine the amount of loss. If they fail to agree, the disagreement will be submitted to an impartial umpire chosen by the appraisers, who is both competent and a qualified expert in the subject matter. If the two appraisers are unable to agree upon an umpire within 15 days, we or you may request that a judge of a court of record, in the county where you reside, select an umpire. The appraisers and umpire will determine the amount of loss. The amount of loss agreed to by both appraisers, or by one appraiser and the umpire, will be binding. You will pay your appraiser's fees and expenses. We will pay our appraiser's fees and expenses. All other expenses of the appraisal, including payment of the umpire if one is selected, will be shared equally between us and you. Neither we nor you waive any rights under this policy by agreeing to an appraisal.

LEGAL ACTION AGAINST US

We may not be sued unless there is full compliance with all the terms of this policy.

Plaintiff argues in its Response: (1) there is no appraisable issue; (2) appraisal is not binding under the express terms of the Policy, or is ambiguous; (3) there are material differences between appraisal and arbitration; (4) the appraisal provision is unenforceable because it does not describe the critical procedures that will govern the appraisal process or the determinations of the appraisers and/or the umpire; (5) the appraisal provision violates the Plaintiff's fundamental rights of access to the courts, to due process, and to a jury trial under the Florida Constitution; (6) Defendant's appraisal provision violates public policy; (7) Defendant has waived any right to appraisal; (8) Defendant is challenging coverage, which is a waiver of the appraisal process; (9) Defendant has selected a biased appraiser, which is a waiver of an appraisal; (10) Defendant's appraisal provision violates the "Prohibitive Cost Doctrine;" (11) Plaintiff was not required to invoke appraisal; and (12) If appraisal is compelled, the Court should abate this lawsuit.

The Court finds the arguments set forth by Plaintiff lack merit. Once appraisal is properly invoked, it becomes a condition precedent to the right to maintain an action on the policy. *U.S. Fire Ins. Co. v. Franko*, 443 So. 2d 170, 172 (Fla. 1st DCA 1983). An appraisal clause contained in an insurance contract acts as a condition precedent to bringing a claim under that contract. *United Community Insurance Company v. Lewis*, 642 So. 2d 59 (Fla. 3d DCA 1994). Here, Defendant invokes appraisal by the filing of the instant Motion. Florida law permits a party to invoke an appraisal provision for the first time during suit. *See Gonzalez v. State Farm Fire & Cas. Co.,* 805 So. 2d 814, 817-818 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D2614b]. Because the Court cannot consider the pre-suit letter as a demand for appraisal prior to suit as it relates to the motion to dismiss, the Defendant has demanded appraisal during the lawsuit by virtue of its alternative motion to compel appraisal. *Id*.

In *United Community Insurance Company,* which contains a near identical appraisal provision as in this case, the court held that "neither party has the right to deny that demand once it is made" and found the appraisal was mandatory and enforceable by the court. 642 So. 2d at 60. Defendant has never denied coverage of the claim in this case, but did not pay what Plaintiff's invoice requested. "When the insurer admits that there is a covered loss, but there is a disagreement on the amount of loss, it is for the appraisers to arrive at the amount to be paid." *Johnson v. Nationwide Mut. Ins. Co.,* 828 So. 2d 1021, 1025 (Fla. 2002) [27 Fla. L. Weekly S779a] (quoting *Gonzalez v. State Farm Fire & Cas. Co.,* 805 So. 2d at 816-17). Further, the subject Policy's appraisal clause clearly states the appraisers are to determine the amount of loss. The appraisal provision does not contain language which requires the appraiser to determine the amount of loss "under this policy" or "payable." The nonexistence of this language in the appraisal provision is a critical factor. *State Farm Fire & Casualty Company v. Middleton,* 648 So. 2d 1200, 1202 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D99b].

Plaintiff further argues this Court should find the subject appraisal provision void based on the Prohibitive Cost Doctrine. This Court rejects Plaintiff's argument that the appraisal clause is invalid as prohibitively costly and in violation of the Prohibitive Cost Doctrine. The Prohibitive Cost Doctrine is inapplicable to matters where a party has filed a breach of contract action and wishes to void an appraisal provision in the underlying contract they are purportedly seeking enforcement of, as no statutory rights are inherently implicated therein. *Zephyr Haven Health & Rehab Center, Inc. v. Hardin*, 122 So. 3d 916 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D2070a] (a litigant is required to make some showing of individualized prohibitive expense to invalidate an arbitration agreement on the ground that fee splitting would be prohibitively expensive and that they will actually be paying any and all costs of appraisal, not the attorney). *See also Green Tree Financial Corp.-Alabama v. Randolph*, 31 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). Furthermore, this Court is unable to find any binding precedent in Florida supporting the application of the Prohibitive Cost Doctrine to an informal appraisal provision contained within a contract. Accordingly, the Court finds the Prohibitive Cost Doctrine does not apply in this case.

To the extent Plaintiff requests the Court rewrite the mandatory appraisal provision, this Court declines to do so. In Florida, appraisal clauses are enforceable unless the clause violates statutory law or public policy. *See Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc.*, 162 So. 3d at 143; *see also Green v. Life & Health of America*, 704 So. 2d 1386, 1390-91 (Fla. 1998) [23 Fla. L. Weekly S42a]. Florida law permits retained rights provisions, and these provisions do not render the appraisal clause unenforceable. This Court finds the subject Policy appraisal provision language is clear, unambiguous, and provides a simple and informal appraisal process, which gives both parties an efficient and inexpensive means of determining the value of the loss.

As it relates to Plaintiff's claim that Defendant waived its right to appraisal, there are numerous Florida cases finding there is no basis for a claim of waiver where an appraisal provision is invoked at the start of litigation. *See Gonzalez v. State Farm Fire & Cas. Co.*, 805 So. 2d at 817 (holding that insurer did not waive right to appraisal by participating in the litigation where it "promptly answered and in the answer, demanded appraisal"); *Fla. Ins. Guar. Ass'n v. Castilla*, 18 So. 3d 703, 705 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2000a] ("FIGA has never acted inconsistently with its right to an appraisal, having raised that right at the earliest opportunity in this suit and continu[ing] to claim it through its subsequent pleadings."); *U.S. Fire Ins. Co. v. Franko,* 443 So. 2d at 172 (holding that petitioner's motion to dismiss constituted a demand for arbitration sufficient to trigger arbitration clause); *Balboa Insurance Co. v. W.G. Mills, Inc.,* 403 So. 2d 1149 (Fla. 2d DCA 1981) (holding that where the allegations of a motion to dismiss are based on a contractual right to arbitration, the motion to dismiss is, in substance, also a motion to compel arbitration). The issue in this case is regarding the value of the loss, not one of coverage. Defendant has admitted there is a covered loss, thus the issue should go to appraisal to determine the value of the loss.

Plaintiff has further alleged their right of access to courts, to a jury trial, and due process are violated by compliance with the appraisal clause. However, by contractually agreeing to arbitration/appraisal, a party relinquishes the right of access to courts. *See Kaplan v.*

Kimball Hill Homes Fla., Inc., 915 So. 2d 755, 761 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2787a], *review denied,* 929 So. 2d 1053 (Fla. 2006); *see also Infinity Design Builders, Inc. v. Hutchinson*, 964 So. 2d 752 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D2032a]. Parties that agree to arbitration clauses, or appraisal clauses as in this case, waive the right of access to courts. *Terminix Intern. Co., LP v. Ponzio*, 693 So. 2d 104 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D1184a]. Were Defendant to fail to comply with their own appraisal provision, Plaintiff would then have a right to maintain a lawsuit, but only after complying with the terms of the policy, which includes the appraisal provision.

Further, this Court finds no merit in the argument that requiring Plaintiff to pay any costs associated with appraisal would violate § 627.7288 and result in a de facto deductible. Section 627.7288 clearly provides that only a deductible shall not be applicable to windshield damage, and deductibles are well defined by Florida law. *See General Star Indem. Co. v. West Florida Village Inn, Inc.,* 874 So. 2d 26, 33-34 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1070b]; *Int'l Bankers Ins. Co. v. Arnone,* 552 So. 2d 908, 911 (Fla. 1989); *Mercury Ins. Co. of Florida v. Emergency Physicians of Cent.,* 182 So. 3d 661 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2364a].

In *Progressive American Ins. Co. v. SHL Enterprises, LLC*, 264 So. 3d 1013 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2434a], the Second District Court of Appeal held the circuit court departed from the essential requirements of law by failing to properly analyze and interpret § 627.7288, Florida Statutes, and found that if the legislature intends for insurers to solely bear the costs of appraisal in windshield damage claims, it knows how to express that intention. The statute, as currently written, only prohibits the imposition of a deductible as applied to a windshield damage claim. It does not prevent a requirement for each party to bear its own appraisal costs in an insurance payment dispute. Thus, where the contracting parties have freely contracted for such a requirement, such as in this case, they or their assignees may not rely on § 627.7288 to avoid their responsibility to pay such costs. *Id.* at 1018.

Finally, the Policy contains express language requiring Plaintiff comply with all the terms of the Policy before Plaintiff may sue Defendant. Thus, the parties should be compelled to appraisal for the appraisers to determine the amount of loss. In *United Community Ins.,* the Third District Court of Appeal ordered the case back to the trial court to enter an order finding that appraisal was a mandatory condition precedent once invoked by one of the contracting parties. 642 So. 2d at 60. Furthermore, the court in *Franko* held an insurer's motion to dismiss the complaint constituted the necessary demand for arbitration and that once the clause was appropriately invoked arbitration became a condition precedent to the right of the insured to *maintain an action on the policy*. (emphasis added). 443 So. 2d at 172. In *Franko,* the trial court found it was not clear whether an affirmative and formal demand for arbitration was ever made by petitioner, but the appellate court held that the motion to dismiss constituted such a demand. *Id.*

The court in *Franko* relied on the decision in *Balboa Insurance Co. v. W.G. Mills, Inc.,* 403 So. 2d 1149 (Fla. 2d DCA 1981), in which the court held where the allegations of a motion to dismiss are based on a contractual right to arbitration, the motion to dismiss is, in substance, also a motion to compel arbitration. The *Balboa* court opined that a pleading is to be governed by its substance rather than its label. As in *Balboa,* the allegations of petitioner's motion to dismiss were based on the contractual right to arbitration. Therefore, the motion to dismiss was a motion to compel arbitration and a demand for arbitration.

Based on the foregoing, this Court finds that compliance with the subject policy's appraisal provision is a mandatory condition precedent which Defendant invoked by the filing of the instant Motion. *Franko*, 443 So. 2d at 172 (once an appraisal clause is properly invoked, appraisal becomes a condition precedent to right of an insured to maintain an action on the policy). If one party to the insurance contract demands appraisal under the contract, the proper action is dismissal until the condition precedent has been met.

In Count Two for declaratory relief, Plaintiff contends Defendant has improperly attempted to invoke the appraisal provision in the policy as there is no appraisable issue when the sole issue is the determination of the amount of "coverage" available to pay Plaintiff's invoice under the limitations of liability provision of the applicable policy of insurance, as all coverage disputes are left solely for the courts to determine. Plaintiff avers that in order to properly assess whether there is a disagreement as to the amount of loss, Plaintiff must know exactly how any limitations were applied and whether those limitations were clearly and unambiguously set forth in the Policy prior to requiring Plaintiff to decide whether there is an actual disagreement as to the amount of the payment. "Issues relating to coverage challenges are questions exclusively for the judiciary." *Florida Ins. Guar. Ass'n, Inc. v. Olympus Ass'n, Inc.,* 34 So. 3d 791, 794 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1117b]. However, "when the insurer admits that there is a covered loss, but there is a disagreement on the amount of loss, it is for the appraisers to arrive at the amount to be paid." *Id.*

To survive a motion to dismiss, a complaint for declaratory relief must show:

(1) There is a bona fide, actual, present practical need for the declaration; (2) that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; (3) that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; (4) that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; (5) that the antagonistic and adverse interest[s] are all before the court by proper process or class representation; and (6) that the relief sought is not merely giving of legal advice by the courts or the answer to questions propounded from curiosity. All of these elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts. A declaratory judgment "may not be invoked if it appears that there is no bona fide dispute with reference to a present justiciable question." *Vazquez v. Citizens Property Ins. Corp.*, 304 So. 3d 1280 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D642a]. Here there is no bona fide, actual, present practical need for the declaration as Defendant has not complied with the Policy's condition precedent of appraisal.

While there appears to be no binding law on this specific set of facts and this specific issue in the context of windshield damage cases, the Court finds the reasoning in *Broward Ins. Recovery Center, LLC a/a/o Howard Goldberg, v. Progressive American Ins. Co.*, 26 Fla. L. Weekly Supp. 421a. (Broward Cty. Ct May 29, 2018, *rehearing denied,* June 14, 2018) persuasive. In *Broward Insurance Recovery Center*, the trial court dismissed six (6) counts of declaratory relief actions alleging the amount reimbursed for the repairs were improperly reduced as the language contained in the applicable limits of liability section is vague and ambiguously written and susceptible to more than one reasonable interpretation, and therefore, the appraisal clause should not be enforced. The trial court found that compliance with the subject policy's appraisal provision is a mandatory condition precedent to the filing and maintaining of the subject lawsuit citing *Franko*, 443 So. 2d at 172 (once an appraisal clause is properly invoked, appraisal becomes a condition precedent to right of an insured to maintain an action on the policy).

The Court also finds the decision instructive in *Broward Insurance*

Recovery Center, LLC, a/a/o Lynn Rudolph, v. Progressive American Ins. Co., 28 Fla. L. Weekly Supp. 427b (Broward Cty. Ct. August 15, 2019), in which the plaintiff raised similar issues as in the instant case in an action for declaratory relief, and the court found that the issue was the amount of the loss and compliance with the subject policy's appraisal provision is a mandatory condition precedent to the filing and maintaining of the subject lawsuit and dismissed the case without prejudice (citing to *Linda Enger v. Allstate Property and Casualty Company*, Case No. 09-17785, 9th Ct., U.S. Ct. App. December 9, 2010) (dismissing the declaratory relief action holding that a claim for declaratory relief in instances regarding the allegations of undervalue of paid claim by utilization of an improper valuation method is purely a value question that must go through appraisal and claims that appraisal provision should be disregarded or waiver were unpersuasive); and *Richard Bettor v. Esurance Property and Casualty Insurance Company,* So. Dist. Fla., U.S. Dist. Ct. Case No. 18-61860-CIV-MORENO/SELTZER (holding that appraisal provision in policy applies to claims for declaratory judgment and breach of contract as a condition precedent; that appraisal provision which allowed either party to invoke, pay their own cost of their chosen appraiser, spilt umpire fee, and agree to be bound by results of appraisal is not unconscionable; recommending Motion to Compel Appraisal and Motion to Dismiss be Granted; and Plaintiff's Amended Complaint be Dismissed and Plaintiff is compelled to submit claim to appraisal)).

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

1. Defendant's Motion to Dismiss, or Alternatively, Defendant's Motion to Abate or Stay and Motion to Compel Appraisal is **GRANTED.**

2. This case is Dismissed without prejudice for the parties to comply with the appraisal provision of the policy.

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[1]Due to the thousands of cases filed in Orange County, FL, on these auto glass issues the Court has spent numerous hours reviewing all documents submitted in this case, as well as conducting hours of its own legal research. Additionally, arguments have been made at subsequent hearings with the same parties and identical policy provisions, as well as additional case law researched by the Court, which causes this Court to amend its prior decision in this case pursuant to Florida Rule of Civil Procedure 1.530(d).

* * *

Insurance—Homeowners—Standing—Assignment—Validity—Assignment of benefits that is signed by insured but not by assignee is not valid assignment—Assignment is also invalid for failing to include rescission notice mandated by section 627.7152(2)(a)2—Complaint dismissed

MOLD ELIMINATORS, LLC., a/a/o Pasquale Prudente, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-001879-SP-21, Section HI01. May 3, 2021. Milena Abreu, Judge. Counsel: Karla Lopez and Andrew J. Vargas, Vargas Gonzalez Baldwin Delombard, LLP, Coral Gables, for Plaintiff. Anthony G. Atala, Kubicki Draper, P.A., Miami, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION OF THE COURT'S DENYING DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

COMES NOW, the Court, after hearing on March 25, 2021, on Defendant's Motion for Reconsideration, and after considering the arguments of both counsels', the pleadings filed in this case, relevant statutory authority and applicable case law, the Court hereby rules as follows:

FACTUAL BACKGROUND:

1) Plaintiff, Mold Eliminators, LLC filed a Complaint against Defendant, Citizens, alleging a breach of contract.

2) Specifically, Plaintiff alleges that, as assignee of Citizens' insured, Pasquale Prudente, it is entitled to benefits under the homeowner's insurance contract between Mr. Prudente and Citizens.

3) Said assignment "AOB" was signed by Mr. Prudente on December 12, 2019.

4) Defendant claims Plaintiff lacks standing to bring this breach of contract action because the assignment, attached to Plaintiff's Complaint, fails to comply with Section 627.7152 of the Florida Statutes.

5) As a result, the Defendant seeks a dismissal of the action with prejudice.

LEGAL ANALYSIS:

The issue for this Court to decide is whether the "AOB" in this case is a valid one. When a Complaint's allegations are inconsistent with an exhibit attached to the complaint, the exhibit controls. *K.R. Exch. Services, Inc. v. Fuerst, Humphrey, Ittleman, PL,* 48 So.3d 889, 894 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2317a]. "Any 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." *Franz Tractor Co. v. J.I. Case Co.*, 566 So.2d 524 (Fla. 2d DCA 1990) (citing *Striton Properties, Inc. v. City of Jacksonville Beach*, 533 So.2d 1174 (Fla. 1st DCA 1988). In this case, the AOB shows only one signature—that of one of the insured's, Mr.Prudente. The AOB is not signed by any representative of the Plaintiff creating an inconsistency between the pleading and exhibit.

Plaintiff asserts their signature is not necessary as what gives validity to the "instrument" is the *performance* of the contract and plaintiff in fact, performed the one service—a mold test. The Court disagrees with this argument. Florida statute 627.7152 defines "**assignor**" as *a person who assigns post-loss benefits under a residential property insurance policy or commercial property insurance policy to another person through an assignment agreement.* The statute further defines "**assignee**" as: *a person who is assigned post-loss benefits through an assignment agreement*. "**Assignment Agreement**" is defined as: *any instrument by which post-loss benefits under a residential property insurance policy or commercial property insurance policy, as that term is defined in s. 627.0625(1), are assigned or transferred, or acquired in any manner, in whole or in part, to or from a person providing services to protect, repair, restore, or replace property or to mitigate against further damage to the property.*

Furthermore, Section 627.7152 of the Florida Statute applies to assignment agreements executed on or after July 1, 2019. This section sets forth detailed requirements for assignees claiming benefits under a property insurance policy to follow; failure to comply with these statutory requirements renders the assignment invalid and unenforceable.

Specifically, 627.7152 states:

2)(a) An assignment agreement must:

1. *Be in writing and executed by and between the assignor and the assignee.* (emphasis added).

2. Contain a provision that allows the assignor to rescind the assignment agreement without a penalty or fee by submitting a written notice of rescission signed by the assignor to the assignee within 14 days after the executionof the agreement, at least 30 days after the date work on the property is scheduled to commence if the assignee has not substantially performed, or at least 30 days after the execution of the agreement if the agreement does not contain a commencement date and the assignee has not begun substantial work on the property.

3. Contain a provision requiring the assignee to provide a copy of the executed assignment agreement to the insurer within 3 business days after the date on which the assignment agreement is executed or the date on whichwork begins, whichever is earlier. Delivery of the copy of the assignment agreement to the insurer may be made:

a. By personal service, overnight delivery, or electronic transmission, with evidence of delivery in the form of a receipt or other paper or electronic acknowledgment by the insurer; or

b. To the location designated for receipt of such agreements as specified in the policy.

4. Contain a written, itemized, per-unit cost estimate of the services to be performed by the assignee.

5. Relate only to work to be performed by the assignee for services to protect, repair, restore, or replace a dwelling or structure or to mitigate against further damage to such property.

6. Contain the following notice in 18-point uppercase and boldfaced type:

YOU ARE AGREEING TO GIVE UP CERTAIN RIGHTS YOU HAVE UNDER YOUR INSURANCE POLICY TO A THIRD PARTY, WHICH MAY RESULT IN LITIGATION AGAINST YOUR INSURER. PLEASE READ ANDUNDERSTAND THIS DOCUMENT BEFORE SIGNING IT. YOU HAVE THE RIGHT TO CANCEL THIS AGREEMENT WITHOUT PENALTY WITHIN 14 DAYS AFTER THE DATE THIS AGREEMENT IS EXECUTED, AT LEAST 30 DAYS AFTER THE DATE WORK ON THE PROPERTY IS SCHEDULED TO COMMENCE IF THE ASSIGNEE HAS NOT SUBSTANTIALLY PERFORMED, OR AT LEAST 30 DAYS AFTER THE EXECUTION OF THE AGREEMENT IF THE AGREEMENT DOES NOT CONTAIN A COMMENCEMENT DATE AND THE ASSIGNEE HAS NOT BEGUN SUBSTANTIAL WORK ON THE PROPERTY. HOWEVER, YOU ARE OBLIGATED FOR PAYMENT OF ANY CONTRACTED WORK PERFORMED BEFORE THE AGREEMENT IS RESCINDED. THIS AGREEMENT DOES NOT CHANGE YOUR OBLIGATION TO PERFORM THE DUTIES REQUIREDUNDER YOUR PROPERTY INSURANCE POLICY.

In this case, the Court recognizes that "execution" is not defined by the statute and merely states *"an assignment agreement must be in writing and executed by and between the assignee and assignor"*. Therefore, the analysis for the Court is whether "execution" as used in the statute requires the two parties' signatures on the assignment agreement as the Defense contends or whether as Plaintiff asserts, their signature is not necessary as what gives validity to the "instrument" is the *performance* of the contract. The AOB here contains only one signature—that of one of the insured—Mr. Prudente. Utilizing the late Justice Scalia's contextual Canons, the Court reads the text as a *whole*. (Whole-Text Canon); See Antonin Scalia and Bryan Garner, Reading Law: The Interpretation of Legal Texts, (2012). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *Kmart Corp. v. Cartier, Inc.*, 486 US 281, 291 (1988). Justice Scalia also cites, Sir Edward Coke, who explained: "If any section (of a law) be intricate, obscure, or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of the other." Edward Coke, The First Part of the Institutes of the Laws of England, or a Commentary upon Littleton section 728, at 281a (1628; 14th ed. 1791).

Here, the Assignment portion of the statute contains interrelated parts that make up the whole. For example, 2(a)6 above deals with the Assignment cancellation notice requirements that states: "*. . .you have the right to cancel this agreement without penalty within 14 days after the date this agreement is executed, at least 30 days after the date work on the property is schedule to commence if the assignee has not substantially performed at least 30 days after the execution if the agreement does not contain a commencement date. . .*" Simply put, this section entitles the homeowner to cancel the assignment in 3 ways: within a prescribed time period after execution, or within a time period after work is scheduled to begin or within a time period after "execution" if no start date. The statute would not include the first or third option if read as Plaintiff contends. In Plaintiff's version, only the second method of cancellation would apply if no "execution", ie: signatures, were required. Similar language is also found in the rescission section 2(a)2 of the statute. Again, this section applies three methods for rescission and includes the exact "execution language" found in 2(a)6. Read as a whole, this Court finds the assignment statute establishes "execution" to require ***all*** parties to have signed the assignment. Therefore, the AOB fails to satisfy the statutory requirements under 627.7152(2)(a)(1) in that there was no valid executed assignment instrument between the assignee and assignor.

Even if the Court were to find a valid assignment of benefits existed between the parties, the AOB ***still*** fails as a matter of law for failure to include the rescission notice outlined in 2(a)(2) that clearly and unambiguously states: *an assignment agreement* ***must*** *contain a rescission clause.* Section 627.7152 is clear and unambiguous—there must be an assignment agreement executed by and between the assignor and assignee containing among other requirements, a cancellation and rescission provision. The AOB here contains no such rescission notice. Therefore, without a valid AOB, the Plaintiff has no enforceable interest for benefits under the subject policy and lacks standing. See *Byrom v. Gallagher*, 578 So.2d 715 (Fla. 5th DCA 1991) ("only those who have standing to be heard in a judicial proceeding may participate in it"). Moreover, the Plaintiff's lack of standing at the inception of the case is not something that can be cured by the acquisition of standing after the case is filed. *Progressive Express Ins. Co. v. Mcgrath Comm. Chiro.*, 913 So.2d 1281 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2622b]. Because the Plaintiff does not have a valid assignment and therefore no standing to bring this action, the Complaint must be dismissed.

Defendant also moves to dismiss the suit as the assignment did not include the signature of the other insured—Mr. Prudent's spouse. However, in light of the analysis above, the Court deems it unnecessary to address this argument.

Florida Rule of Civil Procedure 1.540 states:

> Mistakes, Inadvertence, Excusable Neglect; Newly Discovered Evidence; Fraud; etc.
>
> On Motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for these reasons.

Candidly, the Court made both factual and legal errors in its Ruling of December 8, 2020 and grants Defendant's Motion for Reconsideration.

ACCORDINGLY, it is **ORDERED** and **ADJUDGED** that Defendant's Motion for Reconsideration is ***granted***; the Court order of December 8, 2020 is ***vacated*** and Defendant's Motion to Dismiss the Complaint with prejudice is ***Granted.***

* * *

Insurance—Personal injury protection—Demand letter that includes itemized statement specifying dates of service and charges for each date complies with presuit requirements—PIP statute does not require demand letter to state exact amount owed, account for prior payments made or demand correct compensable amount—Statute's requirement that demand letter identify type of benefit claimed to be due required only that medical provider state whether claim is for medical, disability or death benefits—Fact that later-filed suit contains jurisdictional amount that differs from amount requested in demand letter does not invalidate letter

ANGELS DIAGNOSTIC GROUP, INC., Plaintiff, v. ALLSTATE INSURANCE COMPANY, Defendant. Case No. 2019-024282-SP-25, Section CG03. April 20, 2021. Patricia Marino Pedraza, Judge. Counsel: Aimee A. Gunnells and Adriana De Armas, Pacin Levine, P.A., Miami, for Plaintiff. Manuel Negron and Raul Tano, Shutts

& Bowen, LLP, Miami, for Defendant.

ORDER DENYING DEFENDANT, ALLSTATE'S, MOTION FOR SUMMARY JUDGMENT RE PLAINTIFF'S DEFICIENT PRESUIT DEMAND AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT'S AFFIRMATIVE DEFENSES REGARDING DEFECTIVE PRE-SUIT DEMAND LETTER

THIS CAUSE having come before the Court on April 7, 2021, on Defendant, Allstate's, Motion for Summary Judgment Re Plaintiff's Deficient Presuit Demand ("Defendant's Motion for Summary Judgment") and Plaintiff's Motion for Summary Judgment as to Defendant's Affirmative Defense Regarding Defective Pre-Suit Demand Letter ("Plaintiff's Motion for Summary Judgment"), and the Court having heard argument of counsel, as well as having reviewed applicable law, and otherwise fully advised in the premises, it is hereby **ORDERED** and **ADJUDGED** that Defendant's Motion for Summary Judgment is **DENIED** and Plaintiff's Motion for Summary Judgment is **GRANTED** for the reasons set forth herein.

BACKGROUND

This case arises out of a motor vehicle accident that occurred in Miami-Dade County on June 12, 2017. The insured, Gustavo Solano, sought medical treatment, including physical therapy and diagnostic treatment from the Plaintiff following injuries arising from the subject accident. The Plaintiff, Angels Diagnostic Group, obtained an assignment of benefits from its patient under the subject policy and timely submitted bills for the services rendered. The Defendant, Allstate Insurance Company ("Allstate" or "Defendant"), issued sums for all services billed. Plaintiff subsequently submitted a Notice of Intent to Initiate Litigation ("demand letter") dated June 29, 2019. Defendant responded to Plaintiff's June 29, 2019 pre-suit demand letter and advised Plaintiff that it had allegedly previously paid the subject bills in accordance with its policy and Florida's No-Fault Law. Plaintiff then filed the instant action for alleged underpayment of benefits. Defendant filed its Answer to Plaintiff's Complaint wherein it asserted deficient demand in multiple affirmative defenses.

STANDARD OF REVIEW

Rule 1.510(c) of the Florida Rules of Civil Procedure states that a moving party is entitled to summary judgment if the "pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See also Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a]; and *Collections, U.S.A., Inc. v. City of Homestead*, 816 So.2d 1225, 1227 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D1243a]. If the moving party meets its burden, then the burden shifts to the non-moving party to provide competent admissible evidence sufficient to reveal a genuine and material disputed issue of fact exists. *See Arce v. Wackenhut*, 40 So. 3d 813, 815 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1471b].

ANALYSIS

The central question before the Court in this matter is whether Section 627.736(10) Fla. Stat. (2017), requires a plaintiff to state the exact amount owed in its demand letter. In other words, the matter before this Court is one of statutory construction. As such, the Court looks to long-standing and well-settled law regarding the interpretation of Florida statutes. Courts may only look to the language of the statute and apply its plain and obvious meaning where no ambiguity exists. *See Blanton v. City of Pinellas Park*, 887 So.2d 1224, 1230 (Fla. 2004) [29 Fla. L. Weekly S614a]; and *Woodham v. Blue Cross & Blue Shield of Florida, Inc.*, 829 So.2d 891, 897 (Fla. 2002) [27 Fla. L. Weekly S834a]. If the language of the statute is clear and unambiguous, the legislative intent must be derived from the words used, as interpreting beyond the plain meaning would be contrary to the legislature's intent. *See Nationwide Mutual Fire Ins. Co. v. Southeast Diagnostics, Inc.*, 766 So.2d 229 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D316a]. As such, the Court begins by looking at the statute in question.

Section 627.736(10), Fla. Stat. (2017), states as follows:

> (a) As a condition precedent to filing any action for benefits under this section, written notice of an intent to initiate litigation must be provided to the insurer. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).
>
> (b) The notice must state that it is a "demand letter under s. 627.736" and state with specificity:
>
> 1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.
>
> 2. The claim number or policy number upon which such claim was originally submitted to the insurer.
>
> 3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due. A completed form satisfying the requirements of paragraph (5)(d) or the lost-wage statement previously submitted may be used as the itemized statement. To the extent that the demand involves an insurer's withdrawal of payment under paragraph (7)(a) for future treatment not yet rendered, the claimant shall attach a copy of the insurer's notice withdrawing such payment and an itemized statement of the type, frequency, and duration of future treatment claimed to be reasonable and medically necessary.

Unless it is unclear or not obvious, the Court is bound by the plain language of the statute. This Court finds that the meaning of Section 627.736(10), Fla. Stat., is clear and obvious. Thus, taking the plain and obvious meaning of the statute against the demand letter at issue, the Court notes that Plaintiff's demand letter indicates the name of the insured and claimant, including "a copy of the assignment . . ."; the claim or policy number; the name of the medical provider who rendered the subject services; it includes an itemized statement by way of an enclosed CMS-1500 form specifying each exact amount; the date(s) of service; and it states the type of benefit claimed to be due.

Defendant's motion disputes the sufficiency of Plaintiff's demand letter as it relates to the "exact amount" and "type of benefit claimed to be due" under Section 627.736(10), Fla. Stat., in that it fails to state the *exact amount owed*.

Section 627.736(10), Fla. Stat., is clear as to what must be stated with "specificity" in a demand letter. This Court looks to its sister courts as they have interpreted the "type of benefit claimed to be due." In *La Familia Med. Ctr., a/a/o Luis Gato v. State Farm Mut. Auto. Ins. Co.*, the Court, in granting Plaintiff's Motion for Summary Judgment as to Defendant's deficient demand affirmative defense, found the Plaintiff's demand letter complied with Section 627.736(10), Fla. Stat., and specifically stated:

> **This Court rejects Defendant's notion that a demand letter must indicate the prior payments made by the Defendant as there is no language in Fla. Stat. 627.736(10) requiring the Plaintiff to calculate prior payments made.** As a payor, the Defendant is acutely aware of its prior payments. Moreover, the Court questions "what benefit is derived by asking the Plaintiff to advise the Defendant of information already in its possession and (of its own making). **The purpose of the pre-suit demand letter is not to advise the carrier of information**

that it already has, but to advise the carrier information that it may not have to wit: bills for dates of service that may have been inadvertently unaccounted for by the Defendant with the Plaintiff's initial billing." *St. Johns Medical Ctr. a/a/o Melissa Brown v. State Farm Mut. Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 457a. *See also Professional Medical Building Group, Inc. a/a/o Luisa Grasset v. State Farm Mut. Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 463a.

The Court is not free to edit statutes or add requirements that the legislature did not include. *Meyer v. Caruso*, 731 So. 2d 118, 126 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D990c]. The fats in this case are not in dispute. The Plaintiff attached to its PDL a ledger that constitutes the itemized statement. **The itemized statement contained the relevant information to allow the Defendant to see the exact dates of service at issue, the CPT codes at issue, the exact charges for those codes and the description of the treatment, service or accommodation provided.**

26 Fla. L. Weekly Supp. 37a (Fla. Miami-Dade County Mar. 13, 2018) (emphasis added).

As in the *La Familia* case, the facts are not in dispute here. The Plaintiff in this case provided the pertinent information regarding the provider, insured, claim and policy number, and relevant dates of service in its demand letter, and attached a CMS-1500 form to said demand wherein it provides "the dates of service at issue, the CPT codes at issue, the exact charges for those codes . . . ." *Id*. This Court finds that Plaintiff has complied with the pre-suit requirements of the Florida No-Fault Law as a matter of law.

In *David Saavedra v. State Farm Fire & Cas. Co.*, Judge Guzman presided over a similar deficient demand issue where the Defendant in that case was making a similar argument as the Defendant in this matter. 26 Fla. L. Weekly Supp. 663a (Fla. Miami-Dade County Ct. Oct. 2, 2018). In denying Defendant's Motion for Final Summary Judgment, Judge Guzman stated:

> Additionally, this Court rejects the Defendant's notion that a demand letter must indicate the exact amount owed. There is no language contained in Fla. Stat. 627.736(10) that requires a party to compute the "exact amount owed". The burden to adjust the claim is on the insurance company, not the provider. The provider has a duty to supply the insurance carrier with its bills in a timely manner, which was done in this case. Therefore, once the provider supplied this information to the carrier a second time in the form of an itemized statement, it complied with the requirements of § 627.736. The Court is unclear, assuming it accepted the Defendant's interpretation of F.S. § 627.736(10), how a claimant is supposed to be able to adjust a PIP claim to make a determination as to the exact amount *owed*. When factors such as application of the deductible, knowledge as to the order in which bills were received from various medical providers, and whether claimant purchased a MedPay provision on a policy (as well as other issues) are unknown to the medical provider, knowledge as to the exact amount owed is virtually impossible. The Court is not free to edit statutes of (sic) add requirements that the legislature did not include. *Meyer v. Caruso*, 731 So. 2d 118, 126 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D990c].
>
> Moreover, this Court is also aware of its constitutional duty to allow litigants access to the courts. When examining conditions precedent, they must be construed narrowly in order to allow Florida citizens access to courts. *Pierrot v. Osceola Mental Health*, 106 So. 3d 491 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D131a]. "Florida courts are required to construe such requirements so as to not unduly restrict a Florida citizen's constitutionally guaranteed access to courts." *Apostolico v. Orlando Regional Health Care System*, 871 So. 2d 283 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D750b]. For this Court to hold a potential litigant to the high standard suggested by the Defendant would effectively result in a constitutional denial of access to courts. While the Fifth District Court of Appeal in *Apostolico* and *Pierrot* addressed conditions precedent in a medical malpractice paradigm, the rationale of allowing full and unencumbered access to courts applies equally in a PIP context with respect to a PDL. See, *Apostilico*, at 286 ("While it is true that presuit requirements are conditions precedent to instituting a malpractice suit, the provisions of the statute are not intended to *deny access to courts on the basis of technicalities*") (emphasis added), citing, *Archer v. Maddux*, 645 So. 2d 544 (Fla. 1st DCA 1994).

Additionally, in *Carolyn Maldonado-Garcia, M.D., P.A., a/a/o Aimee Vila v. State Farm Mut. Auto. Ins. Co.*, the Court found Defendant's position that Plaintiff failed to "strictly comply" with the condition precedent because it failed to properly account and calculate all prior payments made or enumerate the "exact amount owed" was not supported by a plain reading of the statute. 26 Fla. L. Weekly Supp. 983a (Fla. 11th Jud. Cir. Jan. 30, 2019). The Court went on to cite a litany of cases throughout Florida that have summarily rejected this position.[1]

In *N. Fla. Chiropractic & Rehab. Ctr., a/a/o Ladeirde Forehand v. Geico Gen. Ins. Co.*, the Court granted Plaintiff's Motion for Summary Judgment finding that Plaintiff had satisfied the condition precedent in Section 627.736(10), Fla. Stat. 27 Fla. L. Weekly Supp. 62a (Fla. Duval County Ct. Feb. 19, 2019). The Court found no merit to Defendant's argument that the "exact amount claimed to be due" had to be "accurate to the penny", otherwise the demand letter was non-compliant citing to *MRI Assoc. of Am., LLC a/a/o Ebba Register v. State Farm Fire & Cas. Co.*, 61 So. 3d 462 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b]. *Id*. The Court dismissed the Defendant's interpretation of the *MRI Associates* case finding that:

> **[t]he "exacting" standard goes to the itemized bill and not to any calculation made by Plaintiff.** Defendant's position that Plaintiff failed to "strictly comply" with the condition precedent because it failed to calculate the exact amount owed so that it matches the amount Defendant states should be at issue is not supported by the language of F.S. §627.736(10), and sister courts have rejected this argument. *See Coastal Care Medical Center, Inc. a/a/o Sharon Wilson v. State Farm Mut. Auto. Ins. Co.*, 25 Fla. L. Weekly Supp. 808a (Duval Cty. Ct., Judge Shore, Nov. 2, 2017); *McGowan Spinal Rehab Center a/a/o Jaynell Cameron v. State Farm Mut. Auto. Ins. Co.*, 22 Fla. L Weekly Supp. 708a (Duval Cty. Ct., Judge Shore, Dec. 17, 2014); *Neurology Partners, P.A. a/a/o Sherry Roy v. State Farm Mut. Auto. Ins. Co.*, (Duval Cty. Ct., Judge Flower, June 4, 2014) [21 Fla. L. Weekly Supp. 927a]; *Neurology Partners, P.A., d/b/a Emas Spine & Brain a/a/o Scott Bray v. State Farm Mutual Automobile Insurance Company*, 22 Fla. L. Weekly Supp. 101b (Duval Cty. Ct., Judge Mitchell, Aug. 7, 2014); *North Florida Chiropractic & Rehabilitation Center a/a/o Kenneth Brown v. State Farm Mutual Automobile Insurance Company*, 22 Fla. L. Weekly Supp. 266b (Duval Cty. Ct., Judge Derke, Aug. 28, 2014); *Silver Consulting Services, Inc. d/b/a Silver Chiropractic a/a/o Marvin Whalen v. United Service Automobile Association*, 23 Fla. L. Weekly Supp. 549b (Duval Cty. Ct., Judge Hudson, Sep. 24, 2015); and *Coastal Care Medical Center, Inc. a/a/o Michael Palkowski v. State Farm Mut. Aut. Ins. Co.*, 24 Fla. L. Weekly Supp. 824a (Duval Cty. Ct., Judge Hudson, Dec. 22, 2016).

Id. (emphasis added).

In the instant case, the Plaintiff provided the Defendant a demand letter that set forth all of the required information pursuant to Section 627.736(10), Fla. Stat. The demand letter stated the name of the "insured upon which such benefits are being sought." Fla. Stat. §627.736(10). It provided "a copy of the assignment giving rights to the claimant if the claimant is not the insured." *Id*. It listed the "claim number or policy number upon which such claim was originally submitted to the insurer." *Id*. Plaintiff's demand letter further provided

the "name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim." *Id*. It also provided an "itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due." The Court finds Plaintiff's demand letter, and the enclosed CMS 1500 form, meets the requirements of Section 627.736(10), Fla. Stat.

The Court, therefore, rejects Defendant's interpretation of Section 627.736(10), Fla. Stat. The statute is plain and obvious, and thus, this Court cannot read into the statute what it does not say. Defendant is asking this Court to read into the statute that Plaintiff is required to provide an "exact amount owed," but such language simply does not exist in the statute. This Court cannot impose requirements upon the Plaintiff that are not set forth in the statute. If the legislature intended for the Plaintiff to essentially adjust the claim or conduct "an accounting" as the Defendant surmises, the legislature would have stated as such in the statute. However, despite several reiterations and amendments to the No-Fault Statute, the legislature has essentially left Section 627.736(10), Fla. Stat., untouched.

Specifically, Defendant asks this Court to create a whole new requirement under Section 627.736(10)(b)3., by combining one portion of this paragraph—"exact amount"—to another portion of the paragraph—"the type of benefit claimed to be due" to create a requirement that the Plaintiff state an "exact amount due." This is a complete rewriting of the Section 627.736(10), Fla. Stat. This Court cannot and will not insert language that does not exist in the statute. Paragraph 3 in Section 627.736(10), Fla. Stat., states in pertinent part:

> 3. **To the extent applicable**, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and **an itemized statement specifying each exact amount**, the date of treatment, service, or accommodation, **and the type of benefit claimed to be due.**

Fla. Stat. §627.736(10)3. (emphasis added). Not only are these two items separated by other items requested in the itemized statement, but it also requests two different items. The itemized statement requested should include the each exact amount, the date of the treatment, and the type of benefit claimed to be due. A plain and obvious meaning of exact amount, which read along with the remaining portion of Section 627.736(10)(b)3., Fla. Stat., means the exact amount billed for that "treatment, service, or accommodation." This is because paragraph 3 of Section 627.736(10), goes on to explain that "[a] completed form satisfying the requirements of paragraph (5)(d) **or** the lost-wage statement **previously submitted** may be used as the itemized statement." (emphasis added). In *MRI Associates*, the Court explicitly stated Florida's No-Fault Law allows a Section 627.736(5)(d), Fla. Stat., health insurance claim form to be " 'used as the itemized statement.' " 61 So. 3d at 465. The legislature clearly provides the option for a medical provider to attach the very same health insurance claim forms (or for an insured to attach the lost-wage statements when claiming disability benefits) previously submitted (i.e., without accounting for prior payments made) in order to satisfy the itemized statement requirement of a pre-suit demand letter. Nothing in the text of the law contemplates a provider or insured to account for prior payments made.

Moreover, with regard to the "type of benefit claimed to be due," words matter. Section 627.736(1), Fla. Stat., lays out three types of benefits that are provided for under the No-Fault scheme—1) medical benefits; 2) disability benefits; and 3) death benefits. Providers, insurers, and even the Courts, seem to forget that the No-Fault Law does not only provide medical benefits for injuries sustained as a result of a motor vehicle accident, but it also provides for disability benefits and $5,000 in death benefits. Despite the fact that the vast majority of disputes between claimants and carriers arise from the reasonableness, relatedness, and medical necessity of medical services and treatment rendered to an insured, it does not mean the other two benefits do not exist and are not provided for under the law. Thus, in reviewing the No-Fault law, including Section 627.736(10), Fla. Stat., the plain and obvious meaning of "type of benefit claimed to be due" can only mean informing the carrier with respect to the type of PIP benefits sought—medical, disability, and/or death.

Plaintiff, in the instant matter, provided a CMS-1500 form with CPT ("Current Procedural Terminology") codes that shows the services at issue are medical benefits rendered to the insured. It is clear to Defendant that Plaintiff is not seeking disability benefits or death benefits in its demand. If Plaintiff was seeking benefits for lost wages, it would have provided a lost-wage statement, or similarly, would have provided a death certificate or similar information if seeking death benefits under the statute. The CMS-1500 form attached to Plaintiff's demand letter clearly shows that the benefits sought are for medical services rendered to the insured.

Furthermore, the information set forth in Plaintiff's demand letter provided Defendant with all of the information it needed to assess the amount due and owing to determine if any additional amounts were owed to the Plaintiff. Defendant had all of the necessary and statutorily required information it needed to review Plaintiff's demand. In fact, Defendant did review Plaintiff's pre-suit demand letter and decided that it did not owe any further benefits. Defendant was able to assess Plaintiff's pre-suit demand letter and conclude that it owed no additional sums, and Defendant issued a letter in response to Plaintiff's demand letter where it stated this conclusion. Such was the choice it made.

Defendant cites to several cases it purports to stand for the proposition that the Plaintiff should have calculated the exact amount owed but these cases are distinguishable. Cases such as *MRI Assoc., supra, and Gov't Employees Ins. Co. v. Open MRI of Miami-Dade, LTD.*, 18 Fla. L. Weekly Supp. 337a (Fla. 11th Jud. Cir. (App.) 2011) deal with services for which a prior version of the No-Fault Law specifically limited the amount of reimbursement to 175% of the Medicare Fee Schedule. These cases are inapposite to the facts in this case.

Defendant cites to the following cases to stand for the position that Plaintiff's demand letter is deficient because it asks for more than the compensable amount: *See Fountain Imaging of West Palm Beach, LLC (a/a/o Charlotte Jennings) v. Progressive Express Ins. Co.*, 14 Fla. L. Weekly Supp. 614a (Fla. 15th Jud. Cir. (App.) Mar. 30, 2007), *Wide Open MRI a/a/o Susana Hinestroza v. Mercury Ins. Group of Fla.*, 16 Fla. L. Weekly Supp. 513b (Fla. 17th Jud. Cir. (App.) Mar. 13, 2009). What Defendant fails to realize is that prior to the 2008 amendment to the No-Fault Law, the statute limited reimbursement of MRI's to 175% of the Medicare Fee Schedule. In the case of *Venus Health Ctr. (a/a/o Joaly Rojas) v. State Farm Fire & Cas. Co.*, 21 Fla. L. Weekly Supp. (Fla. 11th Jud. Cir. (App.) Mar. 13, 2014), the provider's demand sought $17,580.00 in personal injury protection medical benefits.

In the instant matter, Plaintiff not only attached an itemized statement by way of a CMS-1500 form, but also referenced a maximum amount which equated to 80% of the total amount billed. Defendant asserts that the amount referenced in the demand letter is not a compensable amount because the subject policy elected the schedule of maximum charges under Section 627.736(5)(a)1, Fla. Stat. However, even the very case law cited by Defendant asserts that a carrier cannot disclaim reimbursement under Section 627.736(5)(a), Fla. Stat., regardless of whether the subject policy elects the schedule of maximum charges or not.[2] *See generally Allstate Ins. Co. v. Orthopedic Specialists*, 212 So. 3d 973 (Fla. 2017) [42 Fla. L. Weekly

S38a]; and *Geico Gen. Ins. Co. v. Virtual Imaging Servs.*, 141 So. 3d 147 (Fla. 2013) [38 Fla. L. Weekly S517a]. For these reasons, the Court rejects Defendant's argument that Plaintiff's demand letter is deficient because it did not seek a compensable amount.

Defendant further argues that Plaintiff's demand letter is deficient because the amount requested which accounts for 80% of the total amount billed is not the same amount sought in its Complaint. The theory upon which Defendant bases this argument is flawed and is unsupported by case law binding on this Court. *See Raskin v. Raskin*, 625 So. 2d 1314 (Fla. 4th DCA 1993) (stating "it is axiomatic that every complaint is considered to pray for general relief. Ordinarily, it is the facts alleged, the issues, and the proof, not the form of the prayer for relief, which determine the nature of the relief to be granted." (citing *Chasin v. Richey*, 91 So. 2d 811 (Fla. 1957).)). *See also Riggins Fed. Ins. Agency, Inc. v. Art Bruns Executive Club, Inc.*, 575 So. 2d 756 (Fla. 3d DCA 1991) (affirming the trial court citing to *Chasin*, *infra*, and *Marrone v. Miami Nat'l Bank*, 507 So. 2d 652 (Fla. 3d DCA 1987)); *Circle Fin. Co., d/b/a Securities Inv. Co. of Fla.v. Peacock*, 399 So. 2d 81 (Fla. 1st DCA 1981) (stating "[u]nder the Florida Rules of Civil Procedure, every complaint is considered to pray for general relief. Fla. R. Civ. P. 1.110(b)). The court thus is required to look to the facts alleged, the issues and proof, and not the form of the prayer for relief to determine the nature of the relief which should be granted." (citing *Chasin*, *infra*; and *Phelps v. Higgins*, 120 So. 2d 633 (Fla. 2d DCA 1960).)); *Fountainebleau Hotel Corp. v. Walters*, 246 So. 2d 563 (Fla. 1971); and *Shirley v. Lake Butler Corp., et al.*, 123 So. 2d 267 (Fla. 2d DCA 1960).

More recently, in *Alliance Spine & Joint II Inc. v. USAA Cas. Ins. Co.*, the Court dealt with a similar argument regarding the sufficiency of Plaintiff's demand letter. There, the Court noted "that Florida Statute 627.736 does not set forth that Demand Letter is invalid if a later filed suit contains a jurisdictional amount that differs from the amount requested in the Demand Letter." 28 Fla. L. Weekly Supp. 961a (Fla. Broward County Ct. Dec. 3, 2020) (referencing *Nunez v. Geico Gen. Ins. Co.*, 117 So. 3d 388, 398 (Fla. 2013) [38 Fla. L. Weekly S440a]).

Moreover, if the Defendant in this matter had any issue regarding the amount being sought in Plaintiff's Complaint, the proper avenue to raise this issue would have been with a Rule 1.140(c) Motion for More Definite Statement, which would have tolled the time for Defendant to file an answer until such time the Court ruled. The docket in the instant action shows such a motion was filed by the Defendant, but Defendant never set its motion for hearing prior to this hearing on cross-motions for summary judgment. As a result of Defendant's failure to timely set its motion, the Court is not going to rule on this argument as it is not properly before the Court today. However, the argument posited by Defendant does not affect the issue before this Court regarding the sufficiency of Plaintiff's demand letter as jurisdictional allegations contained in the pleadings are not dispositive regarding the issue of damages as it only relates to the Court's jurisdiction over the subject matter.[3]

However, the crux of Defendant's argument is based on a recent Third District Court of Appeal opinion, *David Rivera v. State Farm Mut. Auto. Ins. Co.*, Case No. 3D21-27 (Fla. 3d DCA Feb. 24, 2021) [46 Fla. L. Weekly D447a]. Opinions from the Third District are binding upon this Court, but the Court must nonetheless analyze the opinion to determine if it is distinguishable from the facts in the instant matter.

In *Rivera*, the issue is regarding alleged due and owing reimbursement for transportation costs incurred in connection with medically necessary treatment. Over the course of nearly ten (10) pages, the Third District painstakingly details Rivera's actions which lead to the trial court's finding that his demand letter was deficient. Rivera submitted reimbursement to State Farm for transportation costs for sixteen (16) treatment dates at an entity named Kendall Chiropractic. Rivera, however, failed to provide an itemized statement detailing the dates of service for which he sought transportation costs or specifying the exact amount. Rivera also listed a provider for which State Farm had not received any bills for medical services rendered.[4] State Farm responded to the Rivera's correspondence requesting more information as they did not have the dates of service that he was seeking reimbursement and confirming if treatment was rendered at Kendall Chiropractic as they had not received bills from this entity with respect to Rivera and this claim. Rivera responded by sending a second correspondence which alleged outstanding reimbursement costs for twelve (12) treatment dates—four less than what had been previously requested—and also failed to provide the amount he incurred in costs for each date he sought reimbursement. Once again, State Farm responded requesting more information as Rivera failed to provide any more details regarding the dates of service and the amount incurred in transportation costs pursuant to the statute. Rivera then sent a demand letter to which he attached the initial letter to State Farm.

The Third District affirmed the trial court's decision that Rivera's demand letter was deficient pursuant to Section 627.736(10), Fla. Stat. And, it is clear from the details set forth in the opinion why the Court affirmed this decision. Rivera's demand letter failed to comply with the plain and obvious meaning of Section 627.736(10), Fla. Stat. Rivera's demand letter failed to provide the name of the medical provider who rendered "the treatment, services, accommodations, or supplies that form the basis of such claim." Rivera's demand letter failed to provide "an itemized statement specifying each exact amount" or "the date of treatment, service, or accommodation." By almost all accounts, Rivera's demand letter was deficient in providing the information the Defendant needed to assess the claim set forth in the letter and determine if it in fact owed due and owing reimbursement costs.

This Court agrees with the analysis of the Third District in *Rivera* and agrees that, if such facts were before this Court, it would be bound to find such a demand letter deficient pursuant to the statute and the Third District's opinion in *Rivera*. The Court in *Rivera*, specifically refers back to the particular facts in that case when it affirmed the trial court's ruling stating "[w]e thus **agree that under the facts of this record**, Rivera did not serve State Farm with a valid pre-suit demand letter as required by section 627.736(10)." *Id*. at *20 (emphasis added). The Court further goes on to state, "for the reasons expressed above, **we hold that in order for an insured's pre-suit demand letter to comply with section 627.736(10), it must provide the exact information listed in in the statute**." *Id*. (emphasis added).

It is for the same reasons that this Court, with the facts it has before it in this matter, finds Plaintiff's demand letter complies with Section 627.736(10). Here, Plaintiff's demand letter states it is a "demand letter under s. 627.736" and states with specificity "the name of the insured upon which such benefits are being sought"; it encloses "a copy of the assignment giving rights to the claimant if the claimant is not the insured"; it provides the name of the "medical provider who rendered to an insured the treatment, services, or accommodations, or supplies that form the basis of such claim"; and it provides an itemized statement by way of a CMS-1500 form that sets forth "each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due."

As such, this Court finds that the facts in *Rivera* are highly distinguishable from the instant matter and further finds Defendant's reliance on *Rivera*'s finding that the demand letter in that case was deficient is misplaced, at best. Plaintiff's demand letter in the instant matter "provid[ed] the exact information listed in the statute" and thus

complied with the provisions of §627.736(10).

CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED** that Defendant's Motion for Summary Judgment is **DENIED** and Plaintiff's Motion for Summary Judgment is **GRANTED**.

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[1]*See La Familia Med. Ctr., a/a/o Luis Gato v. State Farm Mut. Auto. Ins. Co.*, 26 Fla. L. Weekly Supp. 37a (Fla. Miami-Dade Cty. Ct., Mar. 13, 2018); *Miami Alternative Med. Ctr. of Fla., Inc. a/a/o Lideisy Rios v. State Farm Mut. Auto. Ins. Co.* (Fla. Miami-Dade Cty. Ct., Mar. 13, 2018); *Saavedra, David v. State Farm Fire & Cas. Co.,* 26 Fla. L. Weekly Supp. 663a (Fla. Miami-Dade Cty. Ct., Oct. 2, 2018); *Prof'l Med. Bldg. Group, Inc., a/a/o Luisa R. Grasset v. State Farm Mut. Auto. Ins. Co.,* 25 Fla. L. Weekly Supp. 473a (Fla. Miami-Dade Cty. Ct., July 18, 2017); *Kadosh Med. Srvcs., Inc., a/a/o Davila Perez v. State Farm Fire & Cas. Co.,* 19 Fla. L. Weekly Supp. 207b (Fla. Miami-Dade Cty. Ct., June 7, 2011); *Ultra Care & Diagnostic, Corp., a/a/o Yania Rodriguez v. MGA Ins. Co., Inc.,* 20 Fla. L. Weekly Supp. 185b (Fla. Miami-Dade Cty. Ct., Oct. 1, 2012); *A.C. Rehab. Ctr., Inc. (Anisleydis Rivero) v. State Farm Mut. Auto. Ins. Co.,* 19 Fla. L. Weekly Supp. 890a (Fla. Miami-Dade Cty. Ct., Mar. 16, 2012); *Oasis Diagnostic Ctr., Inc. (Ania Roque) v. State Farm Fire & Cas. Co.,* 25 Fla. L. Weekly Supp. 976a (Fla. Miami-Dade Ct. Ct., Dec. 21, 2017); *EBM Internal Med. a/a/o Jasmine Gaskin v. State Farm Mut. Auto. Ins. Co.,* 19 Fla. L. Weekly Supp. 382a (Fla. Duval Cty. Ct. Dec. 9, 2011) (finding no requirement to include prior payments made or exact amount owed in a demand letter); *First Coast Med. Ctr, Inc. a/a/o Barbara Derouen,* 17 Fla. L. Weekly Supp. 118a (Fla. Duval Cty. Ct. Nov. 12, 2009); *EBM Internal Med. a/a/o Bernadette Dorelien v. State Farm Mut. Auto. Ins. Co.*, 19 Fla. L. Weekly Supp. 410a (Fla. Duval Cty. Ct. Feb. 8, 2012); *Neurology Partners, P.A., d/b/a Emas Spine & Brain a/a/o Scott Bray v. State Farm Mut. Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 101b (Fla. Duval Cty. Ct. Aug. 7, 2014); *Neurology Partners, P.A. d/b/a Emas Spine & Brain a/a/o Wendy Brody v. State Farm Mut. Auto. Ins. Co.*, (Case No.: 2012-SC-4885, Fla. Duval Cty. Ct. July 23, 2014); *and Physicians Med. Ctrs. Jax, Inc. a/a/o Melanie Wrenn v. State Farm Mut. Auto. Ins. Co.*, 22 Fla. L. Weekly Supp. 359a (Fla. Duval Cty Ct. Aug. 25, 2014).

[2]However, the question of whether an insurer can in-fact disclaim the fact-dependent methodology found in 627.736(5)(a) depending on the contractual language of its policy with its insured is not before the Court today and the Court issues no opinion regarding same.

[3]The Court is further disinclined to take the leap Defendant asks it to take as it relates to the amount in controversy as Plaintiff is the master of its claim and, as such, can move forward with a claim or any part of a claim at any time from inception of the suit up and prior to resolution, including during trial. *See Health First, Inc. v. Cataldo*, 92 So. 3d 859 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1551c]. This right afforded to plaintiffs is absolute. *See Pino v. Bank of N.Y.*, 121 So. 3d 23 (Fla. 2013) [38 Fla. L. Weekly S168a].

[4]There was no dispute between the parties regarding the providers who rendered services to Rivera and that bills for those services were submitted to State Farm and were paid.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Allowable amount under applicable schedule of Medicare Part B within meaning of section 627.736(5)(a)2 requires PIP insurer to reimburse using higher 2007 non-facility limiting charge rather than lower 2007 non-facility participating price—Multiple Procedure Payment Reduction—Insurer unlawfully applied MPPR to therapy services provided by chiropractor where MPPR only applies to services furnished under therapy plan of care, and chiropractors cannot establish therapy plans of care—Further, MPPR is not permissible Medicare payment methodology under PIP statute where MPPR limitation always results in allowable amount lower than 2007 allowable amount in contravention of requirement of section 627.736(5)(a)2 that application of fee schedule and any payment limitation may not result in allowable amount less than allowable amount under 2007 fee schedule

HOLLYWOOD MEDICAL & REHABILITATION, INC., a/a/o Sharon Brown, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-002822-SP-25, Section CG01. May 10, 2021. Linda Melendez, Judge. Counsel: Howard W. Myones, Myones Legal, PLLC, Fort Lauderdale; and Robert K. Hannat, Miami, for Plaintiff. Cristina M. Cabrerea and Michael P. Hughes, Progressive PIP House Counsel, Medley, for Defendant.

ORDER DENYING DEFENDANT'S SECOND AMENDED MOTION FOR SUMMARY JUDGMENT AND GRANTING PARTIAL SUMMARY JUDGMENT FOR THE PLAINTIFF

THIS CAUSE came before the Court on May 7, 2021, upon Defendant's Second Amended Motion for Final Summary Judgment and Plaintiff's Motion for Summary Judgment, and the Court, having reviewed the motion and evidence; having reviewed the court file and the legal authorities supplied by the parties; and having heard extensive argument of counsel, and being otherwise sufficiently advised in the premises, it is hereby finds as follows:

Defendant contends that the payments previously issued to the Plaintiff, a chiropractic facility, were proper pursuant to the schedule of maximum charges found in Section 627.736(5)(a)1-5, Florida Statutes, and Progressive's policy. Specifically, the Defendant alleges that it is allowed to use the Medicare Multiple Procedure Payment Reduction (MPPR) to further reduce the amount it reimbursed Plaintiff for certain therapy services below 200% of the allowable amount under the participating physicians' fee schedule of Medicare Part B for the service year at issue. Furthermore, Defendant reimbursed CPT code 72100 using the participating physicians fee schedule for 2007 rather than the Medicare limiting charge for 2007.

For the purposes of this case, Plaintiff did not contest Defendant's notice of its election to reimburse pursuant to the permissive "fee schedule" payment methodology set forth in Fla. Stat. §627.736(5)(a)(1) or Defendant's ability to use various Medicare payment methodologies and coding policies as referenced in its insurance policy and Fla. Stat. §627.736(5)(a)(3). Accordingly, the Court finds that MPPR is, as Defendant contends, a Medicare payment methodology.

The Court denies Defendant's summary judgment as to proper payment of CPT code 72100. The Third District Court of Appeal ruled in *Priority Medical Centers, LLC v. Allstate Insurance Company*, __ So.3d __, 2021 Fla. App. LEXIS 5741 (Fla. 3d. DCA April 28, 2021) [46 Fla. L. Weekly D978b] that the "the allowable amount under the applicable schedule of Medicare Part B for Medical Services, Supplies and Care Subject to Medicare Part B" in Fla. Stat. §627.736(5)(a)(2) requires the insurer to reimburse using the higher 2007 non-facility limiting charge, not the lower 2007 non-facility participating price.

The Court also denies Defendant's motion for summary judgment as it finds that Progressive cannot use a Medicare payment methodology in a manner that Medicare would not.

The Medicare Claims Processing Manual provides that the therapy services to which the MPPR applies include only physical therapy, occupational therapy and speech-language pathology services, and "therapist" means only a physical therapist, occupational therapist or speech-language pathologist. The Centers for Medicare and Medicaid Services (CMS) also specifies that the MPPR may be applied only when therapists and certain physicians provide therapy services. *See* CMS Manual System Transmittal 88: Pub 100-02 Medicare Benefit Policy, May 7, 2008. The term "physician" with respect to outpatient rehabilitation therapy services means doctors of medicine, osteopathy (including an osteopathic practitioner), podiatric medicine, or optometry (for low vision rehabilitation only). *Id.* Chiropractors and doctors of dental surgery or dental medicine are **not** considered physicians for therapy services and may neither refer patients for rehabilitation therapy services nor establish therapy plans of care. *Id.* (Emph. added). Even assuming that Progressive is authorized to apply MPPR as a Medicare payment methodology, Progressive would have to apply the payment method in the same manner as Medicare would

(otherwise it would not be a "Medicare payment methodology.").

Medicare applies MPPR to "always therapy" services, that is therapy services that are furnished under a therapy plan of care. Medicare specifically excludes chiropractors under the definition of physician as it relates to outpatient therapy services and specifically forbids chiropractors from establishing therapy plans of care. Because MPPR only applies to services that are furnished under a therapy plan of care, and chiropractors can never furnish a therapy plan of care, MPPR can never apply to chiropractors. 75 F.R. 228, 73232 (November 29, 2010) & 78 F.R. 237, 74262 (December 10, 2013). The Court finds that Progressive unlawfully applied the MPPR to the therapy services provided by the Plaintiff, a chiropractor.

Additionally, the Court finds that MPPR is not a permissible Medicare payment methodology under the PIP statute because its use violates Fla. Stat. §627.736(5)(a)(2), which states that the "the applicable fee schedule or payment limitation under Medicare is the fee schedule or payment limitation in effect on March 1 of the services year in which the services...[are] rendered...notwithstanding any subsequent change made to the fee schedule or payment limitation, except that it may not be less than the allowable amount under the applicable schedule of Medicare Part B for 2007 for medical services, supplies and care subject to Medicare Part B." There is no dispute that the allowable amounts for CPT codes at issue in 2015 were higher than the 2007 allowable amounts. There is also no dispute that the allowable amounts for the CPT codes after application of the MPPR are lower than the 2007 allowable amounts. As such, because the MPPR payment limitation always results in an allowable amount lower than the 2007 allowable amount, it is not a permissible payment limitation pursuant to §627.736(5)(a)(2). Progressive wants this Court to write an additional sentence into the statute that would state, "if the payment limitation is lower than the 2007 allowable amount, the insurer may pay the 2007 amount." This Court will not do so.

Finally, despite the fact that subparagraph (5)(a)3 of the PIP statute does not prohibit insurers from using Medicare payment methodologies and coding policies when determining the correct amount of reimbursement, there is nothing in the statute that indicates the legislature intended for subparagraph (5)(a)3 to override subparagraph (5)(a)1 or 2. If the "language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction. *Kingsway Amigo Ins. Co. v. Ocean Health, Inc.* 63 So.3d 63, 66 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1062a]. Parts or subparts of the statute must not be read in isolation. *Citizens Prop. Ins. Corp. v. River Manor Condo. Ass'n*, 125 So.3d 846, 849 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D820a]. Rather, "every statute must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts." *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992). Reading the PIP statute as a whole, the Court finds that while subparagraph (5)(a)3 does not prohibit insurers from using Medicare payment methodologies and coding policies to determine the appropriate amount of reimbursement, those payment limitations may not be less than the allowable amount at the 2007 Medicare Part B fee schedule. Allowing Progressive to use MPPR to pay or allow less than the 2007 fee schedule, would invalidate and render meaningless a significant portion of the PIP statute. This Court holds that subparagraph (5)(a)3 does not authorize PIP insurers to apply Medicare payment methodologies and payment limitations in a manner that renders other portions of the PIP statute meaningless.

Accordingly, based on the foregoing, Defendant's Second Amended Motion for Final Summary Judgment is hereby DENIED and Plaintiff's Motion for Summary Judgment is GRANTED in part such that MPPR shall not be applied to this claim.

* * *

Insurance—Personal injury protection—Choice of law provision in automobile policy stating that Michigan law will control is enforceable where policy was issued in Michigan for vehicle registered in Michigan to insured with Michigan driver's license, and there is no evidence that insured was resident of Florida or that insurer was advised of change in residency—Exception to *lex loci* rule for necessary protection of Florida citizens is not applicable to insured who is not permanent Florida resident and did not inform insurer of Florida residency—No merit to argument that section 627.733(2), which requires nonresident owner of vehicle that has been present in state for more than 90 days in preceding 365 days to maintain security in state requires application of Florida law where there is no evidence of insured's presence in state, and such presence would have required him to obtain Florida policy—Argument that insured's attorney has perfected Florida charging lien is without merit and moot

PRESGAR IMAGING OF CMI SOUTH, L.C., a/a/o Anthony Luna-Cartin, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign company, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 18-CC-009546, Division M. May 4, 2021. Miriam Valkenburg, Judge. Counsel: Christina N. Rothstein, FL Legal Group, Tampa, for Plaintiff. Lisa M. Lewis, Cole, Scott & Kissane, P.A., Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR CHOICE OF LAW

THIS CAUSE having come before the Court on Defendant's Motion for Choice of Law and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon:

ORDERED AND ADJUDGED that said Motion be, and the same is hereby GRANTED. Plaintiff filed this matter alleging a breach of contract for failure to pay Personal Injury Protection (PIP) benefits pursuant to Florida Law. At the time of the accident, Anthony Luna-Cartin was insured under an automobile policy issued in the state of Michigan. The policy contains a Choice of Law provision that specifically states that the law of the State of Michigan will control. Furthermore, Mr. Luna-Cartin's vehicle was registered in the state of Michigan and his driver's license was issued in the State of Michigan. The policy specifically provides that "The premium for this policy is based upon information ***we*** have received from ***you***. . .***You*** must inform ***us*** if any information regarding the following. . .changes during the policy period. . .(3) The location where ***your car*** is primarily garaged." *Policy* at 35. There is no evidence before the Court to suggest that Anthony Luna-Cartin was a resident of the State of Florida or that State Farm was advised in a change in residency.

In *Sturiano v. Brooks*, 523 So.2d 1126 (Fla. 1988), the Florida Supreme Court held that "[t]o allow one party to modify the contract simply by moving to another state would substantially restrict the power to enter into valid, binding and stable contracts. There can be no doubt that the Parties to insurance contract bargained and paid for the provisions in the agreement, including those provisions that apply to the stator law of that state." Parties enter into contracts with the acknowledgment that the law of that jurisdiction control their actions. Florida has long adhered to the rule of lex loci contractus. The rule, as applied to insurance contracts provides that the law of the jurisdiction where the contract was executed governs the right and liabilities of the Parties. *Id.* At 1129.

Here, the Parties did not bargain for Florida law to apply. The policy at issue was negotiated for and bargained for in Michigan. The Choice of Law provision was a term agreed upon by the Parties and is enforceable. There is one narrow exception to lex loci, which states "that the rules of comity may not be departed from, unless in certain cases for the purpose of necessary protection of our own citizens." *Herron v. Passailaigue*, 110 So. 539 (Fla. 1926). In *State Farm Mut. Auto Ins. Co. v. Roach*, 945 So.2d 1160 (Fla. 2006) [31 Fla. L. Weekly

S840b], the Court found that the public policy exception to the lex loci rule may only be invoked to protect a ***permanent resident*** of Florida, finding that where residents of another state reside in Florida for several months of the year, they cannot invoke the public policy exception to lex loci. Furthermore, the Court found that "at least, one more requirement also must be met: the insurer must be on reasonable notice that the insured is a Florida citizen." *Id.* At 1165. In *New Jersey Mfrs. Inc. Co. v. Woodward*, 456 So.2d 552 (Fla. 3d DCA 1984), the Court held that Florida law did not apply to a New Jersey policy because the insurer had notice only of the insured's changed mailing address, not that the insured changed its permanent address to Florida. Furthermore, in *State Farm Mut. Auto. Ins. Co. v. Davella*, 450 So.2d 1202 (Fla. 3d DCA 1984), the Court found Florida law to be inapplicable where the insured specifically rejected a Florida policy and advised State Farm that the Florida residency was temporary.

Plaintiff's allegation that Florida law should apply pursuant to Florida Statute 627.733(2) is misplaced. Florida Statute 627.733(2) requires a nonresident owner or registrant of a motor vehicle, which has been physically present within the state for more than 90 days during the preceding 365 days to maintain security in the state of Florida throughout the period such motor vehicle remains in the state. This duty is upon the insured and not the insurer and there is no evidence before this Court showing Mr. Luna-Cartin and his vehicle were present in the state for 90 days of the preceding 365 days prior to the accident, which would have required him to obtain a Florida policy.

Finally, Plaintiff counsel's allegation that she has perfected a Florida lien is without merit. Plaintiff's Complaint alleges one Count for Breach of Contract for failure to pay PIP and/or Medical Payments Coverage Benefits. There is no reference to an alleged "lien" or violation of same. There is nothing before this Court to suggest that there is a valid lien in this matter, which would require this Court to apply the laws of the State of Florida. Furthermore, Plaintiff's counsel cites to *Heller v. Held*, 817 So.2d 1023 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D1323b] to support its allegation that State Farm has violated its "lien". "An attorney's charging lien is an equitable right to have costs advanced and attorney's fees secured by the judgment entered in the suit wherein the costs were advanced and the fee earned." *Id.* at 1025 (citing to *Zimmerman v. Livnat,* 152 Fla. 329 (1943). There has been no judgement entered in this matter, thus this alleged issue is moot.

Based on the foregoing, Michigan law will control the substantive issues of this cause under the rule of lex loci contractus, including interpretation of the policy language and statutory requirements. Florida Statute 627.736, as well as Florida Statute 627.428 will not apply to this case.

* * *

Insurance—Discovery—Depositions—Supplementary deposition of insurer's corporate representative

REHAB SPECIALITY CENTER, LLC, (a/a/o Calixto Diaz), Plaintiff, v. STAR CASUALTY INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Small Claims Division. Case No. 20-CC-033613. May 11, 2021. James S. Moody, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION FOR PROTECTIVE ORDER

THIS MATTER having come before the court on May 10, 2021 on Defendant's Motion for Protective Order and Objection to Notice of Taking Deposition Duces Tecum. The court having reviewed the file, considered the motion, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds:

1. Defendant's Motion for Protective Order and Objection to Notice of Taking Deposition Duces Tecum Motion for Final Summary Judgment are **HEREBY DENIED**.

2. Plaintiff is entitled to a supplemental deposition of Defendant's Corporate Representative as to Plaintiff's amended breach of contract action as to matters not addressed in the prior deposition. Said deposition shall occur within thirty (30) days of today's date.

3. Defendant's Corporate Representative shall have Defendant's physical claim file in order to be able to properly answer questions. Any claims of privilege as to production of privileged documents shall be honored.

* * *

Insurance—Personal injury protection—Motion to strike insurer's affidavits in support of motion for summary judgment on compensability of electrodes used for electrical stimulation is denied—Striking affidavits without considering insurer's motion for summary judgment would deprive insurer of due process, fee schedules and coding authorities attached to affidavits cannot be stricken because they are incorporated in PIP statute, and argument that affidavits are in conflict with insurer's admissions mischaracterizes general admissions as specific admissions

INJURY TREATMENT CENTER OF NAPLES, LLC, a/a/o Rene Blandon, Plaintiff, v. ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 502019CC008691XXXXSB (RD). April 6, 2021. Reginald Corlew, Judge. Counsel: Robert Trilling, Boca Raton, for Plaintiff. Manuel Negron, Shutts & Bowen LLP, Miami, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO STRIKE AFFIDAVITS

THIS CAUSE came before the Court on March 23, 2021 on the parties' competing Motions for Summary Judgment regarding the compensability of HCPCs Code A4556 and on Plaintiff's Motion to Strike the Affidavits of Defendant, Allstate's Adjuster and Coding Expert. Having reviewed the filings, heard argument of counsel, and being otherwise fully advised in the premises, the Court denies the Plaintiff's Motion to Strike Defendant's Affidavits without prejudice for the reasons set forth herein:

I. **Introduction**

Plaintiff, Injury Treatment Center of Naples, billed HCPCS Code A4556 ("electrodes") with electrical stimulation rendered in a physician office. The electrodes are a medical supply used in conjunction with the medical service of electrical stimulation. Allstate denied reimbursement for the A4556/electrodes supply twice and paid for the medical service of electrical stimulation 13 times.

On January 11, 2021, Plaintiff moved for summary judgment regarding the compensability of A4556/electrodes, thereby signaling that the Plaintiff was ready to proceed with and resolve the issue of the compensability of Code A4556 by summary judgment. On January 21, 2021, Plaintiff noticed its Motion for Summary Judgment regarding A4556 for hearing on March 23, 2021. On February 19, 2021, Defendant, Allstate, filed its competing Motion for Summary Judgment regarding the compensability of A4556. On February 25, 2021, Allstate cross-noticed its Motion for Summary Judgment for hearing on March 23, 2021. On March 17, 2021, Plaintiff filed its Motion to Strike the Affidavits of Allstate's Adjuster and Coding Expert and noticed this Motion to Strike for hearing at the same time as the competing Motions for Summary Judgment. At the March 23, 2021 hearing, Plaintiff requested a ruling on its Motion to Strike Affidavits before proceeding with argument on the competing Motions for Summary Judgment regarding A4556. Allstate requested to proceed with argument on the duly-noticed competing Motions for Summary Judgment.

II. **Analysis**

A. **Striking the Affidavits without Considering Allstate's Summary Judgment Deprives Allstate of Due Process**

Plaintiff's Motion for Summary Judgment claims that Plaintiff can prove its case based on Allstate's January 27, 2020 Responses to Request for Admissions. Plaintiff's Motion to Strike Affidavits claims that Allstate's Responses to Request for Admissions prevent Allstate from proving its case, as set forth within its Motion for Summary Judgment. Plaintiff's two Motions are therefore ostensibly the same insofar as they both argue that Allstate's Responses to Request for Admissions are the sole thing for the Court to consider in determining whether the Plaintiff billed A4556 in compliance with the Medicare fee schedules and coding authorities incorporated into the PIP Statute.

Plaintiff's Motion to Strike asks the Court to find an inconsistency between Allstate's Responses to Request for Admissions and Allstate's Affidavits without considering the Motion for Summary Judgment, of which the Affidavits are a part. The Court is hard pressed to find, as a preliminary matter, that the Affidavits to the Motion for Summary Judgment and the Responses to Request for Admissions are in conflict without fully considering the Motion for Summary Judgment, of which the Affidavits are a part.

To determine if there is a conflict, the Court is required to consider in full the two documents which present the purported conflict.

> When a writing. . . or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing. . . that in fairness ought to be considered contemporaneously.

Section 90.108(1), Fla. Stat. (the "Doctrine/Rule of Completeness"). Plaintiff would have the Court find a conflict between two documents without considering one of the documents in full. The Court cannot do this and must therefore consider the Motion for Summary Judgment with the incorporated Affidavits and exhibits to determine whether the Affidavits actually present a conflict with the Responses to Request for Admissions. For the Court to only consider the Affidavits, without considering the Motion for Summary Judgment, of which they are a part, would be tantamount to the Court considering only one party's side to an argument in violation of the fundamental Due Process of the other party. For this reason alone, Plaintiff's Motion to Strike the Affidavits must be denied at this time.

B. **The Court Cannot Strike the Fee Schedules and Coding Authorities Attached to the Affidavits Because These are Incorporated into the PIP Statute**

Second, the Court notes that the attachments to Allstate's Adjuster and Coding Expert's Affidavits, which the Plaintiff would strike, are fee schedules and coding and billing authorities, which are incorporated into the PIP Statute at Sections 627.736(5)(a)1., (5)(a)3. and (5)(d). The Court is bound to consider these authorities and apply them to the facts of this case regardless of the outcome of any Motion to Strike. *See*, *e.g., State Farm Mutual Automobile Insurance Company v. R.J. Trapana, M.D. P.A. (a/a/o Noemi Marquez)* 23 Fla. L. Weekly Supp. 98a (Fla. 17th Cir. Ct. (App.) May 2015) (finding that coding and billing authorities are incorporated into the PIP Statute and it is the exclusive province of the Court to interpret and apply these to the facts of the case); *see also Daniel Madock (Lynn Kus) vs. Progressive Express Insurance Company*, 2004 WL 1301904 (Fla. 13th Cir. Ct. (App.) March 3, 2004) [11 Fla. L. Weekly Supp. 408b]. As such, the Court cannot strike Allstate's Adjuster and Coding Expert's Affidavits to preclude the Court from considering the exhibits attached to the Affidavits. The Court is bound by the PIP Statute to consider the fee schedules and the billing and coding authorities attached to the Affidavits and cannot dismiss these all out-of-hand regardless of any purported conflict between the Affidavits and Responses to Request for Admissions.

C. **Plaintiff Mischaracterized Allstate's General Admissions as Specific Admissions**

Lastly, the Court is not persuaded that a conflict is presented by the Responses to Request for Admissions and Allstate's Affidavits such that the Court would preclude Allstate from making its summary judgment argument. Allstate has made general admissions that do not account for the specific facts presented in this case. For example, Plaintiff argues that Responses to Request for Admissions 4 and 5 support the Plaintiff's conclusion that the Plaintiff billed the electrodes correctly in this case.

> 4. Per the HCPCS in effect in August and September 2018, Code A4556 was designated by CMS for Electrodes, per pair.
>
> **ANSWER: Admitted.**
>
> 5. Code A4556 is the correct billing Code for the supply of reusable Electrodes, per pair.
>
> **ANSWER: Admitted.**

Because the argument in Plaintiff's Motion to Strike is the same as in its Motion for Summary Judgment, when considering Plaintiff's argument, the Court must view every possible inference in favor of the opposing party: in this instance, Allstate. *Pep Boys-Manny, Moe & Jack, Inc. v. Four Seasons Commercial Maintenance, Inc.*, 891 So.2d 1160 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D284b] (*citing Moore v. Morris*, 475 So.2d 666 (Fla. 1985)). Applying this standard, the Court construes the foregoing admissions to mean that electrodes are billed by using HCPCS Code A4556. These admissions do not, however, concede, as Plaintiff argues, that the manner in which the Plaintiff billed A4556 in this case was correct. To so find would be to divorce the legal issues in this case from the facts underlying the legal issues, yielding an absurd and unlawful result. It would also require the Court to ignore the coding and billing authorities incorporated into the PIP Statute and not apply them to the facts of this case.

With reference to the Responses to Request for Admissions 6 and 7, Plaintiff argues that Allstate admitted that the Medicare Durable Medical Equipment, Prosthetics, Orthotics & Supplies ("DMEPOS") fee schedule pays for A4556.

> 6. The Durable Medical Equipment Prosthetics/Orthotics and Supplies fee schedule of Medicare Part B is the correct schedule of maximum charges to be used for reimbursement of medical equipment and supplies under F.S. 627.736(5)(a)(1).
>
> **ANSWER: Admitted that the Durable Medical Equipment Prosthetics/Orthotics and Supplies fee schedule of Medicare Part B is the correct schedule of maximum charges to be used for reimbursement of durable medical equipment and supplies under F.S. 627.736(5)(a)(1).**
>
> 7. Per F.S. 627.736(5), the Durable Medical Equipment Prosthetics/Orthotics and Supplies fee schedule of Medicare Part B in effect for supplies provided in August and September 2018 was the fee schedule in effect as of March 1, 2018.
>
> **ANSWER: Admitted. Admitted that the Durable Medical Equipment Prosthetics/Orthotics and Supplies fee schedule of Medicare Part B in effect on March 1, 2018 is the correct schedule of maximum charges to be used for reimbursement of durable medical equipment and supplies under F.S. 627.736(5)(a)(1) for supplies provided in August and September 2018.**

Allstate conceded that the DMEPOS fee schedule provides a reimbursement value for A4556. However, again, nowhere did Allstate concede that the DMEPOS fee schedule provides a reimbursement for A4556 as billed by the Plaintiff in this case. Specifically, the Admissions did not address the dispositive inquiry in this case: whether A4556 is payable when billed in conjunction with physician services rendered in a physician office as opposed to when A4556 is billed for

use with Durable Medical Equipment ("DME"). The Plaintiff cannot argue the specific admissions it needs to prove its case from general statements that do not apply to the facts of the case before the Court. Plaintiff's Requests for Admissions were not specific to and did not account for the facts of the case before the Court.

Plaintiff's argument not only mischaracterized the context and content of Allstate's Responses to Request for Admissions but also the Affidavits it claimed presented a conflict with the Responses to Request for Admissions. For example, Plaintiff argued at the hearing and in its Motion to Strike that Allstate's coding expert averred that the reimbursement for A4556 varies from "payer to payer." Plaintiff's argument is premised on the following paragraphs:

> 16. Reimbursement for professional healthcare services is based on the resource-based relative value unit scale that is a schema to value each service. Payment for any service, or CPT/HCPC's code submitted is determined by the clinical and resource costs needed to provide them, each **service (CPT code)** is divided into three components.
> ****
> 17. This valuation, or total relative value unit amount (RVU) is then multiplied by a conversion factor, adjusted for locality, by the payer to determine reimbursement amounts. This conversion factor varies from payer to payer and thus the reimbursement amount for any one **service** can vary depending on who is responsible for the reimbursement

(emphasis added). These paragraphs do not address how A4556, a medical "supply," is valued or reimbursed. These paragraphs pertain to how medical "services" are valued and reimbursed. A4556 is not even a CPT code, but rather a HCPCS code. This error is repeated in the Plaintiff's Motion for Summary Judgment.

The Plaintiff's conflation of "services" with "supplies" is particularly problematic because it does not conform with the authorities attached to Allstate's Affidavit regarding how Medicare and Workers' Compensation reimburse medical services and supplies. These show that Medicare generally has different fee schedules to cover medical services versus medical supplies. They also show that both Medicare and Workers Compensation both prohibit reimbursement of supplies when used "incident to" a physician service. *See* Exhibits E and F to the Affidavit of Allstate's Coding Expert. As shown in these authorities, the distinction between medical services and medical supplies is critical to the reimbursement analysis under the fee schedules and the billing and coding authorities incorporated into the PIP Statute. Plaintiff's foregoing mischaracterization and general argument do not account for this distinction, which is critical to the reimbursement analysis.

D. **Conclusion**

For the reasons set forth herein, the Plaintiff's Motion to Strike Affidavits is denied without prejudice. Plaintiff may raise the same argument in the context of the summary judgment hearing. Indeed, as set forth above, the substance of the Plaintiff's Motion for Summary Judgment is ostensibly the same as its Motion to Strike. However, the Court cannot prematurely find that Allstate is precluded from making its summary judgment argument based on a mischaracterization of Allstate's discovery responses; without the Court fully considering the authorities the Court is bound by Statute to consider and apply; and without fully considering the issues and documents that present the purported conflict. Due Process demands more.

WHEREFORE, for the reasons set forth herein:

1. Plaintiff's Motion to Strike Affidavits is **DENIED** without prejudice.

2. The parties shall proceed to schedule a hearing on their competing Motions for Summary Judgment regarding the compensability of A4556.

* * *

Insurance—Personal injury Protection—Venue—Forum non conveniens—Venue proper in more than one county—Broward County is an inconvenient and improper venue for medical provider/assignee's claim against insurer for treatment rendered in St. Lucie County following accident that occurred in St. Lucie County wehere the only alleged connection to Broward County is fact that plaintiff's counsel resides there, and all parties and witnesses reside in either St. Lucie, Martin, or Okeechobee County—Interests of justice favor transfer of venue because a Broward County jury should not be burdened with determining a case that has no connection to the county—Additionally, citizens of Broward County have an interest in access to justice in their own local courts, and such access is severely impeded when Broward County becomes a repository of thousands of insurance cases that do not relate in any way to any citizen of the county

MCBP ORTHOPEDICS AND NEUROSURGERY, PLLC, (a/a/o Zachary Daniel Phillips), Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE 21-003368 (53). May 31, 2021. Robert W. Lee, Judge. Counsel: Dalton L. Thomas, Fort Lauderdale, for Plaintiff. Nicholas L. Young, Fort Lauderdale, for Defendant.

ORDER TRANSFERRING CASE TO ST. LUCIE COUNTY, WITH DIRECTIONS TO CLERK

THIS CAUSE came before the Court on May 19, 2021 for hearing of the Defendant's Motion to Transfer Case for Forum Non Conveniens, and the Court's having reviewed the Motion and entire court file, heard argument, and reviewed the relevant legal authorities, finds as follows:

This case is one of ***literally thousands*** of insurance cases that have been flooding Broward County courts during the past two years that have nothing whatsoever to do with Broward County, other than the fact that Plaintiff's counsel has an office here, or Plaintiff's counsel simply does not want to file their cases—for whatever reason—in their home county. Indeed, Broward County Court is on track to having almost 200,000 civil cases being filed in the County Court in 2021, shattering the record of civil cases filed each month, and more than triple the amount of the last pre-Covid year, 2019. This case is yet but one exemplar of the forum shopping occurring for these type of cases.

Background:

1. On September 12, 2017, the claimant, Zachary Daniel Phillips, was involved in a three-car automobile accident that occurred in St. Lucie County, about 100 miles north of Broward County. The accident was investigated by the Fort Pierce Police Department.

2. On the date of the alleged accident, the claimant resided, and as of the filing of this Complaint continued to reside, in St. Lucie County (Fort Pierce).

3. Additionally, the owner of the second vehicle involved in the accident also resided in St. Lucie County (Port St. Lucie).

4. The owner of the third vehicle involved in the accident resided in Martin County (Jensen Beach).

5. A passenger in one of the vehicles resided in Crystal Lake, Illinois.

6. The police noted three additional witnesses to the accident—two from St. Lucie County and one from Okeechobee County.

7. One of the drivers of the three vehicles was arrested for DUI as a result of the accident, as well as cited for careless driving and leaving the scene of an accident, all being prosecuted in St. Lucie County.

8. The claimant received all the medical treatment with the Plaintiff, MCBP Orthopedics & Neurosurgery, PLLC, which is located in St. Lucie County (Port St. Lucie). At the hearing, the Plaintiff acknowledged it also had a corporate representative in Orange County, but not in Broward County.

9. The Plaintiff filed this complaint in Broward County, Florida, alleging that there are unpaid PIP benefits. The Plaintiff did not allege any connections between the facts of this case and their chosen venue other than the location of the Plaintiff's counsel. Indeed, there are none.

10. The Defendant, State Farm Mutual Automobile Insurance Company, is a foreign corporation conducting and licensed to do business in the State of Florida. Although it issues policies in Broward County, it issued the policy at issue in this case in St. Lucie County.

11. This case involves a jury trial demand, which is in keeping with the great majority of cases coming before the Court in which an insurance company is a defendant.

12. At the hearing, the Plaintiff argued that the only issues in this case are questions of law. The pleadings and other matters of record belie that statement. In this case, State Farm has denied that the treatment was related to the accident, that the treatment was medically necessary, and that the charges for the services are reasonable. The evidence for these issues all arise out of St. Lucie County. Moreover, any analysis of whether the Plaintiff's charges are reasonable relate to the community where the treatment took place—St. Lucie County.

CONCLUSIONS OF LAW

The Fourth District Court of Appeal has recently aligned itself with the decision of the Third District Court of Appeal in *Caceres v. Merco Grp. of Palm Beaches*, 282 So.3d 1031 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2802a], a case involving the issue of forum non conveniens when venue is proper in more than one Florida county. *See Expert Inspections LLC v. State Farm Florida Ins. Co.*, Case No. 4D21-520 (Fla. 4th DCA May 19, 2021) [46 Fla. L. Weekly D1152d]. In *Caceres*, the appellate court relied on decisions which upheld a trial court's decision to transfer a case to another Florida county when the other location was the "location of the majority of witnesses and the site of the alleged contact, noting that 'in the interest of justice' Polk County should not hear a case where the only connection was the location of the lawyer's office," citing *E.I. DuPont de Nemours & Co. v. Fuzzell*, 681 So.2d 1195, 1197 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D2303a].

When venue is proper in multiple counties, the Florida Legislature has for more than 50 years set forth a simply-stated procedure for transferring the case from one county to another: "For the convenience of the parties or witnesses or in the interests of justice, any court of record may transfer any civil action to another court of record in which it might have been brought." Fla. Stat. §47.122.[1] This Court recognizes that these are in the disjunctive—it is possible that parties will not be inconvenienced, but witnesses will be. It is further possible that neither parties nor witnesses will be inconvenienced, but in the interests of justice, the trial court determines that the case should nevertheless be transferred to another county. In the instant case, however, all three components militate against the case remaining in Broward. Over the many years this judge has been handling State Farm cases, almost without exception its corporate representatives are not in Broward. Moreover, all the fact witnesses in this case are at least 100 miles north of this county, and all the operative facts took place out of this county. And, the interests of justice strongly compel a decision that the workload of the Broward County Court should not be exponentially increased because attorneys simply want to practice here, and further that Broward jurors be called upon to make decisions in cases that have nothing to do with the county in which they live.[2] Further, the Court notes that the laws in play in the instant case are such that the jurors of the county in which the treatment took place are uniquely in a better position to determine whether the provider's charges are reasonable.

The Court agrees that the Plaintiff has chosen an inconvenient and improper because all the parties, accident, treatment and witnesses reside or took place either in St. Lucie County, Martin County, or Okeechobee County. The substantial contacts in this case all fall in St. Lucie County.

The Court notes that a court also may raise the issue of forum non conveniens *sua sponte*. *Stamen v. Arrillaga*, 169 So.3d 1209, 1210 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1638a] ("a trial court may *sua sponte* raise the question" of inconvenient forum "in the interest of justice"), quoting *McDaniel Reserve Realty Holdings, LLC v. B.S.E. Consultants, Inc.*, 39 So.3d 504, 511 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1491c]. And because State Farm is objecting to the case remaining in Broward, this Court may consider whether the interests of justice also favor transfer. In this case, a jury trial has been demanded—a Broward County jury should not be burdened with determining a case that has no connection with Broward County. Additionally, the citizens of Broward County have an interest in access to justice to their own local courts, access which is severely impeded when Broward County becomes the repository of thousands and thousands of cases that do not relate in any way, shape or form to any citizen in Broward County. *See Westchester Fire Ins. Co. v. Fireman's Fund Ins. Co.*, 673 So.2d 958 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1199a] (finding the trial court was correct in transferring a case from Dade County to Hillsborough County as a "Dade County jury, which is both a scarce and precious resource, should not be burdened with determining a case that has no connection with Dade County"). *See also Roy E. Hall et al. v. R.J. Reynolds Tobacco Company,* 118 So.3d 847 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D1370a] (affirming transfer of case from Dade County to Seminole County based upon the fact that Dade County had no relevant connection to the case); *see also Pep Boys v. Montilla*, 62 So.3d 1162, 1166 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1171a] (stating that the interest of justice weighs in favor of Sarasota County: "Broward County's connections to the case are that the plaintiff's attorney is from there and the tire had been sold and installed there. Broward County is a larger, more populous county, has crowded dockets, and the community has virtually no connection to the case"); *Clear Vision Windshield Repair, LLC v. GEICO*, 24 Fla. L. Weekly Supp. 194a (Lee Cty. Ct. 2016).

Simply put, this case is a St. Lucie County case which belongs in St. Lucie County. Accordingly, it is hereby

ORDERED that the Defendant's Motion is GRANTED. The Clerk is hereby directed to transfer this case to St. Lucie County. Additionally, because Plaintiff's counsel has had this issue raised repeatedly, and yet continues to file their cases in Broward County, the Court exercises its discretion under Fla. Stat. §47.191 to require that the Plaintiff bear the cost of transfer. Failure to pay the cost of transfer within 30 days from the date of this Order shall result in the case being dismissed without further notice or hearing.

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[1]In its Motion, the Defendant also relies on Rule 1.061, Fla. R. Civ. P. However, that rule applies only when the party is seeking transfer outside of the State of Florida, which is not the situation in the instant case.

[2]This Court recognizes that in a recent decision of the Fourth DCA, this third factor is of almost no significance when neither party agrees to the transfer. However, in the instant case, State Farm is clearly consenting to and indeed requesting the transfer.

* * *

Civil procedure—Hearings—Rescheduling—Coordination between parties—Time to respond to opposing party's good faith effort to coordinate hearing before matter may be set for hearing unilaterally

AR&C RESOLUTIONS LLC, (a/a/o Sonia Gidwani), Plaintiff, v. ALLSTATE FIRE

AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 20-31574 COCE (53). June 8, 2021. Robert W. Lee, Judge.

ORDER CONTINUING HEARING UPON PARTIES' AGREEMENT

THIS CAUSE comes before the Court for consideration on the parties' Joint Motion to Continue Hearing. The Court having reviewed the Motion, being apprised of the agreement between counsel, and being sufficiently advised in the premises, the Court finds as follows: ORDERED and ADJUDGED that the Motion is **GRANTED**.

The hearing on *Plaintiff's Motion for Summary Judgment* to occur on July 7, 2021 at 2:00PM, is continued and may be reset by the parties to July 29, 2021 at any available time on the Court's online scheduling calendar.

Notwithstanding the parties' agreement, the Court notes its concern with how defense counsel presented this to the Court. After Plaintiff's counsel set this Motion for hearing for the originally-set time, Defendant's counsel submitted a letter to the Court. The letter complains that Plaintiff's counsel set the matter unilaterally. Attorney Cangiano asserted in her letter that "Once the Motion to Dismiss [. . .] was heard and denied, [Plaintiff's] Counsel reached out to our office to set his Motion for Summary Judgment. We advised him we would respond shortly. Counsel then unilaterally set his Motion."

Defense counsel's letter doesn't tell the whole story. After receiving the letter, the Court requested its Judicial Assistant to email the parties and request that Plaintiff's counsel respond to the letter. Plaintiff's counsel was able to demonstrate that it had reached out to defense counsel on May 17 to coordinate a hearing date. After having received no response for an entire week, it sent a follow-up email on May 24. Plaintiff's counsel responded that it would provide an answer the next day. It did not do so, even though Plaintiff's counsel sent a reminder email on May 25. Thereafter, Plaintiff's counsel waited another two days, with an email to defense counsel on May 27 that it was unilaterally setting the hearing. It wasn't until after the hearing date was set that defense counsel—miraculously—decided to respond.

Upon receiving Plaintiff's counsel's response to its letter as requested by this Court, defense counsel responds that "another assistant in our office was helping with urgent requests during that period of time," as if this should excuse their conduct. It does not. Certainly, before sending a letter to a judge, counsel should investigate just a bit to find out what the true facts are. Defense counsel left critical facts out of the letter—at best, this is unprofessional, and at worst, intentionally misleading. However, even if defense counsel set forth all the facts correctly, it still would not have excused its conduct in this case in failing to cooperate to set a hearing date. No party should have to wait ten days for opposing counsel to extend the courtesy of a call back to coordinate the date and time. Had Plaintiff's not agreed to reset this hearing date, the Court would have required the hearing date to proceed as originally scheduled, and leave it up to defense counsel to resolve its own problems with staffing.

In the future, the Court expects defense counsel to promptly respond to requests to coordinate hearing dates and other matters requiring scheduling. Certainly, not more than two business days should pass before this is accomplished. As stated in the Court's online division procedure #3, "[i[f you have tried in good faith to coordinate a hearing, and have not received a response from opposing counsel within two full business days of your contact, you may set the matter unilaterally." Additionally, defense counsel should insure that what it places in correspondence, as well as matters filed with the Court, represent the true story. See Rule 2.515(a)(1) - (3), Fla. R. Gen. Prac. & Jud. Admin.

* * *

Criminal law—Driving under influence—Search and seizure—Detention—Deputy who observed defendant driving erratically had reasonable suspicion for stop—However, where deputy observed that defendant had glassy bloodshot eyes and appeared to be slurring her words but did not have odor of alcohol, deputy did not have reasonable suspicion to support continued DUI investigation and request for breath test—Motion to suppress is granted

STATE OF FLORIDA, v. JESSICA MARIE ASH, Defendant. County Court, 19th Judicial Circuit in and for Martin County. Case No. 20002279CTAXMX. April 23, 2021. Kathleen H. Roberts, Judge. Counsel: Molly McCaffrey, Assistant State Attorney, for State. Dana Earle, The Earle Law Firm, LLC, Stuart, for Defendant.

ORDER GRANTING MOTION TO SUPPRESS

THIS CAUSE having come before the Court on the Defendant's Motion to Suppress, and the court having taken testimony and evidence, hearing argument of counsel, and reviewing the relevant caselaw grants the motion to suppress.

The deputy was the sole witness called to testify in this matter. He made a stop of a vehicle on October 16, 2020 for erratic driving. The Defense conceded to the validity of the stop based on the driving pattern, and the deputy's testimony provided valid reasons to stop the vehicle to determine if the driver was sick, injured, or impaired. Upon speaking with the driver of the vehicle, who was stipulated to be the defendant in this cause, the deputy ascertained that the driver did not need medical attention. When questioned about the driving pattern, the defendant apologized for it, indicating that she was on the phone. The deputy noted that the defendant's eyes were blood shot and glassy, and she appeared to be slurring her words. The deputy did not detect an odor of alcohol nor of an alcoholic beverage, but did note the heavy smell of perfume. When asked for license, insurance, and registration, the Defendant handed the deputy a medical marijuana card for identification, indicating it was the only identification that she had. At this point, the deputy had the defendant step out of the vehicle to determine if her normal faculties were impaired. On cross examination the deputy was asked impaired by what and his response was alcohol, nothing else was suspected.

In order to prove DUI, the state must prove the defendant was under the influence of alcohol or other illicit substance proscribed by Florida law to the extent that her normal faculties were impaired. In other words, the state must answer the question: Impaired by what. While the deputy may have had reason to believe the defendant was impaired, his testimony lacked any foundation to support that alcohol was the cause of the impairment. While the caselaw is replete with cases that caution the mere presence of alcohol standing alone does not give rise to reasonable suspicion of DUI, that same caselaw is limited when there is no evidence or indication of alcohol consumption. That is because the Florida courts have recognized that it is imperative that the officer point to some objective reason to indicate that the defendant has been drinking or consuming another illicit substance:

> Usually, the odor of alcohol must be combined with other factors. *See* Demers and Gayle, Florida DUI Handbook § 4.6(c) (1999). **While the odor of alcohol on a driver's breath is considered a critical factor**, other components central to developing probable cause may include the defendant's reckless or dangerous operation of a vehicle. . .

State v. Kliphouse, 771 So. 2d 16, 23 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f] (*emphasis added)*

Indeed some cases seem to go so far to indicate that the absence of the odor of alcohol on the breath may be critical to the prosecution, *see State v. Perez*, 531 So.2d 961 (Fla. 1988); *State v. Durden*, 655 So.2d 215 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D1310a]; *Cesaretti v. State* 632 So.2d 1105 (Fla. 4th DCA 1994); *White v. State,* 492 So.2d 1163 (Fla. 1st DCA 1986), *State v. Brown*, 725 So. 2d 441, 445 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D368a], however this court

recognizes that other elements may point to the presence of alcohol—a statement by the defendant, the presence of alcohol containers in the vehicle, statements of other persons, receipts, etc,—that may give rise to the reasonable suspicion of alcoholic consumption. None of these factors are present in the case at bar. The physical condition of the defendant and the driving pattern do give rise to indications of impairment, but the deputy's assertion of impairment by use of alcohol is not supported by the record facts. There is no reasonable suspicion that the defendant was impaired by the use of alcohol when she was asked to step out of the car and perform roadsides, and therefore the request to submit to a breath test after the arrest is not supported under the implied consent law. While the stop of the vehicle was warranted by the driving pattern, the continued DUI investigation in this cause is not supported by the evidence adduced at the hearing.

It is hereby ORDERED AND ADJUDGED that all evidence after the Defendant was asked to step out of the vehicle is not supported by reasonable suspicion based on the caselaw and cannot be introduced in a trial on this cause.

* * *