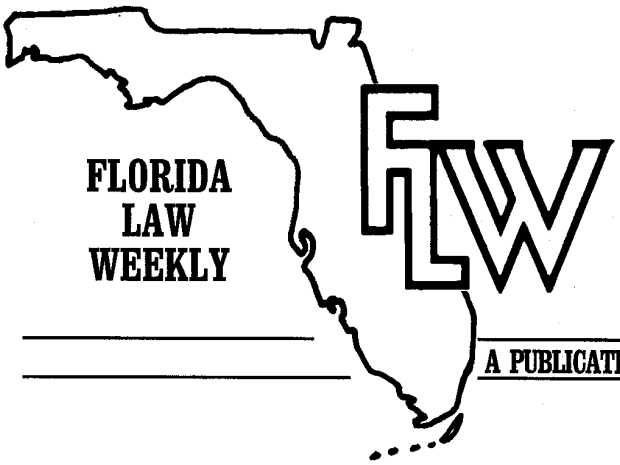
Volume 29, Number 4, August 31, 2021



SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 225-266

Reports of Decisions of:

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

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

SUMMARIES

Summaries of selected opinions or orders published in this issue.

- **INSURANCE—AUTOMOBILE—PROPOSAL FOR SETTLEMENT—EXTENSION OF PERIOD FOR ACCEPTANCE. In seven consolidated cases, an insurer sought review of a nonfinal order granting a repair shop's motion to extend the time for acceptance of the insurer's proposal for settlement until thirty days after discovery was completed. The circuit court, sitting in its review capacity, held that the order departed from the essential requirements of law by granting an indefinite extension of time and placed the insurer at a tactical disadvantage that could not be corrected on postjudgment appeal. The court noted as well that a movant seeking an extension of time assumes the risk of having their acceptance of a settlement proposal become untimely if, as in the case at issue, the motion is not heard within thirty days of the service of the proposal.** *GEICO GENERAL INSURANCE COMPANY v. ANDY'S AUTO BODY & PAINT, LLC. Circuit Court, Fifteenth Judicial Circuit (Appellate) in and for Palm Beach County. Filed May 24, 2021. Full Opinion at Circuit Courts-Appellate Section, page 231a.*

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

Bold denotes decision by circuit court in its appellate capacity.

CRIMINAL LAW (continued)

EVIDENCE

INSURANCE

INSURANCE (continued)

ZONING (continued)

* * *

TABLE OF CASES REPORTED

TABLE OF CASES REPORTED (continued)

* * *

TABLE OF STATUTES CONSTRUED

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

* * *

TABLE OF CASES TREATED

Case Treated / In Opinion At

TABLE OF CASES TREATED (continued)

* * *

REHEARINGS, CLARIFICATIONS, CORRECTIONS, WITHDRAWN OPINIONS

* * *

DISPOSITION ON APPELLATE REVIEW

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

* * *

Volume 29, Number 4
August 31, 2021
Cite as 29 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Refusal to submit to urine test—Lawfulness of arrest—Trooper's testimony regarding observation of indicia of impairment, licensee's speeding, and pattern of lane changes provided competent substantial evidence to support finding that arrest was lawful—Evidence was not negated by fact that dash cam video taken from some distance away may not have reflected all of those observations or that jail nurse did not observe some indicia of impairment when she examined licensee hours after his arrest—Competent substantial evidence supports finding that request for urine test was legal where trooper testified that licensee's breath test results were inconsistent with level of impairment he observed and he believed that licensee was under influence of cannabis—No merit to argument that licensee was not advised of implied consent warning prior to refusing urine test—Warning was read to licensee prior to his submission to breath test, he was reminded of earlier reading of warning when he was asked to submit to urine test, and he stated that he understood warning and did not need it to be reread—Petition for writ of certiorari is denied

KRISTOPHER TIMOTHY SULLIVAN, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for St. Johns County. Case No. CA20-281, Division 55. May 10, 2021. Counsel: Daniel Hilbert, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(HOWARD MASON MALTZ, J.) Petitioner Kristopher Sullivan seeks review of the "Findings of Fact, Conclusions of Law and Decision" of the hearing officer of the Bureau of Administrative Reviews, Florida Department of Highway Safety and Motor Vehicles ("DHSMV") entered on February 6, 2020. The decision of the hearing officer affirmed the order of suspension of the driving privilege of Petitioner. This Court, having considered the briefs of the parties, finds as follows:

Statement of Case

Petitioner was arrested for driving under the influence of alcohol or drugs ("DUI") on December 15, 2020, by Trooper Kenneth Montgomery of the Florida Highway Patrol ("FHP"). The events leading up to Petitioner's arrest, as provided in the record before the hearing officer, are as follows:

At approximately 11:45 p.m., on December 14, 2020, Trooper Montgomery stopped and detained Petitioner for speeding (80 mph in at 40 mph zone), after observing his vehicle making lane changes at high speed. Trooper Montgomery reported that upon contact with Petitioner he noticed a moderate odor of alcoholic beverages emanating from Petitioner, his eyes were bloodshot and watery, his speech was mumbled at times, his face was flushed, he was slow to respond, and he fumbled through papers. Petitioner admitted to the trooper he had consumed one alcoholic drink. Petitioner was asked to perform field sobriety exercises which were modified since Petitioner told the trooper he had an injury. The trooper noted in his report that Petitioner missed the tip of his nose and swayed during the finger to nose exercise, he swayed during the alphabet exercise, and demonstrated "extreme" tremors to his eyelids and body. The trooper, who is a drug recognition expert ("DRE") then performed a horizontal gaze nystagmus ("HGN") on Petitioner who demonstrated a "lack of smooth pursuit" on both eyes, as well as a "lack of convergence."

Petitioner was placed under arrest for DUI and the trooper read him his Implied Consent warning. Petitioner initially refused to submit to a breath test, but ultimately agreed and a breath test was administered by the trooper. Petitioner had a breath alcohol level of .036 and .031. The trooper indicated that considering the breath test result and Petitioner's level of impairment, the lack of nystagmus and convergence on the HGN, and the tremors, it was pointing to some type of cannabis use. The trooper then asked Petitioner to submit to a urine test. Petitioner became argumentative and refused to provide a urine sample. The trooper reminded Petitioner of the Implied Consent warning given to him earlier, and asked Petitioner if he understood it and if he needed it read to him again. Petitioner stated he understood the Implied Consent warning and did not need it read to him again. Petitioner persisted in his refusal to provide a urine sample. Petitioner's driving privilege was immediately suspended pursuant to section 322.2615(1), Florida Statutes, for refusing to submit to a urine test.

As permitted by section 322.2615(6), Florida Statutes, Petitioner requested a formal review of his driver's license suspension. A formal review hearing was held on January 28, 2020, by a DHSMV hearing officer. The following documents were entered into the record at the formal review hearing: (1) Florida DUI Uniform Traffic Citation and Notice of Suspension, citation number A76U9CE, (2) Florida Uniform Traffic Citation, citation number ABJ5SDE; (3) Florida Uniform Traffic Citation, citation number ABJ5SCE, (4) Petitioner's Florida driver's license, (5) Florida Highway Patrol Arrest Report, (6) Florida Department of Law Enforcement ("FDLE") Alcohol Testing Program Breath Alcohol Test Affidavit, (7) DHSMV Affidavit of Refusal to Submit to Breath or Urine Test, (8) Florida Highway Patrol Alcohol and Drug Influence Report, (9) Florida Citation Submittal Report, (10) Armor Correctional Health Services, Inmate Health Record Acknowledgement Form, and (11) Notice of Filing, including "Urine Lab Results." Petitioner's counsel submitted a video recording of the events leading up to Petitioner's arrest, following the hearing. On February 6, 2020, the hearing officer issued an order affirming the suspension of Petitioner's driving privilege. This Petition for Writ of Certiorari followed.[1]

Jurisdiction

Pursuant to sections 322.2615(13) and 322.31, Florida Statutes, Petitioner seeks review of the hearing officer's order affirming the suspension of his driving privilege. This Court has jurisdiction to consider the Petition for Writ of Certiorari, pursuant to Rule 9.030(c)(3), Fla. R. App. P.

Standard of Review

In reviewing an administrative agency decision, the Court must consider: (i) whether procedural due process was accorded; (ii) whether the essential requirements of law were observed; and (iii) whether the administrative findings and judgment are supported by competent substantial evidence. *Fla. Dep't. of Highway Safety and Motor Vehicles v. Trimble,* 821 So.2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]. The Court is not entitled to reweigh the evidence or substitute its judgment for that of the agency. *Id.* The Court's certiorari review power does not allow the Court to direct the lower tribunal to take any action, but rather is limited to the Court quashing the order being reviewed. *See Tynan v. Fla. Dep't of Highway Safety and Motor Vehicles,* 909 So. 2d 991, 995 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2142a].

Analysis

Petitioner raises three arguments in his Petition: (1) that probable cause did not exist to arrest Petitioner for DUI; (2) there was no lawful basis to request a urine test of Petitioner; and (3) the trooper failed to give Petitioner his Implied Consent warning before the requested urine test. Each argument is addressed below.

I. Legality of Arrest

Petitioner claims the hearing officer's determination that he was lawfully arrested is not supported by competent substantial evidence. In order for the hearing officer to uphold an administrative suspension of an individual's driver's license, the hearing officer must find that the individual was placed under lawful arrest. *Fla. Dep't. of Highway Safety and Motor Vehicles v. Hernandez,* 74 So. 3d 1070 (Fla. 2011) [36 Fla. L. Weekly S648c].

Petitioner argues the trooper's testimony "is contradicted by objective and neutral video evidence and scientific evidence from lab analysis and a licensed professional nurse." As mentioned above, the Court has not been provided the video; however, the Court assumes the video contains the content discussed in parties' briefs. The trooper testified, and the records before the hearing officer noted that Petitioner had a moderate odor of alcohol on his breath, had bloodshot and watery eyes, had intermittent mumbled speech, fumbled through papers, and he had unacceptable performance on the field sobriety exercises and HGN. Additionally, the trooper observed a driving pattern of lane changes and traveling at an excessively high rate of speed. The fact a dash cam video recording from a distance may not have reflected all or some of these things, does not mean there is not competent substantial evidence to support probable cause for the arrest.

As Respondent noted in its brief, the Court in *Fla. Dep't. of Highway Safety and Motor Vehicles v. Kamau,* 253 So.3d 781, 782 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D2264a] noted "*Wiggins* did not overrule the well-established rule cited in our prior opinion that the circuit court in a first-tier certiorari proceeding is not permitted to reweigh the evidence presented to the hearing officer [; r]ather, the decision merely recognized a narrow exception to that rule in cases where the hearing officer's findings are directly contradicted by a video recording." Citing *Wiggins v. Fla. Dep't. of Highway Safety and Motor Vehicles,* 209 So.3d 1165 (Fla. 2017) [42 Fla. L. Weekly S85a].

Even if this Court was to discount the presence of tremors or intermittent mumbled speech, the findings Petitioner contends are contradicted by the video, there is still competent substantial evidence to support the hearing officer's finding of probable cause, considering Petitioner's signs of impairment and HGN results, as observed by a trained DRE trooper.

Lastly, the fact a jail nurse did not note the existence of tremors when Petitioner was examined hours after his arrest, or that a urine test conducted days after Petitioner's arrest revealed no drugs in his system, does not negate the findings of the hearing officer, which are based on competent substantial evidence that there was probable cause to support Petitioner's arrest.

II. Legal Basis to Request a Urine Test

Petitioner next argues the trooper had no legal basis to request a urine test from Petitioner. The hearing officer found that following Petitioner's breath test revealing results of .036 and .031, the trooper "determined that these results were not consistent with the Petitioner [sic] level of impairment, and requested the Petitioner to submit to a urine test." The trooper testified at the hearing regarding Petitioner's level of impairment, as discussed above. The DRE trained trooper testified that based on the level of impairment he observed, which was inconsistent with the breath result, and Petitioner's performance on the HGN, he believed Petitioner was under the influence of cannabis.

Accordingly, there was competent substantial evidence for the hearing officer to have concluded the trooper had a lawful basis to suspect Petitioner was under the influence of drugs and to have requested a urine test.

III. Advisement of Implied Consent Prior to Request for Urine Test

A hearing officer's review in the context of a license suspension for refusal to submit to a test requires consideration of

> 1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
>
> 2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
>
> 3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

Section 322.2615(7)(b), Florida Statutes.

Petitioner's final argument addresses the third consideration. It is uncontested that the Implied Consent warning was read to Petitioner prior to the breath test. The trooper testified, as discussed above, that following the breath test, he asked Petitioner to submit to the urine test. At the jail, Petitioner was provided ample opportunity to drink water, or whatever else was needed to provide the urine specimen. The trooper further testified that Petitioner became agitated and refused to provide urine. The trooper further testified

> I asked him if he understood what I had read earlier in reference to implied consent. He did. I asked him if he wanted me to read it to him again. He said I didn't need to read it to him again, that he understood it. And then at that point he refused to give me urine.

Where a law enforcement officer reads a person arrested for DUI their Implied Consent warning advising them that refusal of a test will result in a driver's license suspension, and the officer asks the person if they understood it, which the arrestee acknowledges and indicates it is not necessary for the officer to read it again, it is not unreasonable or unlawful for the officer to take the arrestee at his word and not reread the Implied Consent warning. Petitioner cites to no precedent that would require a rereading of the warning under those circumstances. There is competent substantial evidence that Petitioner was informed and acknowledged the implications of refusing to provide a urine sample, prior to doing so.

This Court concludes, based on the record before it that procedural due process was accorded to Petitioner, the essential requirements of law were observed, and the hearing officer's Findings of Fact, Conclusions of Law and Decision are supported by competent substantial evidence.

Accordingly, it is:

ORDERED AND ADJUDGED that:

The Petition for Writ of Certiorari is hereby DENIED.

---

[1]This Court has before it the items discussed above that were received by the hearing officer, contained in Petitioner's Appendix, and the transcript of the proceedings conducted before the hearing officer on January 28, 2020. The video provided to the hearing officer was not made part of the Appendix.

* * *

Municipal corporations—Development orders—Settlement agreement—Motion for rehearing of order quashing city resolution ratifying settlement agreement in development dispute is denied

ALLIANCE STARLIGHT III, LLC., Petitioner, v. CITY OF CORAL GABLES, FLORIDA, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-000118-AP-01. June 4, 2021. On Petition for Writ of Certiorari from Coral Gables City Commission adoption of City Commission Resolution No. 2019-95 and Dispute Resolution Agreement. Counsel: Richard Sarafan, Alfredo Gonzalez, Martin J. Keane, Joseph B. Isenberg, and Michael Bild of Genovese, Joblove & Battista, P.A., for Alliance Starlight III, LLC, Petitioner. Frances Guasch De La Guardia and Anna Marie Gamez of Holland & Knight LLP, for City of Coral Gables, Respondent. Miriam Soler Ramos, City Attorney, for the City of Coral Gables, Respondent.

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

ORDER ON REHEARING

[Original Opinion at 29 Fla. L. Weekly Supp. 62a]

(WALSH, J.) On March 15, 2021, this Court quashed Coral Gables City Resolution No. 2019-95 ratifying a Dispute Resolution Agreement ("Settlement Agreement") granting Biltmore Development, LLC ("Biltmore") the right to construct a development on property located in the same neighborhood as Petitioner Alliance Starlight. Both Alliance Starlight and the City of Coral Gables have moved for rehearing. After consideration of both motions, rehearing is DENIED. (TRAWICK, J., Concurs.)

(SANTOVENIA, J., Concurring in part and dissenting in part.) I concur in the decision to deny the City of Coral Gables' motion for rehearing, but dissent from the Majority's decision to deny the Petitioner's motion for rehearing for the reasons stated in my dissent from the panel opinion.

* * *

Municipal corporations—Motion for rehearing that reargues merits of case and makes new arguments is denied—However, circuit court exercises its inherent authority to correct relief granted where court exceeded its authority by reinstating vetoed city commission resolution upon quashing mayor's veto of resolution on due process grounds—Petition for writ of certiorari is granted and veto is quashed

MIAMI-DADE COUNTY, Petitioner, v. CITY OF MIAMI, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-167-AP-01. June 3, 2021. On Petition for Writ of Certiorari from City of Miami mayoral veto of City Commission Resolution R-19-0169. Counsel: Abigail Price-Williams, Miami-Dade County Attorney and James Edwin Kirtley, Jr., Assistant County Attorney, for Petitioner. Victoria Méndez, City Attorney, John A. Greco, Deputy City Attorney, and Kerri L. McNulty, Senior Appellate Counsel, for Respondent.

(Before TRAWICK, WALSH and ZAYAS, JJ.)

ORDER ON REHEARING

[Original Opinion at 29 Fla. L. Weekly Supp. 70a]

(PER CURIAM.) The City of Miami has filed a motion for rehearing. For the following reasons, we deny rehearing. Exercising our inherent authority, however, we correct the relief granted by writ of certiorari.

Rule 9.330, Florida Rules of Appellate Procedure sets forth the parameters for a motion for rehearing:

> **(2) Contents**
>
> **(A) Motion for Rehearing**. A Motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its order or decision. The motion shall not present issues not previously raised in the proceeding.

A motion for rehearing should not be used to reargue the merits of the case. *Boardwalk at Daytona Dev., LLC v. Paspalakis,* 212 So. 3d 1063 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D485c], *citing Lawyers Title Ins. Corp. v. Reitzes,* 631 So.2d 1100, 1100 (Fla. 4th DCA 1993). Nor should such a motion be used to raise new or different grounds than those stated in the appeal. *See Gonzalez v. State,* 208 So. 3d 143 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D2312a]; *Cleveland v. State,* 887 So. 2d 362, 364 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D2712b] ("No new ground or position may be assumed in a petition for rehearing. . . . This court need not entertain new argument or consider additional authority cited in support thereof.").

The City of Miami's motion for rehearing both reargues its position and makes new arguments. In addressing a violation of *Jennings v. Dade County,* 589 So. 2d 1337 (Fla. 3d DCA 1991), in its original response to the petition for certiorari, the City argued that this Court lacked jurisdiction to review a mayoral veto[1] and that the remedy under *Jennings* would require the filing of an original action to address the prejudicial effect of the alleged violation. In its motion for rehearing, the City once again argues that the remedy under *Jennings* would require the filing of an original action to address the prejudicial effect of the alleged violation. This is improper. *See Paspalakis,* 212 So. 3d at 1063. Next, the City argues that instead of quashing the veto, this Court should have remanded with directions for the *Commission* to conduct a "new and complete hearing" on the *ex parte* violation. This ground impermissibly presents a new argument on rehearing never before argued in the briefs, which is also improper *Id.* Accordingly, the City's motion for rehearing is denied.

The County filed a response opposing the City's motion for rehearing without asking for affirmative relief. Instead, the County offers suggested corrections to the opinion only if the City's request for rehearing were to be granted. To the extent that the County's response is intended to be a motion for rehearing, this motion is DENIED as well. The City's Motion to Strike the County's Response is likewise DENIED.

Finally, in this Court's opinion on mandate from the Third District Court of Appeal, we concluded, "Accordingly, because we find that the County's due process rights were infringed, we quash the Mayor's veto and reinstate City Commission resolution R-19-169 -Coconut Playhouse Appeal." It appears that in ordering the ordinance reinstated, we have exceeded our authority. Exercising our inherent authority, we correct the relief granted. We grant the writ and quash the Mayor's veto. *See Clay County v. Kendale Land Dev., Inc.,* 969 So. 2d 1177 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2870a] ("We have also noted that another "clearly established principle of law" is that, when considering a petition for writ of certiorari, a court has only two options—it may either deny the petition or grant it, and quash the order at which the petition is directed."); *Miami-Dade County v. Snapp Industries, Inc.,* 3D21-308, 2021 WL 1773502 (Fla. 3d DCA May 5, 2021) [46 Fla. L. Weekly D1029a].

In all other respects, rehearing is DENIED. (TRAWICK, WALSH, and ZAYAS, JJ., concur.)

---

[1]We originally agreed with this argument, but our opinion dismissing the petition was quashed by the Third District in *Miami-Dade County v. City of Miami,* 3D20-1195, 2020 WL 7636006 (Fla. 3d DCA Dec. 23, 2020) [46 Fla. L. Weekly D19a]

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath and blood test—Hearing officer erred in sustaining license suspension for failure to submit to blood test where officer had no legal authority to request blood test since breath test was not impractical or impossible and there was no death or serious bodily injury involved—Finding that licensee refused to submit to breath test is not supported by competent substantial evidence where licensee stated that he was not refusing breath test and breath testing equipment was readily available, but officer abandoned request for breath test in favor of requesting blood test—Petition for writ of certiorari is granted

GABRIEL SHAWN ZELONKER, 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. 2020-000194-AP-01. June 3, 2021. On Petition for Writ of Certiorari from a final order of license revocation, suspension, or cancellation dated September 3, 2020 of the Department of Highway Safety and Motor Vehicles. Counsel: Alejandro Sola and Philip L. Reizenstein, for Petitioner. Christie S. Utt, General Counsel, and Mark L. Mason, Assistant General Counsel, for Respondent.

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

OPINION

This matter is before the court on a Petition for Writ of Certiorari ("Petition") filed by Gabriel Shawn Zelonker ("Petitioner" or "Zelonker") challenging a final order of license revocation, suspension, or cancellation dated September 3, 2020 of the Department of

Highway Safety and Motor Vehicles ("Order" or "decision").

On July 31, 2020, Miami-Dade County Police Officer Kinsey-Smith ("Officer") stopped Petitioner for speeding. After witnessing signs of alcohol impairment such as slurred speech, bloodshot red eyes, watery eyes, difficulty in concentration, and an open 750 ML bottle of platinum 10x Vodka, 1/3 empty in the center console, the Officer began a Driving Under the Influence ("DUI") investigation. Based on the totality of the circumstances, Petitioner was arrested. Subsequently, the Officer placed an implied consent form in front of Petitioner and asked him "will you take the test," to which Petitioner responded, "your tests are a loaded question, please call 9-1-1." The Officer called Miami-Dade Fire Rescue and continued to read the consent form to Petitioner. When the Officer informed Petitioner that if he refused to submit to the breath test his license would be suspended, Petitioner responded, "[s]ir, I am not refusing to do anything."

Once Miami-Dade Fire Rescue arrived at the scene, an officer asked Petitioner for a voluntary blood sample. Petitioner informed the officer: "[a]fter they [Fire Rescue] check me and my levels are normal, I will consent to anything." After Miami-Dade Fire Rescue examined and cleared the Petitioner and returned him to the custody of Miami-Dade Police, Petitioner laid on the floor and "continued to complain about pain, but, now the pain was in his back." The officer did not attempt to take a breath sample at that time, but instead continued to request a blood sample. Afterward, Petitioner consented to provide a urine sample, and did provide one. The Petitioner was arrested for DUI in violation of Section 316.193, Fla. Stat., and refusal affidavits were submitted for breath and blood tests. The Department of Highway Safety and Motor Vehicles ("DMV") suspended his driver's license. Following an August 27, 2020 hearing, a hearing officer affirmed the suspension.

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." *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]; *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982); *Dep't of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a].

"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.; 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). Zelonker does not argue a lack of due process. Notwithstanding, the record reveals that Petitioner received not only notice of the hearing, but also 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.

Petitioner argues that there was no competent substantial evidence to support the hearing officer's findings because he did not refuse to provide a breath or blood sample and actually did provide a urine sample. We agree.

Competent substantial evidence is "such evidence [that] will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *DeGroot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957). The test is whether there exists any competent substantial evidence to support the decision maker's conclusion, and any evidence which would support a contrary decision is irrelevant. *Dusseau v. Metropolitan Dade County Board of County Commissioners,* 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a]. "When exercising its certiorari review power, the circuit court is not permitted to reweigh the evidence or substitute its judgment for that of the agency." *Dep't of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1085-86.

In deciding whether to uphold the Petitioner's license suspension, the hearing officer was required to determine:

> 1. Whether the officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
>
> 2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
>
> 3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of one (1) year or, in the case of a second or subsequent refusal, for a period of eighteen (18) months.

§ 322.2615 (7)(b)(1)-(3), Fla. Stat. (2020). Petitioner does not argue that there was no competent substantial evidence supporting the hearing officer's decision as to the first and third elements, but only as to the second element. Specifically, Petitioner argues that he did not refuse to submit to any test and that the Officer did not have a valid reason to request a blood test in the first place.

Florida's implied consent law, Section 316.1932, Fla. Stat.,[1] provides, in relevant part, that:

> Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by operating such vehicle, *deemed to have given his or her consent to submit to an approved blood test* for the purpose of determining the *alcoholic content* of the blood or a *blood test for the purpose of determining the presence of chemical substances or controlled substances as provided in this section if [1] there is reasonable cause to believe the person was driving or in actual physical control of a motor vehicle [2] while under the influence of alcoholic beverages or chemical or controlled substances and [3] the person appears for treatment at a hospital, clinic, or other medical facility and [4] the administration of a breath or urine test is impractical or impossible.* As used in this paragraph, the term "other medical facility" includes an ambulance or other medical emergency vehicle. The blood test shall be performed in a reasonable manner. . . . Any person who is capable of refusal shall be told that his or her failure to submit to such a blood test 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 the person has been suspended previously as a result of a refusal to submit to such a test or tests, and that a refusal to submit to a lawful test of his or her blood, if 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, is a misdemeanor. The refusal to submit to a blood test upon the request of a law enforcement officer is admissible in evidence in any criminal proceeding.

§ 316.1932(1) (c), Fla. Stat. (emphasis added).

The Third District Court of Appeal has interpreted the above statutes, as follows:

> Thus, the general scheme for determining if a motorist is impaired is: (1) before an arrest, the suspect may consent to or demand a breath test; and (2) after an arrest, the person is deemed to have implicitly consented to a breath test and a urine test.
>
> The first exception to this general scheme is given in section 316.1932(1)(c), whereby a 'person whose consent is implied' i.e., is lawfully arrested, is taken for treatment to a medical facility and a breath or urine test is impossible or impractical to perform. **Only then may a blood test be requested**, subject to the person's refusal. The subsection further provides penalties for such a refusal but does not authorize the officer to proceed with the test regardless of the refusal.

State v. Slaney, 653 So. 2d 422, 427 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D717b] (citing *State v. Perez,* 531 So.2d 961 (Fla. 1988)) (emphasis added).

Similarly, the Fourth District Court of Appeal has interpreted the

above statutes as follows:

> We think it is clear that the legislature intended and provided for the use of breath and urine tests, except under the circumstances described in sections 316.1932(1)(c) and 316.1933(1) and that the legislature did not intend to authorize a law enforcement officer to request a blood test when the conditions described in these statutes do not exist.

*Slaney, Id. (*citing *Chu v. State,* 521 So. 2d 330 (Fla. 4th DCA 1988). *See Robertson v. State,* 604 So.2d 783, 790 n.7 (Fla. 1992) ("[T]he implied consent statute. . . appl[ies] only when blood is being taken from a person based on probable cause that the person has caused death or serious bodily injury as a result of a DUI offense specified in the statutes.").

Notably, Section 316.1932(1)(c) allows a police officer to request a blood test only if, *inter alia,* "the administration of a breath or urine test is impractical or impossible." The Third District Court of Appeal in *Slaney* acknowledged that where:

> there was utterly no showing below that "a breath or urine test [was] impractical or impossible,". . . there was no basis under Section 316.1932(1)(c), Florida Statutes (1991), for the police to require the defendant to give a blood sample nor to advise the defendant that he would lose his driver's license if he failed to consent to such a blood withdrawal.

Id. at 430.

Here, although the Petitioner was complaining of pain—both in his chest and back apparently stemming from recent surgeries—which may have delayed or made it more difficult to obtain a breath test, difficulty does not equate to impracticality or impossibility. Petitioner willingly provided a urine sample. And there is no evidence that Petitioner refused to submit to a breath test: the Petitioner stated that he was not refusing to submit to a breath test; he was conscious; he was always in the officers' presence; and the testing equipment was readily available.

Because there was no death or serious bodily injury involved and it was not impractical or impossible to obtain a breath or urine test, there was no valid reason for the Officer to request a blood test. *See Slaney, Id.* As such, the hearing officer departed from the essential requirements of law in concluding that "all elements necessary to sustain the suspension for refusal to submit to a breath, *blood,* or urine test under section 322.2615 of the Florida Statutes are supported by a preponderance of the evidence." (emphasis added).

Conclusion

After the Petitioner was medically cleared by Lieutenant Litt with the Miami-Dade Fire Department, the Officer was not precluded from seeking a breath test. However, the Officer effectively abandoned the request for a breath test when he requested an impermissible blood test instead. The officer pursued that course of action notwithstanding his lack of legal authority to request a blood test absent death or serious injury, and absent impracticality or impossibility in obtaining a breath or urine test.

We find that there is no competent substantial evidence supporting the hearing officer's conclusion that the Petitioner refused to consent to a breath or blood test[2]. Furthermore, the hearing officer departed from the essential requirements of law in concluding that the Petitioner refused a blood test that was not authorized as a matter of law. Accordingly, the petition for writ of certiorari is **GRANTED** and the decision of the Hearing Officer is **QUASHED**. (TRAWICK, WALSH, and SANTOVENIA, JJ., concur.)

[1]Section 316.1933, Fla. Stat. provides another basis for a police officer to request a blood test. However, this section requires the police officer to have probable cause to believe that the driver, who was driving under the influence, caused death or serious injury to himself or others before a blood test can be requested and obtained. This section does not apply here because Petitioner did not cause death or a serious injury to himself or another human being.

[2]Petitioner correctly points out that there is also no competent substantial evidence supporting the hearing officer's conclusion that Zelonker "refused to submit to *any* such test after being requested to do so by a law enforcement officer" and that "all elements necessary to sustain the suspension for refusal to submit to a breath, blood, or *urine* test under section 322.2615 of the Florida Statutes are supported by a preponderance of the evidence" as it pertains to any alleged failure to submit to a urine test because the Petitioner did provide a urine sample. (emphasis added).

* * *

Counties—Zoning—Rezoning—Ordinance sustaining zoning appeals board resolution approving rezoning of fragment of applicant's property to match light industrial zoning designation of balance of property is affirmed—Objector was afforded due process, and decision to approve ordinance is supported by competent substantial evidence—No merit to argument that zoning board hearing was tainted by perjured testimony because witnesses testifying in favor of rezoning were not members of defunct homeowners' association where witnesses were, nonetheless, affected residents of neighboring community

RONALD YEARBY, Appellant, v. MIAMI-DADE COUNTY BOARD OF COUNTY COMMISSIONERS, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-212-AP-01. L.T. Case No. Z2019000100. May 24, 2021. On a Petition for Writ of Certiorari seeking to quash Miami-Dade County Ordinance Z-10-20 sustaining Community Zoning Appeals Board 8 Resolution No. CZABB-18-19. Counsel: Ronald Yearby, Pro se, Appellant. Abigail Price-Williams, Miami-Dade County Attorney, and Cristina Rabionet, Assistant County Attorney, for Appellee.

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

(PER CURIAM.) Appellant, Ronald Yearby (Mr. "Yearby"), seeks to quash a Miami-Dade County Ordinance rendered by the Miami-Dade Board of County Commissioners (the "BCC") in Resolution No. Z-10-20 sustaining the Community Zoning Appeals Board (the "CZAB") Resolution number CZAB8-18-19. This resolution approved a zoning district boundary change requested by VF Acquisitions, LLC ("the "Applicant").

Background

The Applicant owns a property located east of Northwest 32 Avenue between Northwest 71 Street and Northwest 73 Street, in unincorporated Miami-Dade County. Mr. Yearby lives south of the subject property in an abutting residential neighborhood known as "Gladeview." Most of the subject property was already zoned IU-1, or Light Industrial Manufacturing District, but a small fragment of the property was zoned RU-1, Single-Family Residential District. The Applicant applied to the CZAB for approval to rezone the fragment from RU-1 to IU-1, to categorize the property under one zoning designation. The Applicant described this as an attempt to "square off" their property.

The Miami-Dade County Department of Regulatory and Economic Resources submitted a staff report in favor of the rezoning. The report noted that industrial uses lie to the north, east and west of the subject property and residential uses lie to the south. The report further explained that the subject property is designated "Industrial and Office" on the Comprehensive Development Master Plan (the "CDMP"). The CDMP Land Use Element Objective LU-4 "*requires the County to reduce the number of land uses which are inconsistent with the uses designated on the LUP map and interpretive text, or with the character of the surrounding community*." (Emphasis in Original) (App. at p. 19)[1] Rezoning the inconsistent fragment zoned RU-1 would accomplish this objective. The staff report further noted that the Applicant proffered a "Declaration of Restrictions" which would limit use to light industrial and preclude such uses as adult entertainment, day care centers, auto repair shops, night clubs, etc.

The Traffic Review Section of the Department of Regulatory and Economic Resources did not object to the rezoning, because the property lies within "the urban infill area where traffic concurrency

does not apply." *Id.* Therefore, no excessive noise or undue or excessive burden on public facilities would occur. Nor would the change affect fire rescue services in the subject area. Every affected department recommended approval. The staff report therefore recommended approval of the rezoning application.

A hearing was held before the CZAB on December 11, 2019.[2] At the hearing, counsel for the Applicant, Juan Carlos Bermudez, remarked:

> Now, one thing that is very important is last time we were here, we had some residents, some that at that point hadn't had a chance to speak to us, and maybe appear as protest at the time. We have since then—and I'll defer to both of the principals of the applicant who are both here. We've had a meeting with the Gladeview Homeowners and Civic Association, Ms. Barr, and a group of residents, I think about 15 in particular, here at the Dayspring Missionary Baptist Church.
>
> So we have spoken to the residents as you've instructed us, had an opportunity to let them know exactly what we would plan to do here, which we went through last time, and hopefully tonight you will hear from them also and their point of view in support of this item.

(App. at p. 92).

Two residents spoke at the December 11, 2019 hearing in support of the application. Both live in proximity to the proposed development. (App. at p. 94) Both indicated that they were members of the homeowner's association. *Id.* Both testified that they met with the Applicant and were satisfied with the accommodations to limit noise. They testified that they were in favor of the rezoning. (App. at pp. 95-96).

The lone objector, Mr. Yearby, spoke at length about his concerns about after-hours noise at the 71st Street entrance to the residential neighborhood, possible traffic issues, and additional burdens on the existing sewer system. (App. at pp. 97-103). He presented exhibits demonstrating that in the past, when another business, "Performance Team," opened in the neighborhood, code and police departments were frequently called to address noise and disruption affecting the tranquility of the neighborhood when trucks entered through the residential neighborhood. (App. at pp. 103-105).

In rebuttal, the Applicant clarified that this was a zoning change for .76 acres within an existing property the rest of which was already zoned light industrial. (App. at p. 107). To address concerns about noise, the Applicant proposed a covenant of restriction which would require closing access to the residential streets at 6:00 p.m. Further, landscaping buffering would be installed to reduce noise. Following the hearing, the CZAB recommended approving the rezoning application, with the restriction ensuring that access from Northwest 71 Street would close at 6:00 p.m., to preserve the tranquility of the residential area south of the subject property. (App. at pp. 44, 57-59).

Mr. Yearby appealed the CZAB decision for *de novo* review before the BCC. (App. at p.46).

A *de novo* hearing on Mr. Yearby's appeal was heard by the BCC on September 24, 2020. (App. at p. 253). Resident Steven Blimbaum spoke in favor of the application because it would enable the neighborhood to get better tenants and keep a cleaner neighborhood. Resident Bobby Hicks, who owns multiple properties in the neighborhood, opposed the application because it would increase carbon, noise, dust, and lights, disrupting the peacefulness of the neighborhood.

Mr. Yearby spoke for 20 minutes. (App. at p. 262) The crux of his argument was that the neighborhood residents who testified at the CZAB meetings were not, in fact, members of a homeowners' association. (App. at p. 265). The Gladeview homeowner's association "is not recognized by the state" because it has been inactive since 2015. *Id.* at p. 266. The residents' testimony was therefore "fraud and criminal acts," for which they were "complicit or co-conspirators in this organized scheme by these ladies to defraud the proceedings of both hearings." *Id.* at p. 275. In response, the Applicant argued, "[w]hether or not Ms. Barr and the others that were there paid their dues in Tallahassee of the Gladeview homeowners association, they happen to be neighbors. That's why they were there. They actually requested the meeting between the first meeting and the second meeting and felt comfortable enough to support the item." *Id.* at pp. 295-296.

The Applicant argued that the CZAB approval was based upon reports by every department recommending approval. *Id.* at 287. To address noise, the agreed covenant of restriction would limit the time that trucks may enter the entrance nearest to Mr. Yearby. *Id.* at 287. The rezoning would change only 11% of his property, the remainder of which was already zoned for light industrial. The rezoning would correct the mismatched fraction in order to "square out that parcel, so there could be a nicer property. So we could create jobs. So it could be something good for the neighborhood." *Id.* at p. 288. The Applicant met with members of the community, which included Mr. Yearby. *Id.* at p. 293.

The County zoning director testified about the need for the rezoning:

> Everything to the South [of 71st street] is residential. Years ago, again, before all of our time, there were several rezonings to industrial and this—on the north side. And this ended up leaving the old remnant RU-1s on the north side, which is actually—the residential use is actually encroaching into the industrial area rather than vice versa, which is unique.
>
> So the land use of this subject application, again, from the Comp Plan perspective, is industrial. So we see this as really an adjustment to square off that property.

Id. at p. 304. The zoning director also pointed out that where the industrial abuts a residential area,

> it forces the property owner to put in a minimum of a 10-foot greenbelt and a masonry wall along that south property. Whenever you're across from residential, industrial to residential, you need either an 8-foot or a 10-foot green buffer plus a masonry wall. In this case, the property is large enough that it would be a 10-foot wall.

Id. at p. 305. The BCC unanimously passed a motion to deny the appeal and retain the approval of the CZAB with the acceptance of a proffered covenant to restrict access to 71st street.

Mr. Yearby filed a notice of administrative appeal with this Court. Review of a quasi-judicial decision to approve rezoning is governed by the first-tier certiorari review standard. *See Bd. of County Com'rs of Brevard County v. Snyder*, 627 So. 2d 469, 475 (Fla. 1993).

Analysis

The BCC's decision to retain the CZAB approval of the rezoning application is quasi-judicial in nature. This Court's review is limited to determining (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. *Miami-Dade Cty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 199 (Fla. 2003) [28 Fla. L. Weekly S717a]; *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982); *Metro. Dade Cty. v. Blumenthal*, 675 So. 2d 598, 601 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1445c].

Procedural Due Process

Mr. Yearby argues that there was no procedural fairness in the rezoning process. In a quasi-judicial proceeding, basic considerations of fairness must be adhered to so that a party is not deprived of due process. *See Jennings v. Dade Cty.*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991); *Astore v. Fla. Real Estate Comm'n*, 374 So. 2d 40 (Fla. 3d DCA 1979); *City of Miami v. Jervis*, 139 So. 2d 513, 515 (Fla. 3d DCA 1962). "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." *Miami-Dade Cty. v. City of Miami*, 46 Fla. L. Weekly D19a (Fla. 3d DCA Dec. 23, 2020) (citing *Jennings,* 589 So. 2d at 1340); *see also Carillon Cmty. Residential v. Seminole Cty.*, 45 So. 3d 7, 9 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D1467a] ("The 'core' of due process is the right to notice and an opportunity to be heard."). In addition, "[i]n quasi-judicial zoning proceedings, the parties must be able to present evidence, cross examine witnesses, and be informed of all the facts upon which the commission acts." *Miami-Dade Cty*, 46 Fla. L. Weekly D19a (*citing Jennings*, 589 So. 2d at 1340) (emphasis added).

In his Initial Brief, Mr. Yearby does not argue that he was not given notice or an opportunity to be heard. In fact, since he appeared at the BCC hearing and spoke for over 20 minutes, and spoke at length at the CZAB hearing, he was clearly provided with notice and an opportunity to be heard.

Instead of challenging the evidence in support of the rezoning application, he chose to spend his allotted time complaining that the neighborhood residents who spoke at the CZAB hearings in favor of rezoning were not, in fact, members of a homeowner's association. Mr. Yearby's decision to argue about the status of the homeowner's association rather than challenging the evidence supporting the application does not amount to a denial of due process. *See A & S Entm't, LLC v. Fla. Dep't of Revenue*, 282 So. 3d 905, 909 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2341b] ("[W]here a government entity provides notice and a meaningful opportunity to be heard, satisfying the requirements of procedural due process, a defendant's voluntary failure to meaningfully participate in those proceedings will not vitiate the protections accorded.").

Moreover, Mr. Yearby's argument that perjury at the CZAB hearings tainted the proceedings does not constitute a deprivation of due process. Even in the context of a criminal trial, a witness' knowing presentation of perjured testimony will only require a new trial if it is harmful. *See Giglio v. U.S.*, 405 U.S. 150, 153-54 (1972) (knowing use of perjured testimony at trial deprives a criminal defendant of due process if the testimony is harmful). Whether or not the witnesses' homeowner's association was administratively dissolved was immaterial to the CZAB zoning decision and the BCC *de novo* review of the zoning application. The witnesses' testimony at the CZAB hearing was relevant because they were *affected neighbors*, not because they were association members. We find that Mr. Yearby's right to due process was not abridged.

Competent Substantial Evidence

In determining whether there was competent substantial evidence to support the BCC decision, our role is "to review the entire record for any competent, substantial evidence" supporting the determination, not to weigh and determine the competing evidence provided by the objecting party. *See Miami-Dade County v. Publix Supermarkets, Inc.*, 305 So. 3d 668, 672 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1089a]. The circuit court cannot reweigh the "pros and cons" of conflicting evidence. *Dusseau v. Metro. Dade Cty. Bd. of Cty. Comm'rs*, 794 So. 2d 1270, 1275-76 (Fla. 2001) [26 Fla. L. Weekly S329a]; *see also Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (the circuit court may not reweigh the evidence or substitute its judgment for that of the lower tribunal). In other words, our job is to review the record for evidence *supporting* the decision below. Evidence weighing against the decision is irrelevant.

Indisputably, there was competent substantial evidence to support the BCC decision to reject the appeal. Every affected County department—DERM, the Platting and Traffic Review section of the Department of Regulatory and Economic Resources, the Fire Department, the Water and Sewer Department, and the Department of Parks, Recreation and Open Spaces—opined that the rezoning should be granted and offered supporting memoranda. The staff report supported approval, in part, because the Comprehensive Development Master Plan (CDMP) Land Use Element Objective LU-4 "requires the County to reduce the number of land uses, which are inconsistent with the uses designated on the LUP map and interpretive text, or with the character of the surrounding community." Rezoning would accomplish this objective. At the *de novo* hearing before the BCC, one resident spoke in favor of approval, one against.

To refute Mr. Yearby's complaint that the CZAB proceedings were tainted by perjured testimony, the Applicant responded that it was immaterial whether the homeowner's association was current or defunct. The point was that three affected residents of a neighboring community testified before the CZAB in favor of the rezoning application. To address concerns about noise and disruption, the Applicant met with residents, including Mr. Yearby and the testifying neighbors, to explain the plan to develop the property and efforts to curtail noise and disruption. The residents requested and received a restrictive covenant to close access to the residential entrance at 71st Street after 6:00 pm, again, to limit disruption in the neighborhood.

We find that there was competent substantial evidence to support the decision below.[3]

Because there was competent substantial evidence presented at the CZAB and BCC quasi-judicial hearings and because Mr. Yearby's due process rights were not violated,[4] we AFFIRM. (TRAWICK, WALSH and SANTOVENIA, JJ., concur.)

---

[1]The Appellee filed an Appendix, which shall be referred to as "App."

[2]The first reading by the CZAB occurred at a hearing on November 13, 2019. At the conclusion of that hearing, the CZAB deferred to allow the Applicant to meet with residents of the Gladeview neighborhood. (App. at pp. 245, 247, 248).

[3]In addition, the BCC conducted its own *de novo* review hearing where it took evidence and considered the record. There is nothing in the record to suggest that the BCC decision to affirm the approval rested upon whether affected residents were members of a lapsed homeowner's association.

[4]Mr. Yearby does not appear to argue that there was a departure from the essential requirements of law. It appears that the CZAB and the BCC followed all applicable code provisions for consideration and approval of this rezoning application.

* * *

Insurance—Automobile—Settlement agreement—Certiorari challenge to nonfinal order granting motion to extend time for auto body shop to accept insurer's proposal for settlement until 30 days after discovery is completed is granted—Order departed from essential requirements of law by granting indefinite extension of time and placed insurer at tactical disadvantage that cannot be corrected on postjudgment appeal—Further, movant seeking extension of time assumes risk of having their acceptance of settlement proposal become untimely if, as here, motion is not heard within 30 days of service of proposal

GEICO GENERAL INSURANCE COMPANY, Petitioner, v. ANDY'S AUTO BODY & PAINT, LLC, a/a/o Alberto Martinez, Respondent. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Division AY. Case No. 50-2020-CA-003318-XXXX-MB. L.T. Case No. 50-2018-SC-013392-XXXX-SB (Consolidated w/: 50-2020-CA-003320-XXXX-MB 50-2020-CA-003322-XXXX-MB 50-2020-CA-003368-XXXX-MB 50-2020-CA-003407-XXXX-MB 50-2020-CA-003411-XXXX-MB 50-2020-CA-003422-XXXX-MB). May 24, 2021. Petition for Writ of Certiorari from County Court in and for Palm Beach County; Reginald Corlew, Judge. Counsel: Lindsey R. Trowell, Smith, Gambrell & Russell, LLP, Jacksonville, for Petitioner. David B. Pakula, David B. Pakula, P.A., Pembroke Pines; and Chris Kasper, Ovadia Law Group, P.A., Boca Raton, for Respondent.

(PER CURIAM.) In these seven consolidated cases, Petitioner GEICO General Insurance Company ("GEICO") seeks review of a nonfinal order entered by the trial court extending the time Respondent has to accept GEICO's proposal for settlement pursuant to section 768.79, Florida Statutes and Florida Rule of Civil Procedure 1.442.[1] Respondent requested that the county court extend the time that it could accept

the proposal for settlement until thirty days *after* it had completed discovery. Several months passed between the filing of the motion and a hearing on the motion, but the county court ultimately granted the motion. Since the lower court's order effectively gave Respondent an indefinite period of time in which to accept the proposal, we must grant the instant Petition to correct this departure from the essential requirements of law.

Certiorari review of a nonfinal order is an "extraordinary remedy" that cannot be used to circumvent rule 9.130—which allows for interlocutory appeals of certain nonfinal orders. *Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So. 2d 812, 822 (Fla. 2004) [29 Fla. L. Weekly S783a] (quoting *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1098 (Fla. 1987)). To obtain a writ of certiorari in such an instance, the petitioner must demonstrate that there was "1) a departure from the essential requirements of the law, 2) resulting in material injury for the remainder of the case 3) that cannot be corrected on postjudgment appeal." *Reeves*, 889 So. 2d at 822 (quoting *Bd. of Regents v. Snyder*, 826 So. 2d 382, 387 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1634a]). The last two elements, which are sometimes combined into one single "irreparable harm" element, are jurisdictional and must be considered first. *Fla. Fish & Wildlife Conservation Comm'n v. Jeffrey*, 178 So. 3d 460, 464 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D2355b]. We agree with GEICO that the Court has jurisdiction since extending the period of time to accept a proposal for settlement placed GEICO at an inherent tactical advantage—an injury that "cannot be redressed in a court of law." *K.G. v. Fla. Dep't of Children & Families*, 66 So. 3d 366, 368 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D1594b].

In order to grant the instant Petition, the Court must determine whether or not the lower court's order departed from the essential requirements of law. The issue before us concerns the interplay between rule 1.090, which governs extensions or enlargements of time, and rule 1.442, which concerns proposals for settlement. These two rules were explored in depth by the Florida Supreme Court in *Koppel v. Ochoa*, 243 So. 3d 886 (Fla. 2018) [43 Fla. L. Weekly S225a]. In *Koppel*, the court reviewed a certified conflict between the district courts of appeal about whether filing a motion for extension of time pursuant to rule 1.090 automatically tolls the thirty-day deadline set by statute to accept a proposal for settlement. *See id.* at 887-88. After review, our supreme court held that rules 1.090 and 1.442 did not "allow additional time to accept [a proposal for settlement] by simply filing the motion to enlarge," and that to hold otherwise "would appear to provide an automatic period of enlargement and see[m] to undermine the rule as it is currently written." *Id.* at 892. Notably, the *Koppel* court affirmed that courts could still allow for enlargements of time to accept a proposal for settlement, but that the failure to rule on the motion within the initial thirty days would not cause that time limit to toll until the court held a hearing or issued an order. *Id.* at 892-93; *Three Lions Constr., Inc. v. Namm Grp., Inc.*, 183 So. 3d 1119, 1119-20 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1703a].

GEICO argues that two errors occurred below. First, GEICO claims that the lower court erred in granting the motion without a showing of excusable neglect. Second, GEICO argues that, even if Respondent did not need to show excusable neglect, there was no good cause to grant the motion to enlarge time. We do not agree with GEICO's first argument because the language of rule 1.090 only requires a showing of excusable neglect when a motion to enlarge time is served "after the expiration of the specified period." Fla. R. Civ. P. 1.090(b)(1)(B); *see also Koppel*, 243 So. 3d at 892 ("Rule 1.090 allows for the time period set forth in rule 1.442 to be enlarged . . . *[a]fter the time period has expired,* the trial court still has discretion to enlarge the time period if the moving party can demonstrate excusable neglect in addition to cause.") (emphasis added). So long as the initial motion to enlarge time is filed within thirty days of the proposal for settlement being served, the moving party does not need to show excusable neglect. *But cf. Three Lions*, 183 So. 3d at 1119-20 (noting that once the acceptance period for a proposal for settlement has expired the offeror can avail itself to section 768.69, even if a motion for extension of time was timely filed but still pending).

However, we concur that good cause cannot be shown because no good cause can ever be shown to justify an indefinite extension of time. In its motion for extension of time, Respondent requested that the county court "[grant] Plaintiff an extension to *thirty days after discovery is complete* to accept Defendant's Proposal for Settlement." By granting an extension of time with an indefinite end date, GEICO was placed at an extreme disadvantage because it neutered the purpose of section 768.69 and rule 1.442: to encourage settlements. *See* § 768.79(1), Fla. Stat. (establishing that an offer not accepted within thirty days constitutes a rejection that could entitle the offeror to recover costs and fees). Any extension of time to accept an offer tendered in a proposal for settlement "would put the defendant at a disadvantage since the value of a settlement is likely to vary as litigation progresses." *Kennard v. Forcht*, 495 So. 2d 924, 925 (Fla. 4th DCA 1986) (citing *Staffend v. Lake Cent. Airlines*, 47 F.R.D. 218, 220 (N.D. Ohio 1969)).

We agree with GEICO's assertion that an indefinite extension of time materially prejudices the non-moving party and that "a court could not in fairness grant that extension no matter what the good cause was." *Pineda v. Am. Plastics Tech., Inc.*, No. 12-CV-21145, 2014 WL 1946686, at *9 (S.D. Fla. May 15, 2014). *See also Davis v. Post Univ., Inc.*, 497 F. Supp. 3d 1252, 1268-69 (S.D. Fla. 2019) (holding that good cause could not be established to extend time until "after class certification is decided" as it would create an indefinite extension that would "shift all of the risk" to the defendant and deprive it of the benefit of the rule); *Wallert v. Atlan*, No. 14 Civ. 4099, 2015 WL 518563, at *2 (S.D.N.Y. Feb. 5, 2015) (rejecting the plaintiff's attempt to extend the time to accept a settlement proposal "until the close of discovery" because of the litigation costs that would be imposed on both parties).[2] While we hold that good cause can never be shown to grant an indefinite extension of time to accept a proposal for settlement, we also note that the trial court still has broad discretion to extend the time period to accept under rule 1.442 so long as the defendant proposes a discrete and definite period of time in its motion. We also echo the warning of the *Koppel* court that the moving party assumes the risk of having their acceptance become untimely if their motion is not heard within thirty days of the proposal for settlement being served. *See Koppel*, 243 So. 3d at 892-93; *Three Lions*, 183 So. 3d at 1119-20.

Accordingly, GEICO's Petition for Writ of Certiorari is **GRANTED**. We hereby **QUASH** the county court's February 19, 2020 order and **REMAND** for further proceedings consistent with this opinion. In addition, GEICO's "Motion for Appellate Attorney's Fees" is provisionally **GRANTED** so long as GEICO can demonstrate its strict compliance with section 768.79, Florida Statutes. *See Metro. Dade Cnty. v. Cerezo*, 774 So. 2d 1, 1 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D984a]; *Schmidt v. Fortner*, 629 So. 2d 1036, 1043 n.10 (Fla. 4th DCA 1993). (SCHER, KERNER, and WILLIS, JJ., concur.)

---

[1]Prior to May 21, 2021, there were thirty-four (34) individual cases that were consolidated. All of the consolidated cases concerned the same order rendered by the county court with the same attorneys representing both GEICO and the various respondents. Twenty-seven (27) of those cases have since been dismissed pursuant to a settlement agreement between GEICO and most of the respondents.

[2]Federal Rule of Civil Procedure 68 and rule 1.442 are parallel provisions and so federal cases interpreting rule 68 are instructive to our analysis of rule 1.442. *See Kennard*, 495 So. 2d at 925.

* * *

Municipal corporations—Parking citations—Appeals—Absence of transcript—Affirmance of hearing officer's order affirming citation

DON KOZICH, Appellant, v. CITY OF FORT LAUDERDALE, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-004574 (AP). L.T. Case No. FL00117462. May 17, 2021. Appeal from a decision by a City of Fort Lauderdale Traffic Hearing Officer/ Magistrate. Counsel: Don Kozich, Pro se, Fort Lauderdale, Appellant. Robert M. Oldershaw, City of Fort Lauderdale City Attorney's Office, Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, and the Hearing Officer's Disposition Order Affirming Parking Citation rendered on January 23, 2019 the Court finds as follows:

Appellant claims that deficiencies exist with regard to the City of Fort Lauderdale's Disposition Order as the evidence and testimony he presented at the violation hearing prove that the Order is not supported by competent substantial evidence. The appellate record and Appellant's appendix are incomplete, contain illegible portions and do not contain a copy hearing transcript.

In appellate proceedings the decision of a trial court has "the presumption of correctness and the burden is on the appellant to demonstrate error." *Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150, 1152 (Fla. 1979). A trial court's ruling is presumed correct, and when no transcript is provided, a judgment that is not fundamentally erroneous will be affirmed. *See id.* Florida Rule of Appellate Procedure 9.200(e) provides that "[t]he burden to ensure that the record is prepared and transmitted in accordance with these rules shall be on the petitioner or the appellant." Fla. R. App. P. 9.200(e). Moreover, Appellant has the responsibility to "provide a sufficient record for review, and [the] failure to do so leaves the [appellate] court with no alternative but to assume that the [trial] court ruled correctly." *Smith v. Orhama, Inc.,* 907 So. 2d 594, 595 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D1748a].

Appellant's claims lack the support of the record evidence necessary to conclude that the Hearing Officer's Order was not based on requisite substantial competent evidence. The burden to produce such evidence rests on Appellant. It is not enough to suggest that one side's evidence is "better" or should have prevailed as this may apply to the wisdom of the Hearing Officer's decision, not the legality of it. *Dusseau v. Metro. Dade Cnty. Bd. of County Comm'rs,* 794 So.2d 1270 (Fla. 2001) [26 Fla. L. Weekly S329a]. The findings of the Hearing Officer could very well have been or not been supported by the evidence introduced at the hearing. But, without a complete record and hearing transcript to prove that the Hearing Officer committed error this Court is bound to affirm the decision of the lower tribunal.

Additionally, Appellant raises a procedural due process claim however by his own pleadings Appellant acknowledges that the fundamental elements of due process had been complied with as Appellant received notice and was afforded the opportunity to be heard. *See Yue Yan v. Byers,* 88 So.3d 392,394 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D1183a]. Appellant admits he attended the citation hearing and was provided with an opportunity to testify and present evidence.

Therefore, it is:

ORDERED that the Hearing Officer's Disposition Order Affirming Parking Citation rendered on January 23, 2019 is hereby **AFFIRMED.** (BOWMAN, ROBINSON, and COLEMAN, JJ., concur.)

* * *

Licensing—Driver's license—Appeals—Certiorari—Timeliness—Petition for writ of certiorari filed more than 30 days after rendition of Department of Highway Safety and Motor Vehicles hearing officer's order is untimely—Hearing officer's order was rendered on date it was mailed

JOSEPH LEPORE, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, DIVISION OF DRIVER LICENSES, BUREAU OF ADMINISTRATIVE REVIEWS, Respondent. Circuit Court, 17th Judicial Circuit in and for Broward County (Appellate). Case No. CACE21008347, Division AW. May 24, 2021. John Bowman, Judge. Counsel: Roberto R. Castillo, Assistant General Counsel, DHSMV, for Respondent.

FINAL ORDER OF DISMISSAL

THIS CAUSE came before this Court, sitting in its appellate capacity, upon the petition for writ of certiorari, filed April 23, 2021. This Court on May 3, 2021 filed an Order to Show Cause why this petition for certiorari reviewed should not be dismissed for lack of jurisdiction. The petitioner filed his response on May 11, 2021, and the respondent ("DHSMV") filed its reply on May 20, 2021. After having reviewed the court file, the applicable law, and being duly advised in the premises, this Court finds as follows:

This Court does not have jurisdiction to consider this appeal. In order for this Court to exercise its appellate jurisdiction, review must be sought within 30 days of rendition of the order to be reviewed. *See* Fla. R. App. P. 9.100(c); Fla. R. App. P. 9.110(c). An untimely filed appeal has the effect of defeating potential appellate jurisdiction. *See Peltz v. Dist. Court of Appeal, Third Dist.,* 605 So. 2d 865, 866 (Fla. 1992); *Wibbens v. State, Dep't of Highway Safety & Motor Vehicles, Bureau of Driver Improvement,* 956 So. 2d 503, 504 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1027c]. The record shows that petitioner commenced this matter on April 23, 2021, disputing an order entered by the DHSMV. The order entered by the DHSMV's hearing officer shows that the petitioner was informed of his appellate rights and that he had a 30-day time frame to file for an appellate review. The hearing officer's order shows the date of execution was March 23, 2021. A DHSMV's hearing officer's order is rendered on the date it is mailed, as reflected on the driver record. *Id.* The driver record, as provided by the DHSMV, shows that the date of mailing is the same as the date the order was executed, April 23, 2021. Thus, the petitioner commenced this matter more than 30 days from the date of rendition of either of the order that the petitioner may have wished for this Court to review. *See* Fla. R. Jud. Admin. 2.514(a).

Unfortunately, the "late filing [of an appeal] is a defect no one can correct, not even the court." *Hawks v. Walker,* 409 So. 2d 524, 525 (Fla. 5th DCA 1982). An untimely filed appeal has the effect of defeating potential appellate jurisdiction. *See Peltz v. Dist. Court of Appeal, Third Dist.,* 605 So. 2d 865, 866 (Fla. 1992). It is well settled that where a court does not have jurisdiction of the subject matter on which it assumes to act, its proceedings are absolutely void. *Roberts v. Seaboard Sur. Co.,* 29 So. 2d 743, 748 (Fla. 1947). "It is axiomatic that subject matter jurisdiction is indispensable to a court's power to adjudicate rights between parties." *Stel-Den of Am., Inc. v. Roof Structures, Inc.,* 438 So. 2d 882, 884 (Fla. 4th DCA 1983). "Jurisdiction is the oxygen of an action. If present, the action is alive and the court may act." *In re Gonzalez,* 2000 WL 492102, 4 (Fla. Cir. Ct. 2000) (*citing Keena v. Keena* , 245 So. 2d 665, 666 (Fla. 1st DCA 1971)). "Equally if subject matter is not present, the court may not act." *Id.*

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

1. The instant action is **DISMISSED** for lack of jurisdiction.
2. **The Clerk of Court is DIRECTED to close this case.**

* * *

Volume 29, Number 4
August 31, 2021
Cite as 29 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—ORIGINAL

Torts—Automobile accident—Rear-end collision—Presumption of liability—Directed verdict—Court denies motion for directed verdict premised on rear end collision presumption, the foundation for plaintiff's accident reconstruction expert's opinions, and a general attack on the credibility and strength of witnesses—Regarding the rear end collision presumption, the pile-up in low visibility conditions consistently described by witnesses in this case is not a common occurrence, and jury could easily conclude that the specific situation plaintiff encountered is not something a reasonable person would have expected—Plaintiffs have produced expert analysis and lay evidence that is sufficient to support several inferences of negligence that a reasonable jury could accept, including inference that defendant's eventual stop was abrupt and arbitrary or irresponsible

DUANE WASHINGTON, et al., Plaintiffs, v. SINCLAIR BROADCAST GROUP, INC., et al., Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 18-CA-861. June 18, 2021. David Frank, Judge. Counsel: Robert S. Cox, Law Offices of Robert Scott Cox, PL, Tallahassee; and Benjamin L. Crump, Ben Crump Law, PLLC, Tallahassee, for Plaintiffs. David Luck, Lewis Brisbois Bisgaard & Smith LLP, Coral Gables; Robert L. Shannon, Jr. and Logan M. Owens, Carlton Fields, P.A., Atlanta, Georgia; and Peter D. Webster, Carlton Fields, P.A., Tallahassee, for Defendants.

ORDER ON DEFENDANTS' MOTION FOR DIRECTED VERDICT

This cause came before the Court for hearing at trial on June 16, 2021 at the close of the plaintiff's case in chief, and renewed on June 17, 2021 at the close of defendants' case, on Defendants,' Sinclair Broadcast Group, Inc. and Steven Sheridan, motion for directed verdict on liability, and the Court having heard argument of counsel, and being otherwise fully advised in the premises, finds

Florida Law on Directed Verdicts

"Rarely are motions for directed verdicts appropriate in negligence cases. *Harris v. Gandy*, 18 So. 3d 569, 571 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D264a] (quoting *Howell v. Winkle*, 866 So. 2d 192, 195 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D486b]); *see also Petroleum Carrier Corp. v. Gates*, 330 So. 2d 751, 752 (Fla. 1st DCA 1976) ('We do not here express an opinion as to whether a directed verdict should [e]ver be granted where the negligence of both parties is at issue. We do, however, believe that such cases will be extremely rare.')" *Vitro America, Inc. v. Ngo*, 304 So. 3d 379, 381 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D2192b], reh'g denied (Oct. 30, 2020). "Florida law cautions against a motion for directed verdict in negligence cases since the evidence to support the elements of negligence are frequently subject to more than one interpretation." *Regency Lake Apartments Assocs. v. French*, 590 So.2d 970, 972 (Fla. 1st DCA 1991).

A motion for directed verdict can only be granted:

> . . .where no view of the evidence, or inferences made therefrom, could support a verdict for the nonmoving party. In considering a motion for directed verdict, the court must evaluate the testimony in the light most favorable to the nonmoving party and every reasonable inference deduced from the evidence must be indulged in favor of the nonmoving party. If there are conflicts in the evidence or different reasonable inferences that may be drawn from the evidence, the issue is factual and should be submitted to the jury.

United Services Automobile Association v. Rey, 313 So.3d 698, 702 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D1855d] (citation omitted).

The First District's opinion in *Vitro* is prescient for our present case. In *Vitro*, the plaintiff was driving around a turn in darkness and collided with defendant's truck as it was backing out onto the roadway in front of plaintiff. According to the defendant, the defendant's vehicle's hazard lights were flashing and its headlights and running lights were on. Much of the same expert and lay evidence at play in *Vitro* is at play in the present case—the perception of the drivers, distances and positions of the vehicles, speeds, and braking.

The *Vitro* defendant's attorney moved for directed verdict on liability, causation, and comparative negligence, arguing that, "the undisputed evidence proved that [plaintiff] 'could and should have taken some evasive action to avoid the accident. . ." *Id*. at 383.

The First District held:

> Just as in *Allen*, here, too, the trial court jumped the gun in directing a verdict on the question of proximate causation. Weighing the facts and factual inferences in the light most favorable to *Vitro*, we conclude that had the jurors been allowed to conduct themselves as the triers of fact on causation, they might have deduced that Mr. Ngo's inattentiveness was the sole proximate cause of the collision. More precisely, Mr. Dewberry's expert opinion—juxtaposed against that of Mr. Spooner—generated such a palpable factual question on who caused the accident . . . The negligence of both parties—from a causation perspective—was irrefutably at issue below. *Petroleum Carrier Corp. v. Gates* underscores the point. In *Gates*, we reversed a directed verdict on liability in favor of the plaintiff driver—whose vehicle had been rear-ended by the defendant truck driver—because it was "axiomatic that a directed verdict should be entered only where the state of the evidence is such that a jury of reasonable men could not reach a contrary result." 330 So. 2d at 752. Specifically, we stated: "Because of the very nature of the comparative negligence doctrine, situations in which directed verdicts will be appropriate will occur with even less frequency, particularly in cases where the plaintiff's own negligence is in issue." *Id*. Applying those principles to the facts in *Gates*, we reasoned that there was "sufficient evidence from which the jury could have concluded that the sole proximate cause of the collision was the inattention of [the plaintiff], or that the sole proximate cause of the collision was the failure on the part of [the defendant] to have his vehicle under control, or that both drivers were negligent to some extent." *Id*. at 752 (emphasis added).

Id. at 384.

When ruling on a motion for directed verdict, ". . .the trial court may not weigh the evidence or assess a witness's credibility' and must deny a directed verdict 'if the evidence is conflicting or if different conclusions and inferences can be drawn from it. If an expert opinion is sufficient to raise a fact question for the jury and the jury makes a determination supported by that expert opinion, a motion for [directed verdict] should be denied." *Duclos v. Richardson*, 113 So.3d 1001, 1004 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D878a] (citations and quotations omitted).

Finally, "[t]he erroneous granting of a motion for directed verdict notwithstanding the jury's verdict implicates the constitutional right to trial by jury guaranteed in Article I, section 22, of the Florida Constitution (1968)." *Keene v. Chicago Bridge & Iron Co.*, 596 So.2d 700, 704 (Fla. 1st DCA 1992).

Defendants' Motion

Defendants provided the Court several Florida cases that outline some of the general parameters of directed verdicts and the specific workings of Florida's rear end collision presumption. Most of these authorities are easily distinguishable.

Defendant also cites to several federal court rulings, which are only persuasive, *if similar*, and not binding on this Court. Particularly, defendants cite *Jones v. Jones*, No. 3:18-CV-1522-J-34JBT, 2020 WL 3259087, at *1 (M.D. Fla. June 16, 2020) as most applicable to this case.

The facts in *Jones* differ significantly. In *Jones*, neither the front nor the rear driver faced the challenging visibility and complex obstacles that existed here. Indeed, the facts as recounted by the court in *Jones* indicate there was nothing more than a slowdown of vehicles due to routine heavy traffic on I-95. The plaintiff initially travelled south at a normal pace when the traffic slowed and came to a stop. She then "inched forward, keeping with the preceding traffic for several minutes." *Id*. at 1. "[T]his general slowdown was the reason for [the front driver's] braking and maintaining a low speed. Critically, Defendant present[ed] no evidence to refute Mr. Bruton's description of the traffic preceding [the front driver] and that it was the cause of [the front driver's] slowdown. *Id*. at 5.

The *Jones* court's conclusion was:

> Regardless of the fact that the incident occurred on a highway, the record demonstrates that [the lead driver] braked in response to a general slowdown of all traffic. In such a circumstance it cannot be said that the lead driver's braking was unexpected such that the presumption of the rear driver's negligence is rebutted. In sum, [the rear driver] puts forth no evidence that remotely suggests that [the lead driver] acted negligently." *Id*. at 6.

The present defendants' principal arguments are an application of Florida's rear end collision presumption, a third attack on the foundation for plaintiff's accident reconstruction expert's opinions, (a matter addressed, readdressed and already ruled upon by the Court), and a general attack on the credibility and strength of witness testimony. For example, a witness defendants perceive as favorable was "the only non-party testifying eyewitness who had a real recollection of the accident," a witness defendants perceive as unfavorable "lacked a basic understanding and recollection," and various other evidence in favor of plaintiffs simply "didn't make sense."

The Evidence in This Case

Regarding the rear end collision presumption, the mayhem (pile up) in low visibility consistently described by witnesses in this case is not a common occurrence. The eyewitnesses who testified made it clear that they had never seen anything like it. It was not an expected event on a highway. It was not mere slowed traffic on an interstate where "slowdowns" of all traffic on a typical day are commonplace. The jury could easily conclude that the specific situation plaintiff encountered is not something a reasonable person would have expected.

More importantly, defendant Sheridan's stop is only one of many inferences of negligence. Plaintiffs have produced expert analysis and lay evidence that is sufficient to support several inferences of negligence that a reasonable jury could accept. There is record support for inferences that defendant Sherman failed to use reasonable care when he attempted to negotiate a major hazard while distracted by a cell phone conversation with his wife, when he made a lane change to the left when he could have safely remained in his travel lane, when he made a lane change without using his turn signal in low visibility conditions, when he stopped in the emergency lane without engaging his hazard lights in low visibility conditions, when he stopped abruptly with no vehicles in front of him, when he stopped short when he could have pulled forward. And yes, one such inference is that defendant Sheridan's eventual stop was abrupt and arbitrary or irresponsible, *see Sorel v. Koonce*, cited by defendants.

Vitro, one of the most recent First District opinions on this matter, was particularly instructive. It held that the trial court erred in granting the motion for directed verdict because it would have been reasonable and permissible for the jury to have decided that the "inattentiveness" of one driver was the sole cause of the accident. It is this very "inattentiveness," among other things, on which the jury here could find Mr. Sheridan negligent.

It is clear that defendants believe the plaintiffs' evidence is weak. To apply an important quote from *Daubert* to this case, ". . .[defendants] seem [ ] to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596, 113 S. Ct. 2786, 2798, 125 L. Ed. 2d 469 (1993). Indeed, having now seen the entire trial, that is exactly what defendants did.

By their motion for directed verdict, defendants invite this Court to commit the cardinal sin of directed verdict jurisprudence—to weigh the credibility and importance that should be given to individual witnesses and expert analysis, decide the case on that basis (assuming I would conclude the same as defendants in this regard), and in doing so, deprive the plaintiffs of their right to trial by jury. The Court declines the invitation.

Accordingly, it is ORDERED and ADJUDGED that the motion is DENIED.

* * *

Torts—Automobile accident—Evidence—Experts—Motion seeking to exclude expert accident reconstructionist's references to "hard braking" versus "abruptly stopping" is denied—Expert's opinions, including the numerous times he discusses "braking" in both his initial and supplemental depositions and in plaintiff's expert disclosures, pass the *Daubert* standards for scientific reliability

DUANE WASHINGTON, et al., Plaintiffs, v. SINCLAIR BROADCAST GROUP, INC., et al., Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 18-CA-861. June 13, 2021. David Frank, Judge. Counsel: Robert S. Cox, Law Offices of Robert Scott Cox, PL, Tallahassee; and Benjamin L. Crump, Ben Crump Law, PLLC, Tallahassee, for Plaintiffs. David Luck, Lewis Brisbois Bisgaard & Smith LLP, Coral Gables; Robert L. Shannon, Jr. and Logan M. Owens, Carlton Fields, P.A., Atlanta, Georgia; and Peter D. Webster, Carlton Fields, P.A., Tallahassee, for Defendants.

ORDER DENYING DEFENDANTS' SUPPLEMENTAL / ORE TENUS *DAUBERT* MOTION TO PRECLUDE TESTIMONY OF PLAINTIFFS' EXPERT BUCHNER

This cause came before the Court for hearing on Defendants Sinclair Broadcast Group, Inc.'s and Steven Sheridan's Motion to Limit and Exclude Opinions of Plaintiff's Accident Reconstructionist, G. Bryant Buchner, and the Court having reviewed the motion and all supporting and opposing memoranda and materials submitted, twice heard argument of counsel, and being otherwise fully advised in the premises, finds

Buchner's opinions were first disclosed to defendants in plaintiffs' March 3, 2021 expert disclosures and April 7, 2021 witness list. His opinions were further disclosed and vetted when defendants deposed him for more than 14 hours over multiple days in late March - early April, 2021.

Defendants' current *Daubert* motion was filed on May 6, 2021.

Plaintiffs filed Plaintiffs Supplemental Retained Expert Disclosures on May 24, 2021. The "supplemental disclosures" addressed opinions to be rendered by Buchner.[1]

Defendants filed The Sinclair Defendants' Emergency Motion to Limit Plaintiffs' Accident Reconstruction Expert, Bryant Buchner, to His Prior Opinions and Materials or, Alternatively, to Compel Expert Disclosures From Buchner and an Updated Pretrial Deposition of Buchner on May 31, 2021. Plaintiffs filed Plaintiffs' Response in Opposition to Sinclair Defendants' *Daubert* and Emergency Motion Pertaining to Plaintiff's Expert Buchner on June 4, 2021.

The Court first heard matters related to Buchner on June 4, 2021. At that time, the Court granted defendants' alternate request for a supplemental deposition of Buchner to cure any prejudice that may

have resulted from the filing of supplemental disclosures after his first deposition had concluded. The Court deferred ruling on defendants' *Daubert* motion in chief until after the supplemental deposition. The supplemental deposition was held on June 8, 2021.

After jury selection on June 11, 2021, defendants presented an ore tenus motion re-arguing their *Daubert* motion in chief to preclude Buchner's opinions, having now completed the supplemental deposition. The Court issued an order later the same day, ruling on all the *Daubert* matters raised by defendants except one. *See* this Court's Order Granting In Part And Denying In Part Defendants' Original Motion To Limit Plaintiff's Expert G. Bryant Buchner, June 11, 2021.

Defendants' remaining attack on Buchner's opinions is his reference to "hard braking" versus "abruptly stopping." Defendants argue that Buchner has not provided a sufficient scientific basis for this part of his opinions and, thus, it should be precluded under *Daubert*.[2]

The Court deferred on the ruling and requested that the parties provide highlighted deposition transcript testimony supporting their positions for the Court's review over the weekend. Both parties submitted highlighted deposition testimony extracts, which the Court reviewed. The Court also reviewed the entire initial and supplemental depositions of expert Buchner, extracts of defense expert Bayan's deposition testimony, and the expert disclosures defendants filed on expert Bayan.

The Legislature has adopted, and the Florida Supreme Court has now approved, the *Daubert* standard for the admissibility of expert testimony, which is:

> Testimony by experts.—If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

Fla. Stat. 90.702 (2020).

In its order adopting *Daubert*, the Florida Supreme Court explained:

> As a note to the federal rule of evidence explains, "[a] review of the caselaw after Daubert shows that the rejection of expert testimony is the exception rather than the rule." Fed. R. Evid. 702 advisory committee's note to 2000 amendment. "Daubert did not work a 'seachange over federal evidence law,' and 'the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.' "

In re Amends. to Fla. Evidence Code, 278 So.3d 551, 553 (Fla. 2019) [44 Fla. L. Weekly S170a], reh'g denied, No. SC19-107, 2019 WL 4127349 (Fla. Aug. 30, 2019) (citations omitted).

"Under Daubert, the trial court not only evaluates a putative expert's credentials, but also serves as a gatekeeper in 'ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.' " *Baan v. Columbia Cty.*, 180 So.3d 1127, 1132-34 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D2707a] (citation omitted).

In *Baan*, the First District reversed the trial court's order precluding the opinions of an expert under *Daubert* which was based on the same ground defendants assert here:

> In the present case, Dr. Tulsiak's opinions amounted to much more than ipse dixit. See Booker, 166 So.3d at 194-95. Cf. Giaimo, 154 So.3d at 388 (concluding expert's testimony was not the product of reliable principles and methods where the expert was asked how he arrived at his opinion and stated " 'when I was asked and thought about it, that is the answer that I came up with' "). Dr. Tulsiak reviewed the child's medical records, the autopsy report, EMS records, and statements from witnesses who observed Craven's medical condition in the last hours and minutes of his life.
>
> In support of his opinion that the ambulance should not have left Craven behind on its first run, Dr. Tulsiak invoked (in addition to his first-hand knowledge of children's respiratory problems, his 30 years' experience as an emergency room physician, and his 25 years as an advisor, first to Hillsborough County Fire Rescue, and then to Tampa Fire Department, Rescue Division 9), as one salient "reliable principle[ ]" EMS's own protocol requiring transport to a hospital in the event an infant was experiencing respiratory distress. § 90.702(2), Fla. Stat. Whatever the precise nature of Craven's respiratory problems, he stopped breathing, depriving his brain of oxygen, as explained by Dr. Tulsiak. We reject EMS's contention that Dr. Tulsiak's opinion is unfounded speculation or amounts to no more than reasoning post hoc, ergo propter hoc. Cf. Perez, 138 So.3d at 499.

Baan at 1133-34.

Buchner's opinions, including the numerous times he discusses "braking" in both his initial and supplemental depositions and in plaintiff's expert disclosures, pass the *Daubert* standards for scientific reliability. They spring from commonly employed forensic accident reconstruction concepts based on evaluations of eye witness' testimony, photographs and weather data, observation and measurements at the scene, the layout of the road and shoulder, mathematical calculations, testing, an analysis of the positions and directions of the vehicles, and the timing of vehicle movement from one location to another.

A review of defendants' expert disclosures shows that defendants' experts used many, if not all, of the same data sources and methods of analysis that Buchner used—witness testimony, measurements, vehicle movement times, visibility, etc. *See* defendants' expert disclosures filed on February 26, 2021 and April 30, 2021.

". . .[A]s noted in *Daubert*, '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.' *Daubert*, 509 U.S. at 596, 113 S.Ct. 2786." *Royal Caribbean Cruises, Ltd. v. Spearman*, No. 3D18-2188, 2021 WL 1652549, at 11-12 (Fla. 3d DCA, Apr. 28, 2021) [46 Fla. L. Weekly D969a]. Defendants will be given this opportunity at trial.

Accordingly, it is ORDERED and ADJUDGED that the motion is DENIED.

---

[1]Contrary to defendants' assertion, plaintiffs' "supplemental" disclosures regarding Buchner were not a significant change from previously disclosed opinions. Rather, the supplemental disclosures focus on additional materials reviewed.

[2]Defendants provided no technical or scientific evidence or reference to support their assertion that the meaning of these terms significantly differ as applied to a vehicle's mechanical braking. Defendants' counsel simply stated the terms do not mean the same because one denotes how quick in time the braking was and the other something else.

* * *

Torts—Automobile accident—Dismissal—Election of remedies—Satisfaction of judgment—Motion to dismiss asserting that plaintiffs were barred from recovering against defendants based on election of remedies because satisfaction of judgment was filed in severed action against a separate defaulted defendant—Because plaintiffs properly amended satisfaction of judgment to spell out that it only applies to defaulted defendant, motion to dismiss must be denied on that basis alone—Even if amended satisfaction of judgment were not sufficient, there would still be no election of remedies where defendant knew that plaintiffs did not intend to elect a remedy or proceed solely against defaulted defendant and amount plaintiffs were paid based on settlement with defaulted defendant was hardly a full payment of the judgment plaintiff received

DUANE WASHINGTON, individually, and as parent and natural guardian of JORDAN WASHINGTON, JAE'CHAD WASHINGTON, and RACHON WASHINGTON, Plaintiffs, v. SINCLAIR BROADCAST GROUP, INC., a subsidiary of Sinclair Television Group, NORTH AMERICAN VAN LINES, INC., GREATER BAY RELOCATION SERVICES, INC., KATHY WATKINS DBA PROSPERITY ENTERPRISES, LERONE COPELAND and STEVEN SHERIDAN, Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 18-CA-861. May 16, 2021. David Frank, Judge. Counsel: Robert S. Cox, Law Offices of Robert Scott Cox, PL, Tallahassee; and Benjamin L. Crump, Ben Crump Law, PLLC, Tallahassee, for Plaintiffs. David Luck, Lewis Brisbois Bisgaard & Smith LLP, Coral Gables; Robert L. Shannon, Jr. and Logan M. Owens, Carlton Fields, P.A., Atlanta, Georgia; and Peter D. Webster, Carlton Fields, P.A., Tallahassee, for Defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

This matter came before the Court on May 10, 2021 on Defendants Sinclair Broadcast Group's and Sheridan's Motion to Dismiss with Prejudice Because of Plaintiff's Election of Remedies, and the Court having reviewed the motion, the response, and supplemental briefing, heard argument of counsel, and being otherwise fully advised in the premises, finds

I. Introduction

This action arises out of a "45+ vehicle pileup" on Interstate 10 in Tallahassee that occurred on July 24, 2018. In their initial November 14, 2018 complaint, plaintiffs sued Gadsden County resident Steven Sheridan and the company that owned the vehicle he was driving, Sinclair Broadcast Group, Inc., alleging in a single count that Sheridan had been negligent, that the negligence had resulted in serious bodily injuries to Plaintiff Duane Washington, and loss of consortium to Washington's three children, and that Sinclair was vicariously liable for the same. Over the course of the litigation of this lawsuit, and the parties' further investigation and discovery, additional defendants were added to include Top Auto Express, Inc., a Miami corporation that owned a tractor trailer involved in the crash.

In July 2020, counsel for Top Auto were permitted to withdraw and the company refused to participate any further. Consequently, the Court entered a judicial default against Top Auto. The Court severed plaintiffs' case against Top Auto for a jury trial on damages based on Top Auto's negligence.

The jury trial for the severed case was on October 2, 2020. There was no appearance on behalf of Top Auto. The jury returned a verdict awarding $410,226,608.42 in total damages (that included past and future medical expenses, past and future lost wages, and past and future non-economic damages) to Duane Washington and $500,000 to each of his three children. The Court entered a final judgment in these amounts. Plaintiffs filed a Satisfaction of Judgment in which they acknowledged "payment and satisfaction" of that judgment, and "consent[ed] that the same shall be satisfied of record."

After several voluntary dismissals, the remaining defendants in this case are Sinclair and Sheridan ("defendants"). The trial of these defendants is set for June 11, 2021.

II. Procedural History

Defendants are asking this Court to dismiss the case and deem plaintiffs to have forfeited any claim or recovery against them because plaintiffs filed a satisfaction of the judgment after the final judgment was entered in the severed case against Top Auto.

The Court entered a judicial default against Top Auto after it refused to participate in this action, despite its withdrawing counsel's urging that it get substitute counsel and defend. Without clear supporting authority, defendants objected to the entry of a default against Top Auto to which plaintiffs were unquestionably entitled. Defendants' rationale for the objection was that the jury would hear at trial that Top Auto was determined to be negligent to some extent as a matter of law. That, according to defendants, would somehow interfere or detract from their position that plaintiffs were themselves totally or mostly at fault. This even though plaintiffs and all defendants would appear on the verdict form for apportionment of fault.

At a prior hearing, the Court discussed with counsel and all counsel agreed, subject to their client's approval, that a severed, separate trial which had no effect on the main trial could address defendants' concern. All parties agreed that defendants' trial could proceed with Top Auto as a Fabre defendant and without the jury being instructed that Top Auto was defaulted or negligent. This Court's August 3, 2020, order afforded the parties the option to draft a stipulation.

Plaintiffs and defendants entered a Stipulation drafted by defense counsel to sever Top Auto from the case and to hold a separate default trial for damages only against Top Auto with the agreement that the result in the severed trial would not affect their liabilities.

Top Auto was then removed from the caption of this case and plaintiffs proceeded to trial against Top Auto only. The jury returned a sizable verdict for which judgment was entered shortly thereafter. There were no post-trial motions. Defendants did not participate.

After the jury trial, judgment was entered against Top Auto and a settlement was reached for much less that the total amount of the jury's verdict. As part of the settlement, plaintiffs were dismissed from the coverage case in South Florida (Southern District of Florida, No. 20-61575-CIVDIMITROULEAS.) and a satisfaction of the judgment was filed as to the severed action against Top Auto only.

Defendants now contend that they were pressured into agreeing to the stipulation and severed trial. They further contend that by complying with the stipulation and this Court's order for the severed trial, and eventually recording the corresponding satisfaction of judgment, plaintiffs are barred from any further relief, specifically a recovery against (the remaining) defendants, due to the doctrine of "election of remedies." Def's Motion at 6-7. Defendants explain the purpose of the doctrine as follows:

> In summary, if the remedies are inconsistent, an election of remedies occurs when the party obtains a judgment on one; however, if the remedies are consistent, an election of remedies occurs only when a judgment on one has been satisfied. Finally, it is important to emphasize that the rationale for the doctrine is to prevent double recoveries.

Def's Motion at 5.

At the hearing on the present motion, defendants strongly suggested that all of this could have been avoided had plaintiffs simply spelled out the purpose of the satisfaction of judgment in the text of the satisfaction itself—limiting it to Top Auto. Defendants then suggested that plaintiffs could proceed under Florida Rule of Civil Procedure 1.540(b) to correct the satisfaction to eliminate the language acknowledging "payment" of the judgment and stating the Judgment was satisfied after a settlement for a reduced amount and was not intended to satisfy any judgment against (the remaining) defendants. Following defense counsel's recommendation, plaintiffs and counsel for Top Auto obtained consent and filed a motion to

amend/correct the originally recorded satisfaction and attached a copy of the proposed amended/corrected satisfaction.

The amended satisfaction makes it clear that it does not apply to "...any other tortfeasor involved in any separate proceeding or any of the Defendants in Civil Action No.: 18:000861CAA..."

The Court granted the motion to amend on May 15, 2021.

III. Analysis

First, the contention that defendants were forced into the stipulation and severed trial is without merit. The transcripts provided for the Court's review, and the Court's own recollection, strongly belie this notion. In fact, the driving force behind the stipulation and severed trial was a desire to address and resolve *defendants'* concern, while not obliterating plaintiffs vested right to a default against Top Auto.

The Court agrees with defendants—a properly amended satisfaction of judgment that spells out its application to Top Auto only is dispositive here. Plaintiffs have properly amended their satisfaction of judgment to spell out that it only applies to Top Auto. Defendants' present motion must be denied on this basis alone.

Even if the amended satisfaction were not sufficient to win the day for plaintiffs, there still would be no election of remedies.

The Court agrees with plaintiffs that *Dunmore v. Eagle Motor Lines*, 560 So.2d 1261, 1265-66 (Fla. 1st DCA 1990) controls the election of remedies issue. [1]

Dunmore was an auto negligence case against three Defendants. *Id.* One defendant complained that the bad conduct of another defendant should not be made known to the jury. *Id.* To ameliorate this concern over possible prejudice, a defendant sought a separate, severed trial—just as was done here. *Id.* After the severed case was tried and a verdict and judgment entered against the one severed defendant, the plaintiff filed a Satisfaction of Judgment. *Id.* The trial against the severed defendant awarded plaintiff's entire damages. *Id.* Similar to the present motion, the remaining defendants in the non-severed case claimed that the Satisfaction of Judgment eliminated the right to proceed against them. *Id.* The First District rejected the claim and reversed a summary judgment. *Id.*

The *Dunmore* court explained why a satisfaction of the judgment from the severed trial did not preclude the action against the other defendants. *Id.* The opinion ended with a discussion of the parties' intention and the need to obtain a just result:

> ...the satisfaction of a judgment does not operate as a release of all where the plaintiff intends to limit the effect of such satisfaction and does not intend to release all other joint tortfeasors, and such intention is apparent from the facts and circumstances. See generally, 47 Am.Jur.2d Judgments §§ 989, 992 (1969). *Cf. Talcott v. Central Bank and Trust Co.*, 247 So.2d 727 (Fla. 3d DCA 1971), cert. denied, 262 So.2d 658 (Fla.1972). Here, it is perfectly plain from the manner in which Eagle was severed from the Pitts trial that Dunmore did not desire *1266 nor intend to proceed against the Pitts defendants alone and treat a judgment against them as a full satisfaction of Eagle's liability for damages. The court ordered a severance of the counts for trial at the request of Eagle and Pitts over Dunmore's objections. The order of severance was granted in express contemplation that the trial against Eagle would be held after the Pitts trial. Nothing in the motions for severance, the arguments of the parties before the trial judge, the comments of the trial judge, or the order itself indicated that the trial of damages against Pitts would be controlling on the damages issues against Eagle. If we were to accept Eagle's argument in this case and apply the common law rule so as to fully release Eagle from all potential liability for damages to Dunmore, we would necessarily have to approve an improper use of the severance rule that would deprive Dunmore of the right and opportunity to have a jury consider Eagle's negligence in determining the relative fault of the decedent and the defendants and the percentage by which the decedent's fault should diminish the damages assessed. Such a result would not accord with even rudimentary concepts of justice and fair play.

Id.

Defendants here knew that plaintiffs did not intend to elect a remedy or proceed solely against Top Auto. The pleadings, orders, and transcripts all contemplated a second trial with Top Auto as a Fabre defendant. The *Dunmore* court makes it clear that a satisfaction of judgment does not have the preclusive effect asserted by defendants. Rather, a court is empowered to look behind the satisfaction and determine what was actually satisfied based upon the facts and circumstances. *Id.*

According to defendants' own argument, the heavy hammer of election of (consistent) remedies only falls if there has been a "*full satisfaction of claim*." Def's Motion at 3, quoting *Holmes Regional Medical Center, Inc. v. Allstate Insurance Company*, 225 So.3d 780, 787 (Fla. 2017) [42 Fla. L. Weekly S738a].

At the hearing, the Court asked defendants what evidence they had to show that plaintiffs full damages had been recovered. First, defendants pointed to a statement given to the press by plaintiffs' counsel after the Top Auto verdict that the verdict, "ensures [Mr. Washington] will be well taken care of and his family will be financially secure." See Def's Motion at 2. Second, defendants made the ipse dixit declaration that, "it is clear from the verdict." See Def's Motion at 2.

While addressing another aspect of their arguments at the hearing, defendants stated that proof was needed and not statements by counsel, which are not evidence. The Court agrees. The statement by plaintiffs' counsel in the post-trial euphoria of obtaining a substantial verdict for a client were not record evidence. Indeed, they were not evidence at all and prove nothing.

Regarding the declaration that full recovery was clear from the verdict, what is not clear is how defendants were privy to the total amount plaintiffs intended to seek at trial. Whether plaintiffs chose to ask for less than full damages for tactical reasons. Whether the numbers on the verdict form were more, less, or the same as that requested by plaintiffs in their closing argument.

But most importantly, it does not matter. According to the Amended Satisfaction of Judgment and the Specific Release attached as Exhibit B to plaintiffs' motion to amend the newly recorded satisfaction is "based on a settlement of the parties" pursuant to which plaintiffs were paid or will be paid $991,293.93. Hardly full payment for a judgment in the amount of $410,226,608.42 for Mr. Washington and $500,000 for each of his three children.

Finally, it is true that "[a]s for the election of remedies doctrine, its role is to 'prevent double recoveries for a single wrong.' " *Thompson v. DeSantis*, No. SC20-985, 2020 WL 5362111, at *2 [301 So. 3d 180] (Fla. Sept. 8, 2020) [45 Fla. L. Weekly S223a], quoting *Holmes*. However, even if the amounts to be recovered by the present plaintiffs were a potential "windfall," that alone does not answer the question. The Florida Supreme Court has explained that potential windfalls are sometimes accepted as the fairest balance of legal theories and public policy.

The classic example of this is the treatment of settlements under Florida's comparative negligence regime. Under *Fabre* and its progeny, a plaintiff could sue two defendants, be paid $500,000 by one to settle, and the dollar amount apportioned by the jury at trial for the settling (Fabre) defendant could be $100,000 with no setoff. Many would consider that to be a $400,000 "windfall" for the plaintiff. Nonetheless, it is a possible windfall that is considered acceptable to uphold the objectives and mandates of joint tortfeasor comparative negligence:

> As to the suggestion that the plaintiff would receive a "windfall" if the total amount paid in settlement was not set off, we again quoted with approval from Neil: Settlement dollars are not synonymous with damages but merely a contractual estimate of the settling tortfeasor's liability; they include not only damages but also the value of avoiding the risk and expense of trial. Given these components of a settlement, "there is no conceptual inconsistency in allowing a plaintiff to recover more from a settlement or partial settlement than he could receive as damages." *Wells*, 659 So.2d at 252 (quoting *Neil*, 859 P.2d at 206).

Gouty v. Schnepel, 795 So.2d 959, 962-63 (Fla. 2001) [26 Fla. L. Weekly S586a].

Given the procedural posture of the default against Top Auto, this case may represent one of the scenarios where a potential windfall would be tolerated.

IV. Conclusion

For the reasons stated above, defendants have not provided sufficient facts or law to support a dismissal for preclusive election of remedies.[2] Accordingly, it is

ORDERED and ADJUDGED that the motion is DENIED.

---

[1]The adoption of pure comparative fault, where the allocation of damages for each defendant is solely a result of that defendant's fault and not joint and several liability, strengthens the rationale of *Dunmore*.

[2]The amended satisfaction and controlling First District case law on election of remedies make it unnecessary to address plaintiffs' promissory estoppel / waiver argument.

* * *

Torts—Automobile accident—Evidence—Motion in limine—Court declines to grant part of defendant's omnibus motion in limine seeking to prohibit hypothetical bad conduct which is contrary to rules of evidence and civil procedure

DUANE WASHINGTON, et al., Plaintiffs, v. SINCLAIR BROADCAST GROUP, INC., et al., Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 18-CA-861. May 10, 2021. David Frank, Judge. Counsel: Robert S. Cox, Law Offices of Robert Scott Cox, PL, Tallahassee; and Benjamin L. Crump, Ben Crump Law, PLLC, Tallahassee, for Plaintiffs. David Luck, Lewis Brisbois Bisgaard & Smith LLP, Coral Gables; Robert L. Shannon, Jr. and Logan M. Owens, Carlton Fields, P.A., Atlanta, Georgia; and Peter D. Webster, Carlton Fields, P.A., Tallahassee, for Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' OMNIBUS MOTION IN LIMINE

This cause came before the Court for hearing on May 10, 2021 on The Sinclair Defendants' Omnibus Motion in Limine, and the Court having reviewed the motion and all supporting and opposing memoranda and materials submitted, and being otherwise fully advised in the premises, it is

ORDERED and ADJUDGED that the motion is GRANTED IN PART and DENIED IN PART as follows:

1. The purpose of a motion in limine is to obtain an advanced ruling precluding improper evidence for which there is a good faith basis to believe another party will attempt to offer at trial, ". . .the mere mention of which at trial would be prejudicial." *Chadwick v. Corbin*, 476 So.2d 1366, 1368 (Fla. 1st DCA 1985). The present "omnibus" motion includes multiple requests for an order prohibiting hypothetical bad conduct, such as general "improper comments" and "use of discovery depositions" contrary to the applicable rule. There should be no need for this Court to order in advance that all parties and counsel follow the rules of evidence and civil procedure. To the extent the parties need guidance in this regard, here it is—behave. These requests are denied as premature. Should they become a reality at trial, they will be individually addressed within the context of the question asked, the statement made, or the procedure followed.

2. Plaintiff shall not comment on the size of the law firm representing defendants, or the number of offices it has, or its resources, or the type of client it typically represents, as these facts are irrelevant to any claim or defense.

3. There have been one or more settlements in this case. The parties shall not comment on them or any settlement offers or negotiations.

4. The parties are reminded not to comment on a party's decision not to call a witness to trial, unless there is proper foundation laid as to availability.

5. The parties shall not ask potential jurors whether certain facts or types of facts meet any legal threshold such as "negligence." Legal thresholds are explained by the Court at the appropriate time.

6. The parties shall not mention or solicit any comments regarding the existence of insurance unless a door has been opened or unless there is another permissible reason under the evidence code, and with prior approval from the Court.

7. The parties shall not comment on or elicit testimony on other lawsuits, the financial status of a party, attorney's fees or costs, work product materials not produced, the conduct of parties during discovery, or the reason for the trial date,

8. The parties shall not present damages evidence in the first trial unless relevant to a liability claim or defense.

9. Otherwise the motion is denied.

* * *

Civil procedure—Parties—Torts—*Fabre* defendant—Where summary judgment has been entered in favor of a party, that party cannot be a *Fabre* defendant or included on verdict form

DUANE WASHINGTON, et al., Plaintiffs, v. SINCLAIR BROADCAST GROUP, INC., et al., Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 18-CA-861. May 10, 2021. David Frank, Judge. Counsel: Robert S. Cox, Law Offices of Robert Scott Cox, PL, Tallahassee; and Benjamin L. Crump, Ben Crump Law, PLLC, Tallahassee, for Plaintiffs. David Luck, Lewis Brisbois Bisgaard & Smith LLP, Coral Gables; Robert L. Shannon, Jr. and Logan M. Owens, Carlton Fields, P.A., Atlanta, Georgia; and Peter D. Webster, Carlton Fields, P.A., Tallahassee, for Defendants.

ORDER GRANTING PLAINTIFFS' MOTION TO STRIKE AFFIRMATIVE DEFENSES

This cause came before the Court for hearing on May 10, 2021 on Plaintiffs' Motion to Strike Defendants,' Sinclair and Sheridan, Affirmative Defense and Claim Against Lerone Copeland and Kathy Watkins DBA Prosperity Enterprises, and the Court having reviewed the motion and all supporting and opposing memoranda and materials submitted, and being otherwise fully advised in the premises, finds

Where summary judgment has been entered in favor of a party, the party cannot be a Fabre defendant in the case and cannot be included on the verdict form. *Jackson Cty. Hosp. Corp. v. Aldrich*, 835 So.2d 318, 331 (Fla. 1st DCA 2002) [28 Fla. L. Weekly D28a], case dismissed sub nom. *Bay Anesthesia, Inc. v. Aldrich*, 863 So.2d 310 (Fla. 2003) 28 Fla. L. Weekly S847a; *Dickey v. Kitroser*, 53 So.3d 1182, 1184 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D307b]. Accordingly, it is

ORDERED and ADJUDGED that the motion is GRANTED.

* * *

Civil procedure—Discovery—Subpoena on nonparty is quashed based on various procedural defects—Subpoena failed to properly identify deponent and subject matters upon which testimony is sought, and process servicer failed to list identification number on subpoena

MAGALIE GABRIEL, Plaintiff, v. OCTAVIO PEREZ, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2017-028965-CA-01, Section CA09. June 7, 2021. Pedro P. Echarte, Jr., Judge. Counsel: Michael D. Dickenson, for Plaintiff. Ricardo M. Luces, for Defendants. Mark A. Goldstein, Miami, for Nonparty Sugicare of Boca Raton, LLC.

ORDER QUASHING DEFENDANT'S SUBPOENA ON SURGICARE OF BOCA RATON, LLC

This cause came before the Court for hearing on June 7, 2021, on Nonparty Surgicare of Boca Raton, LLC's Motion to Quash and for Protective Order, and the Court having reviewed the Motion, heard argument of counsel, and being otherwise fully advised in the premises,

it is Ordered as follows:

1. Nonparty Surgicare of Boca Raton, LLC's Motion is granted and the Defendant's subpoena is quashed. The Court need not delve into the merits of counsels' arguments concerning each item sought by the Defendant's subpoena as various procedural defects identified in this Order mandate that the subpoena be quashed.

2. The Defendant's subpoena names the deponent only as "Surgicare". However, the Secretary of State's records show that there are 81 business entities with that name. Thus, the Defendant has failed to properly name the deponent in its subpoena. Moreover, the subpoena suffers from a blatant noncompliance with Fla.R.Civ.P. 1.310(b)(6) as it designates absolutely no subject matters upon which it seeks testimony from the deponent's corporate representative. *Chiquita Int'l Ltd. v. Fresh Del Monte Produce, N.V.,* 705 So. 2d 112, 113 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D290b].

3. Lastly, the process server omitted his identification number on the subpoena served on the deponent in violation of Section 48.031(5), Fla. Stat. Service of process statutes are strictly construed, *Brown v. U.S. Bank Nat. Ass'n,* 117 So. 3d 823, 824 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D1402a] and the failure to list process server's identification number on the subpoena served on the deponent requires the Court to quash the subpoena. *Walker v. Fifth Third Mortgage Company,* 100 So. 3d 267 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D2615b]; *Caruso v. Baker,* 24 Fla. Law Weekly Supp. 329b (Fla. 19th Cir. Ct. 2015).

* * *

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

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. LIDYS MARBELLA HERNANDEZ BUESO and JOSUE LEONEL QUINONEZ GIRON, Defendants. Circuit Court, 12th Judicial Circuit in and for Manatee County. Case No. 2020-CA-3861. May 26, 2021. Charles Sniffen, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Lidys Marbella Hernandez Bueso, Pro se, Sarasota, and Josue Leonel Quinonez Giron, Pro se, Sarasota, Defendants.

ORDER GRANTING MOTION FOR FINAL SUMMARY JUDGMENT OF PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY, AGAINST DEFENDANTS, LIDYS MARBELLA HERNANDEZ BUESO AND JOSUE LEONEL QUINONEZ GIRON

THIS CAUSE having come before this Court at the hearing on May 4, 2021, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendants, LIDYS MARBELLA HERNANDEZ BUESO and JOSUE LEONEL QUINONEZ GIRON, and the Court having reviewd the court file, summary judgment motion and papers filed in support thereof, it is hereby,

ORDERED AND ADJUDGED:

1. For the reasons set forth below, Plaintiff's motion for summary judgment is hereby GRANTED.

2. Plaintiff's five count complaint was filed and served upon the Defendants on October 7, 2020. A default was entered against each of the Defendants on December 17, 2020 for their failure to plead or otherwise defend. As a result, all well-pleaded allegations in the complaint were admitted.

3. The pleadings and summary judgment evidence establish the following:

a. Defendant Lidys Marbella Hernandez Bueso failed to disclose her fifteen-year-old son as a household resident at the garaging address as required by the terms of the policy. As a result Direct General Insurance Company thereafter declared the policy void ab initio due to a material misrepresentation, gave notice of the rescission, returned the paid premiums to Lidys Marbella Hernandez Bueso, and denied coverage for the subject motor vehicle accident. The court finds that the policy was voided in accordance with the terms of the policy and Section 627.409, Florida Statutes.

b. Had Defendant disclosed that her son was a household resident Plaintiff would issued the policy at a higher premium rate. Accordingly, Plaintiff was entitled to rescind the policy.

c. 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.

4. In light of the foegoing the court finds that Plaintiff properly denied coverage for the loss at issue.

5. Final Judgment is hereby entered for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendants, LIDYS MARBELLA HERNANDEZ BUESO and JOSUE LEONEL QUINONEZ GIRON as follows:

a. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # XXXXXX2148, is rescinded and is void *ab initio;*

b. The material misrepresentation of Defendant, LIDYS MARBELLA HERNANDEZ BUESO on the application dated February 17, 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 # XXXXXX2148, issued by DIRECT GENERAL INSURANCE COMPANY;

c. There is no insurance coverage for the named insured, LIDYS MARBELLA HERNANDEZ BUESO 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 # XXXXXX2148;

d. There is no insurance coverage for the Defendant, JOSUE LEONEL QUINONEZ GIRON 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 # XXXXXX2148;

e. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, LIDYS MARBELLA HERNANDEZ BUESO, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148;

f. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the Defendant, JOSUE LEONEL QUINONEZ GIRON, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148;

g. There is no personal injury protection ("PIP") insurance coverage for JOSUE LEONEL QUINONEZ GIRON for the accident which occurred on June 1, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148;

h. There is no collision insurance coverage for LIDYS MARBELLA HERNANDEZ BUESO for the accident which occurred on June 1, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148;

i. There is no comprehensive insurance coverage for LIDYS

MARBELLA HERNANDEZ BUESO for the accident which occurred on June 1, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148;

j. There is no bodily injury insurance coverage for Jennifer Yvonne Conrad for the accident which occurred on June 1, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148;

k. There is no bodily injury insurance coverage for Oscar Batista Soler for the accident which occurred on June 1, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148;

l. There is no bodily injury insurance coverage for Cristian Jesus Ramos for the accident which occurred on June 1, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148;

m. There is no bodily injury insurance coverage for Hosanna Beth Clark for the accident which occurred on June 1, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148;

n. There is no bodily injury insurance coverage for Lindsey Janell Aleman for the accident which occurred on June 1, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148;

o. There is no property damage insurance coverage for Jennifer Yvonne Conrad for the accident which occurred on June 1, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148;

p. There is no property damage insurance coverage for Oscar Batista Soler for the accident which occurred on June 1, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148;

q. There is no property damage insurance coverage for Marieta Soler for the accident which occurred on June 1, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148;

r. There is no property damage insurance coverage for Hosanna Beth Clark for the accident which occurred on June 1, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148;

s. There is no property damage insurance coverage for Douglas James Clark for the accident which occurred on June 1, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148;

t. There is no obligation to provide Personal Injury Protection benefits coverage to any medical provider, doctor and/or medical facility for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on June 1, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # XXXXXX2148;

u. The Defendant, LIDYS MARBELLA HERNANDEZ BUESO, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148, for the June 1, 2020 accident;

v. The Defendant, JOSUE LEONEL QUINONEZ GIRON, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148, for the June 1, 2020 accident;

w. Since DIRECT GENERAL INSURANCE COMPANY is not obligated to provide any coverages or indemnity to any of the potential claimants, Metropolitan Casualty Insurance Company, shall have no rights of subrogation against DIRECT GENERAL INSURANCE COMPANY under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # XXXXXX2148, for the June 1, 2020 motor vehicle accident;

x. Since DIRECT GENERAL INSURANCE COMPANY is not obligated to provide any coverages or indemnity to any of the potential claimants, Progressive American Insurance Company, shall have no rights of subrogation against DIRECT GENERAL INSURANCE COMPANY under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # XXXXXX2148, for the June 1, 2020 motor vehicle accident;

y. There is no insurance coverage for the motor vehicle accident which occurred on June 1, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148;

z. There is no personal injury protection ("PIP") insurance coverage for the accident which occurred on June 1, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148;

aa. There is no bodily injury liability coverage for the accident which occurred on June 1, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148;

bb. There is no property damage liability coverage for the accident which occurred on June 1, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148;

cc. There is no comprehensive coverage for the accident which occurred on June 1, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148;

dd. There is no collision coverage for the accident which occurred on June 1, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX2148;

ee. Since the policy of insurance issued to the Defendant, LIDYS MARBELLA HERNANDEZ BUESO, bearing policy # XXXXXX2148, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from JOSUE LEONEL QUINONEZ GIRON to any medical provider, doctor and/or medical entity is void;

ff. This Court hereby reserves jurisdiction to award Plaintiff its costs in this action, including its reasonable attorneys' fees;

gg. The court hereby reserves jurisdiction to enter such further orders as justice may require;

hh. 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.

* * *

Criminal law—Drug possession and trafficking—Search and seizure—Residence—Knock-and-announce statute was applicable to officer who opened unlocked door to serve search warrant on residence where officer's entry into home was at least minimally forcible—Four-second wait before entering home after announcement of their presence was insufficient for officers to conclude that entry had been refused—Because officers failed to comply with knock-and-announce statute, motion to suppress is granted

STATE OF FLORIDA, Plaintiff, v. ROSIE ROMAN, Defendant. Circuit Court, 14th Judicial Circuit in and for Bay County. Case Nos. 17-3132-CFMA; 18-0611-CFMB; 18-4051-CFMA; 19-1511-CFMA; 20-2283-CFMA. May 27, 2021. Dustin Stephenson, Judge. Counsel: Frank Sullivan, Assistant State Attorney, Office of the State Attorney, Panama City, for Plaintiff. Autumn M. Miller, Office of the Regional Conflict Counsel, Panama City, for Defendant.

ORDER GRANTING JOINT MOTION TO SUPPRESS EVIDENCE

THIS MATTER is before the Court on the Defendant's Joint Motion to Suppress Evidence filed on March 9, 2021. Having considered said Motion, the State's Response, argument and evidence

presented at the hearing, court files and records, and being otherwise fully advised, this Court finds as follows:

After obtaining a search warrant for the Defendant's home, law enforcement arrived at the residence to execute the warrant. As they approached the door of the residence, officers announced their presence, notified persons inside the home of their intent to execute a search warrant, and knocked on the door. One officer then grasped the handle of the front door and, finding it unlocked, opened the door and entered the home. Approximately four seconds elapsed between the initial announcement and the entry into the home. Prior to the entry, no one inside the residence authorized or refused law enforcement's admittance. Upon executing the search warrant, officers discovered various drugs and drug paraphernalia. The Defendant was arrested and has been formally charged in Case No. 20-2283-CFMA with Trafficking in 1,4-Butanediol (5KG.-10KG) (Count I), Trafficking in Illegal Drugs (4 Grams or More) (Count II), Trafficking in Fentanyl (4G or More but <14G) (Count III), Sale or Possession with Intent to Sell (Methamphetamine) (Count IV), Possession of Controlled Substance (Count V), and Possession of Paraphernalia (Use) (Count VI).

The Defendant has filed the present Motion seeking to suppress all evidence discovered during the execution of the search warrant on the basis that officers failed to comply with Florida's "knock-and-announce" statute. In her Motion, the Defendant contends that officers failed to give occupants of the home a reasonable opportunity to respond to their arrival. At the hearing, the Defendant introduced into evidence the video of law enforcement's arrival at and entry into her home. She argued again that law enforcement failed to fully comply with the notice requirement of Florida's "knock-and-announce" statute and insisted that the "break open" language of the statute did not require that the officer use significant force in order to invoke the statutory requirement. In its written Response and at the hearing, the State argued that the decisional law cited by the defense was distinguishable from the facts of the present cases and posited that the statute could not be invoked because the officer did not forcibly enter the residence. The State conceded, however, that the appropriate remedy for a violation of the "knock-and-announce" statute would be suppression.

Analysis

The issues presently before the Court are three-fold. The first matter to be addressed is whether Florida's "knock-and-announce" statute applies in the present cases. If that inquiry is answered in the affirmative, the Court must then determine whether law enforcement violated the statute in the present cases. If that inquiry is also answered in the affirmative, the Court must identify the remedy that is available for the violation. Each of these issues is addressed separately below.

Applicability of § 933.09

Chapter 933 of the Florida Statutes addresses "search and inspection warrants." Florida's "knock-and-announce" statute for search warrants provides that

> [t]he officer may break open any outer door, inner door or window of a house, or any part of a house or anything therein, to execute the warrant, if after due notice of the officer's authority and purpose he or she is refused admittance to said house or access to anything therein.

§ 933.09, Fla. Stat. (2020). The specific issue in the present cases is whether the minimal force used by the officer to open the unlocked door is sufficient to trigger the requirements of the "knock-and-announce" statute.

The State contends that the officer's peaceable entry into the Defendant's residence is insufficient to allow the Court to determine that Florida's "knock-and-announce" statute applies in the present cases. The State is correct that a peaceable entry does not trigger the requirements of the "knock-and-announce" statute. In fact, Florida law is clear that the "knock-and-announce" statute does not apply when officers peaceably enter a home. *State v. Brown,* 564 So. 2d 136 (Fla. 2d DCA 1990) (holding that the "knock-and-announce" statute does not apply where law enforcement gains peaceable entry into a home by walking through an open door); *State v. Gray,* 518 So. 2d 301 (Fla. 2d DCA 1987) (holding that the "knock-and-announce" statute does not apply where law enforcement gains peaceable entry into a home either by consent or by ruse); *Ryals v. State,* 498 So. 2d 1365 (Fla. 5th DCA 1986) (holding that the "knock-and-announce" statute is not violated when law enforcement gains peaceable entry into a home by deception); *State v. Clarke,* 387 So. 2d 980, 981 (Fla. 2d DCA 1980) ("Where entry is gained peaceably, as by invitation, the 'knock and announce' requirement does not apply."). However, based on a review of applicable decisional law, the officer's entry in the present cases was at least minimally "forcible" because, under Florida law, the only force required to constitute a breaking is the force needed to open an unlocked door. *Burden v. State,* 455 So. 2d 1066, 1068 (1st DCA 1984) ("The concept of breaking is not limited to or synonymous with the use of force. . . . 'An unannounced intrusion into a dwelling . . . is no less an unannounced intrusion whether officers break down a door, force open a chain lock on a partially opened door, open a locked door by use of a passkey, or . . . open a closed but unlocked door.' "); *Benefield v. State,* 160 So. 2d 706, 708 (Fla. 1964) (holding that a "breaking" occurs when an "officer open[s] [an] unlocked . . . door and step[s] into the house"); *State v. Robinson,* 565 So. 2d 730, 732 (Fla. 2d DCA 1990) ("As a matter of law, the opening of an unlocked screen door is a breaking which invokes the due notice requirements of section 933.09, Florida Statutes (1987)."); *see also Boynton v. State,* 64 So. 2d 536, 548 (Fla. 1953) (holding that "pushing a door open was a sufficient breaking and entering to make the acts of the officers a plain violation" of the defendants' state constitutional rights).

Interestingly, federal law also supports this conclusion. Like Florida, federal law also includes a "knock-and-announce" statute, which similarly provides that an

> officer may break open any outer door or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

18 U.S.C. § 3109 (2020); *see also United States v. Chapman,* 384 F. Supp. 1232, 1234 (S.D. Fla. 1974) (considering "virtually identical" Florida and federal "knock-and-announce" statutes in determining that the statutes were applicable to an officer's warrantless entry through an unlocked door prior to being refused admittance). In fact, one federal court of appeals considered an issue almost identical to that of the present cases. In *United States v. Marts,* 986 F.2d 1216 (8th Cir. 1993), law enforcement arrived at the defendants' home to execute a search warrant. They announced, "Police officers—search warrant," knocked quickly, and entered the unlocked door fewer than five seconds later without being refused entry. *Id.* at 1217. The federal court of appeals refused to reduce the statute "to nothing more than a 'knock and enter' rule" and held that law enforcement violated the statute by failing to allow the defendants an adequate opportunity to either permit or refuse entry. *Id.* at 1217-1218.

Accordingly, it is clear to this Court that the requirements of section 933.09, Florida Statutes, applied in the present cases.

Violation of § 933.09

It is undisputed that law enforcement in the present cases announced their presence, announced their purpose, and knocked on the Defendant's door. The issue is whether law enforcement waited

enough time to satisfy the "due notice" requirement of the "knock-and-announce" statute prior to making entry into the home. It is clear from the video of the incident that law enforcement waited approximately four seconds prior to entering the unlocked door.

The length of time an officer must wait prior to forcing entry is an oft-litigated issue for which there is no bright-line rule. Courts should consider the totality of the circumstances in determining whether an officer waited a reasonable amount of time prior to forcing entry. Factors to consider "include the nature of the underlying offense, the time of day the warrant is executed, the size of the home, whether any activity or movement is observed within the home at the time of execution, and whether any exigencies exist." *Mendez-Jorge v. State,* 135 So. 3d 464, 467 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D599a]. Historically, "[t]ime periods less than five seconds are rarely deemed adequate, and periods in excess of fifteen seconds are often adequate. The window of greatest debate seems to center on the period of around ten seconds." *State v. Cassells,* 835 So. 2d 397, 399 n.2 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D340a]. The appropriate inquiry "is whether, given the information known to law enforcement at the time of the warrant's execution, the officer can reasonably infer that he has been refused admittance by the occupants." *Mendez-Jorge,* 135 So. 3d at 467.

It is clear from a review of the video in the present cases that officers did not wait a sufficient amount of time prior to making entry into the Defendant's residence. After knocking and announcing their presence, law enforcement waited only four seconds prior to entering the residence through the unlocked door. Such a short amount of time was insufficient to allow them to conclude that entry had been refused. Having considered the totality of the circumstances in the present cases, the Court finds that law enforcement failed to comply with the requirements of Florida's "knock-and-announce" statute.

Available Remedy

The Florida Supreme Court has long held that the exclusionary rule applies to violations of Florida's "knock-and-announce" statute. *Benefield,* 160 So. 2d at 711. However, in 1990, the Second District Court of Appeal urged the Florida Supreme Court to reconsider the remedy for a violation of the statute:

> Both the trial court and this court are required to use the exclusionary rule as the remedy for any violation of section 933.09, Florida Statutes (1987). This judicially created remedy was announced as a matter of common law in *Benefield.* This common law exclusionary rule is based on the sanctity of the home and the need for privacy. While these reasons are as important, if not more important, today as they were in 1964, there have been many changes in Florida and in legal remedies over the last twenty-six years. At this point, we believe it would be constructive for the supreme court to reconsider the exclusion of evidence as an essential remedy in cases where the police have obtained a proper search warrant and the violation of section 933.09 results from a negligent execution of the warrant which results in no significant personal injury or property damage.

State v. Robinson, 565 So. 2d 730, 732-733 (Fla. 2d DCA 1990). However, the high Court declined to reconsider its ruling at that time.

In 2006, the United States Supreme Court determined that the exclusionary rule is inapplicable to Fourth Amendment violations based on law enforcement's failure to comply with the federal "knock-and-announce" statute. *Hudson v. Michigan,* 547 U.S. 586 (2006) [19 Fla. L. Weekly Fed. S244a]. The Florida Supreme Court subsequently addressed the holding of *Hudson* and determined that it does not preclude application of the exclusionary rule to violations of the state's "knock-and-announce" statute:

> Under *Hudson,* it is clear that the exclusionary rule does not apply to Fourth Amendment knock-and-announce violations. However, *Hudson* is not automatically diapositive of the question of whether the exclusionary rule may be applied for violations of Florida's knock-and-announce statute because, as explained in *State v. Slaney,* 653 So. 2d 422, 425 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D717b]:
>
> > [T]he states are privileged under their state law to adopt higher, but not lower, standards for police conduct than those required by the Fourth Amendment. In Florida, those higher standards may not, as a matter of state law, be imposed under the state constitutional guarantee against unreasonable searches and seizures, *but may be imposed by other provisions of Florida law, including a state statute.*
>
> (Emphasis added.) As a matter of state law, a state may provide a remedy for violations of state knock-and-announce statutes, and nothing in *Hudson* prohibits it from doing so. *Benefield* was based on state law grounds and not the Fourth Amendment.
>
> . . .
>
> The knock-and-announce statutes in Florida do not explicitly provide for any remedies. The State argues that a person harmed by a violation of the knock-and-announce statute may seek civil damages for a violation. However, without a basis in the statute for civil remedies, and because of the difficulties faced by a defendant seeking to recover money damages for a statutory violation against the police, we are concerned that the important values represented by the knock-and-announce statute, which is based on common law origins, would be undermined if the exclusionary rule did not apply to its violation.
>
> The fact that *Benefield* has been the law since 1964 and the fact that the statute has not been amended by the Legislature to prohibit the remedy of exclusion are further considerations in favor of not receding from *Benefield.* As we have observed, "[l]ong-term legislative inaction after a court construes a statute amounts to legislative acceptance or approval of that judicial construction."

State v. Cable, 51 So. 3d 434, 441-443 (Fla. 2010) [35 Fla. L. Weekly S705b] (citations omitted).

Although this Court finds the reasoning of the majority opinion in *Hudson* (and the dissent in *Cable*) to be extremely persuasive with regard to why the exclusionary rule should not apply to violations. of Florida's "knock-and-announce" statute, it is nonetheless bound by the holding of *Cable* and, therefore, finds that suppression is the applicable remedy for a violation of section 933.09, Florida Statutes.

Conclusion

For hundreds of years, the law has recognized the special protections afforded to a person's home. "Entering one's home without legal authority and neglect to give the occupants notice have been condemned by the law and common custom of this country and England from time immemorial." *Benefield,* 160 So. 2d at 708. In the present cases, law enforcement failed to abide by the mandatory requirements of section 933.09. The officers' entry through the unlocked door of the Defendant's residence with only a few seconds' notice to the occupants constitutes a clear violation of Florida's "knock-and-announce" statute, the remedy for which is the suppression of all evidence obtained as a result of the subsequent unlawful search of the home.

Therefore, it is

ORDERED AND ADJUDGED that the Defendant's Motion is hereby **GRANTED**. It is further

ORDERED AND ADJUDGED that all evidence obtained as a result of the unlawful search of the Defendant's residence is hereby **SUPPRESSED.**

* * *

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. JERRARD EDDIE JOHNSON, et al., Defendants. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE20016825, Division 21. June 18, 2021. Michele Towbin Singer, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Jerard Eddie Johnson and Java Ervin Johnson, Pro se, Fort Lauderdale, Defendants.

ORDER ON PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AGAINST DEFENDANTS, JERARD EDDIE JOHNSON AND JAVA ERVIN JOHNSON

THIS CAUSE having come before this Court at the hearing on June 10, 2021, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendants, JERARD EDDIE JOHNSON and JAVA ERVIN JOHNSON, 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, Mdy Oscard, and the Defendants, Jerard Eddie Johnson and Java Ervin Johnson, regarding the policy rescission as a result of the insured's material misrepresentation on the application for insurance dated May 6, 2020. Plaintiff rescinded the policy of insurance on the basis that Mdy Oscard failed to disclose that that the insured vehicle was being utilized for business purposes or commercial use 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.

Mdy Oscard initially completed an application for a policy of automobile insurance from Direct General Insurance Company on May 6, 2020. Mdy Oscard failed to disclose that the insured vehicle was being utilized for business purposes or commercial use when completing the application for insurance. Mdy Oscard answered "NO" to the following application question, which provides:

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

In addition, the insured, Mdy Oscard, signed and initialed the Applicant's Statement on the application for insurance, which provides in pertinent part as follows:

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

Plaintiff determined that had Mdy Oscard 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 Mdy Oscard 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 Mdy Oscard, Direct General Insurance Company may void the insurance policy as follows:

FRAUD AND MISREPRESENTATION

The statements made by **you** in any application for insurance or policy change are deemed **your** representations. A misrepresentation; omission; concealment of fact; or incorrect statement may prevent recovery under this policy if:

1. The misrepresentation; omission; concealment; or statement is fraudulent or is material either to the acceptance of the risk or to the hazard assumed by **us**; or

2. Had **we** known the facts, we in good faith would not have:
   a. Issued the policy;
   b. Issued the policy at the same premium rate;
   c. Issued the policy with the limits shown;
   d. Issued this policy with these terms and conditions; or
   e. Provided the coverage with respect to the hazard resulting in the accident or loss.

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 November 11, 2020, the named insured, Mdy Oscard, entered into a Stipulation for Consent Judgment, confirming that he failed to disclose that the insured vehicle was being utilized for business purposes or commercial use at the time of the application for insurance dated May 6, 2020. Specifically, Mdy Oscard admitted the following information in his Stipulation for Consent Judgment:

> On May 6, 2020, I, MDY OSCARD, failed to disclose and failed to report and business use or commerical use of the insured vehicle at the time of the application for insurance.
>
> On May 6, 2020, I understood all of the questions on the application for insurance and I signed the application for insurance.

On November 21, 2020, this Court entered an Order granting the Plaintiff, Direct General Insurance Company's Motion for Final Consent Judgment against Mdy Oscard.

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

Analysis Regarding the 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 (Mdy Oscard) to disclose the business use of the insured vehicle at the time of the policy inception. In addition to providing a "NO" response to application question #7, the applicant (Mdy Oscard) 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 Mdy Oscard on the application for insurance. Since the Carrier relied on the representations by Mdy Oscard 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 Mdy Oscard subsequently claimed that the "agent did not ask" the questions on the application since Mdy Oscard signed the application which is a legal contract and thus, Mdy Oscard is bound by the terms and conditions of the contract. Further, the Defendant, Mdy Oscard, did not establish any proof of coercion, duress, and/or fraud in the inducement during the application process.

In addition, since Mdy Oscard 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, Mdy Oscard, to disclose that the insured vehicle was being used for business purposes, that Plaintiff provided the required testimony to establish that Mdy Oscard's failure to disclose the business use of the insured vehicle 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 Defendants, JERARD EDDIE JOHNSON and JAVA ERVIN JOHNSON, is hereby

GRANTED.

b. This Court ***hereby enters final judgment*** for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendants, JERARD EDDIE JOHNSON and JAVA ERVIN JOHNSON.

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 MDY OSCARD, the Motion for Final Summary Judgment and in the Affidavit of Kimberly Willcox, are not in dispute, which are as follows:

e. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # FLPGXXXXX0215, is rescinded and is void *ab initio;*

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

g. The Defendant, MDY OSCARD, stipulated that he failed to disclose that the insured vehicle was used for business/commercial purposes at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # FLPGXXXXX0215, issued by DIRECT GENERAL INSURANCE COMPANY;

h. The Defendant, MDY OSCARD, failed to disclose and failed to report any business use or commercial use of the insured vehicle at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # FLPGXXXXX0215, issued by DIRECT GENERAL INSURANCE COMPANY;

i. The Defendant, MDY OSCARD breached the insurance policy contract and application for insurance, under the policy of insurance, bearing policy # FLPGXXXXX0215, issued by DIRECT GENERAL INSURANCE COMPANY;

j. The material misrepresentation of Defendant, MDY OSCARD on the application for insurance dated May 6, 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 # FLPGXXXXX0215, issued by DIRECT GENERAL INSURANCE COMPANY;

k. There is no insurance coverage for the named insured, MDY OSCARD for any property damage liability coverage or personal injury protection benefits coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215;

l. Notwithstanding the rescission of the subject insurance policy, the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPGXXXXX0215, does not provide any bodily injury liability insurance coverage;

m. Notwithstanding the rescission of the subject insurance policy, the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPGXXXXX0215, does not provide any comprehensive and/or collision insurance coverage;

n. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, MDY OSCARD, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215;

o. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify MDY OSCARD for any bodily injury claim for JERARD EDDIE JOHNSON arising from the accident of June 29, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215;

p. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify MDY OSCARD for any bodily injury claim for JAVA ERVIN JOHNSON arising from the accident of June 29, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215;

q. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify MDY OSCARD for any bodily injury claim for Marilyns Young arising from the accident of June 29, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215;

r. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify MDY OSCARD for any property damage claim for Marilyns Young arising from the accident of June 29, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215;

s. There is no personal injury protection ("PIP") insurance coverage for MDY OSCARD for the accident which occurred on June 29, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215;

t. There is no personal injury protection ("PIP") insurance coverage for JERARD EDDIE JOHNSON for the accident which occurred on June 29, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215;

u. There is no personal injury protection ("PIP") insurance coverage for JAVA ERVIN JOHNSON for the accident which occurred on June 29, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215;

v. There is no bodily injury liability insurance coverage for JERARD EDDIE JOHNSON for the accident which occurred on June 29, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215;

w. There is no bodily injury liability insurance coverage for JAVA ERVIN JOHNSON for the accident which occurred on June 29, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215;

x. There is no bodily injury liability insurance coverage for Marilyns Young for the accident which occurred on June 29, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215;

y. There is no property damage insurance coverage for Marilyns Young for the accident which occurred on June 29, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215;

z. There is no obligation to provide Personal Injury Protection benefits coverage to any medical provider, doctor and/or medical facility for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on June 29, 2020, under the policy of

insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPGXXXXX0215;

aa. There is no obligation to provide Personal Injury Protection benefits coverage to Chiropractic Clinics of South Florida, PL for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on June 29, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215;

ab. The Defendant, MDY OSCARD, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215, for the motor vehicle accident which occurred on June 29, 2020;

ac. The Defendant, JERARD EDDIE JOHNSON, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215, for the motor vehicle accident which occurred on June 29, 2020;

ad. The Defendant, JAVA ERVIN JOHNSON, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215, for the motor vehicle accident which occurred on June 29, 2020;

ae. Marilyns Young is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215, for the motor vehicle accident which occurred on June 29, 2020;

af. Chiropractic Clinics of South Florida, PL is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215, for the motor vehicle accident which occurred on June 29, 2020;

ag. Santander Consumer USA, Inc. is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215, for the motor vehicle accident which occurred on June 29, 2020;

ah. Progressive American Insurance Company is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215, for the motor vehicle accident which occurred on June 29, 2020;

ai. Since DIRECT GENERAL INSURANCE COMPANY is not obligated to provide any coverages or indemnity to any of the potential claimants, Progressive American Insurance Company, shall have no rights of subrogation against DIRECT GENERAL INSURANCE COMPANY under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPGXXXXX0215, for the motor vehicle accident which occurred on June 29, 2020;

aj. There is no insurance coverage for the motor vehicle accident which occurred on June 29, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215;

ak. There is no personal injury protection ("PIP") insurance coverage for the accident which occurred on June 29, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215;

al. There is no property damage liability coverage for the accident which occurred on June 29, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX0215;

am. Since the policy of insurance issued to the Defendant, MDY OSCARD, bearing policy # FLPGXXXXX0215, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from MDY OSCARD to any medical provider, doctor and/or medical entity is void;

an. Since the policy of insurance issued to the Defendant, MDY OSCARD, bearing policy # FLPGXXXXX0215, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from MDY OSCARD to Chiropractic Clinics of South Florida, PL is void;

ao. Since the policy of insurance issued to the Defendant, MDY OSCARD, bearing policy # FLPGXXXXX0215, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from JERARD EDDIE JOHNSON to any medical provider, doctor and/or medical entity is void;

ap. Since the policy of insurance issued to the Defendant, MDY OSCARD, bearing policy # FLPGXXXXX0215, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from JAVA ERVIN JOHNSON to any medical provider, doctor and/or medical entity is void.

* * *

Volume 29, Number 4
August 31, 2021
Cite as 29 Fla. L. Weekly Supp. ____

COUNTY COURTS

Insurance—Personal injury protection—Coverage—Medical expenses—Summary judgment is granted in favor of medical provider on issue of reasonableness of charges—Provider's supporting affidavit satisfied its burden of proving charges are reasonable—Insurer's opposing affidavit, filed the night before hearing, was untimely and medical records attached were records of a person other than the insured

COASTAL CARE MEDICAL CENTER, INC., d/b/a COASTAL CARE PLUS MEDICAL CENTER, a/a/o Sharon Wilson, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2015-SC-003280, Division CC-K. June 8, 2021. Kimberly Sadler, Judge. Counsel: Ashley-Britt Hansen, Law Office of D. Scott Craig, LLC, Jacksonville, for Plaintiff. R. Ryan Smith, Kirwan Spellacy & Danner, PA, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY [sic] DISPOSITION REGARDING THE REASONABLENESS OF PLAINTIFF'S CHARGES PURSUANT TO F.S. 627.736(5)(a)(1) (2008)

THIS CAUSE came to be heard upon Plaintiff's Motion for Partial Summary [sic] Disposition Regarding the Reasonableness of Plaintiff's Charges Pursuant to F.S. §627.736(5)(a)(1) (2008). Both parties were represented by counsel. The Court, having heard arguments of the parties, finds as follows:

1. This is an action for breach of contract for No-Fault benefits due to Defendant's reduced and partial payment of medical bills submitted by Plaintiff.

2. On June 6, 2016, this Court granted Defendant's Motion to Invoke the Florida Rules of Civil Procedure, except Rule 1.442; therefore, this case is guided by the Florida Rules of Civil Procedure rather than the Small Claims Rules.

3. On November 2, 2017, this Court granted Plaintiff's Motion for Final Summary Judgment that Plaintiff's Presuit Demand Letter Satisfied the Conditions Precedent in F.S. §627.736(10) and denied Defendant's Motion for Summary Judgment. This Court held that Plaintiff's presuit demand letter and Assignment of Benefits were valid and met the requirements of the Florida No-Fault Law.

4. There is no dispute that Defendant's insurance policy did not clearly elect the use of payment pursuant to two hundred (200) percent of the Medicare Part B Fee Schedule; therefore, Defendant is obligated to pay the billed amounts submitted by Plaintiff so long as charges for the billing were reasonable in amount.

5. On April 1, 2020, Plaintiff filed its Motion for Summary [*sic*] Disposition as to whether Plaintiff's charges were reasonable and met the factors listed in F.S. §627.736(5)(a)(1) (2008). Plaintiff had also filed the affidavit of Dr. Clint D. Miller, DC in support of its Motion.

6. Soon after the Motion was filed, on April 23, 2020, the parties, along with the Court, set the Motion to be heard on August 6, 2020.

7. On August 5, 2020 at 4:25 p.m., the night before the hearing that had been scheduled for almost four (4) months, Defendant filed a Notice of Filing and Intent to Rely on Affidavit of Dr. Alan Nathans, DC in Opposition to Plaintiff's Motion for Summary *[sic]* Disposition Regarding Reasonableness. The exhibits attached to Dr. Nathans' affidavit, and relied on by Dr. Nathans in preparing the affidavit, were medical records of a forty-seven (47) year old male and not the records of Plaintiff's patient, Ms. Sharon Wilson.

8. The Florida No-Fault Law established factors in order to determine whether a medical provider's charges are reasonable. F.S. §627.736(5)(a)(1) (2008) states, in pertinent part:

> With respect to a determination of whether a charge for a particular service, treatment, or otherwise is reasonable, consideration may be given to evidence of *usual and customary charges and payments accepted by the provider involved in the dispute, and reimbursement levels in the community and various federal and state medical fee schedules applicable to automobile and other insurance coverages, and other information relevant to the reasonableness of the reimbursement* for the service, treatment, or supply.

This provision of the Florida No-Fault does not mandate consideration of every factor when determining a reasonable amount.

9. Dr. Miller, by way of his affidavit, testified that the factors listed in F.S. §627.736(5)(a)(1) (2008) had been met. Dr. Miller's affidavit specifically referenced the actions taken by Plaintiff to ensure the charges are reasonable.

10. Dr. Miller testified the amount charged was Plaintiff's usual and customary amount in that the charges for Ms. Wilson are the same amounts billed to all payors such as health insurance carriers or patients who are self-pay. Dr. Miller testified that Plaintiff regularly analyzes reimbursement amounts from different payors, including the Medicare Part B Fee Schedule. He also testified that he has conferred with various medical providers in his community and that has occurred for over two (2) decades as Plaintiff has been in practice since 1989 in the same community. Dr. Miller also testified he employs a company who is in the business of medical billing to audit Plaintiff's files to make sure its charges are aligned with reasonable charges as announced by the Florida No-Fault Law. Dr. Miller's testimony evidences Plaintiff acknowledges and analyzes each factor contained in F.S. §627.736(5)(a)(l) (2008). Dr. Miller's testimony satisfies Plaintiff's burden of proving its charges were reasonable.

11. The affidavit of Dr. Nathan, filed by Defendant the night before the hearing, was untimely in violation of Florida Rule of Civil Procedure 1.510(c). Dr. Nathans' affidavit could also not be relied upon because the medical records attached to his opinion did not relate to Ms. Wilson.

12. Therefore, Plaintiff established its *prima facie* case that its charges are reasonable pursuant to the requirements of the Florida No-Fault Law and Defendant has not provided competent admissible evidence to dispute that proof, therefore it is

ORDERED and ADJUDGED that:

1. Plaintiff's Motion for Partial Summary Disposition [*sic*] Regarding the Reasonableness of Plaintiff's Charges Pursuant to F.S. §627.736(5)(a)(1) (2008) is GRANTED.

* * *

Criminal law—Search and seizure—Detention—Traffic infraction—Auxiliary lamps on vehicle—Officers lacked probable cause to detain defendant for violation of statute that restricts brightness and number of lit auxiliary lights on vehicle where record does not reflect that officers had any training or experience that would have allowed them to estimate brightness of auxiliary lights at more than 300 candlepower or how many lights of that brightness were lit—Officers did not have probable cause to detain defendant for violation of statute requiring that lights be aimed so that glaring rays are not projected into eyes of oncoming drivers where no vehicles were approaching defendant at time of detention—Passenger's admission that oncoming driver had flashed headlights at defendant does not support detention for violation of headlight-aiming statute where admission was not made until after detention—Detention was not lawful under mistake of fact or law doctrines where there was no reasonable basis for mistake of fact or law—Motions to dismiss traffic infraction and to suppress are granted

STATE OF FLORIDA, v. AURELIO DIAZ, JR., Defendant. County Court, 5th Judicial Circuit in and for Lake County. Case Nos. 2020-MM-003356 and 2020-TR-

0012052. May 27, 2021. Jason J. Nimeth, Judge. Counsel: Stacia Godkin, Office off the State Attorney, for State. Benjamin Boylston, for Defendant.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

THIS CAUSE came before the Court on Defendant's Motion to Suppress and Dismiss, and the Court having held a hearing on March 16, 2021; reviewed the testimonial and media evidence; considered the arguments and memorandums of law from the parties; and reviewed the applicable law, finds as follows.

FACTS

On July 2, 2020, Deputies Bronson Binder and Sandra Chessher were working as part of the DUI Taskforce. While walking to their vehicles at the conclusion of an unrelated traffic stop, a Jeep approached them. The Jeep caught their attention due to the numerous bright lights. Deputy Binder described the lights as brighter than normal, and he counted eight lights on the front of the vehicle finding a violation of section 316.2396(2), Florida Statutes. The driver of the vehicle was later identified as Aurelio Diaz, Jr. (hereinafter "Defendant").

Deputy Chessher described the lights as blinding. The lightbar on top of the vehicle was aimed in a way that it would shine directly into the eyes of on oncoming motorist. However, at the time of the stop there was no other traffic on the roadway. The female passenger informed Deputy Chessher that a vehicle had flashed its headlights at Defendant's vehicle earlier in the night.

The Lake County Sheriff's Office does not possess, nor has it ever possessed, any equipment capable of measuring the brightness of a light. Deputy Binder and Deputy Chessher have no personal experience or special training on the measurement of light sources. Neither deputy has had any personal experience to distinguish whether a light is above or below 300 candlepower.

ANALYSIS

When a defendant is detained or searched outside the issuance of a search warrant, the State has the burden to establish that the evidence was legally obtained. *State v. Setzler,* 667 So. 2d 343, 345 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2418b]. "When a search [or arrest] warrant has issued, the defense has the burden of going forward, and the burden to establish grounds for suppression." *Id.* "As a practical matter, absence of a search warrant in the court file [suffices] to shift the burden of going forward to the prosecution." *Id.* (citing *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *United States v. Jeffers,* 342 U.S. 48 (1951); *Jones v. State,* 648 So. 2d 669, 674 (Fla. 1994)). The trial court's findings of fact relating to a motion to suppress must be "supported by competent, substantial evidence. . . ." *State v. Nowak,* 1 So. 3d 215, 217 (Fla. 5th DCA 2008) [34 Fla. L. Weekly D356c] (citing *Weiss v. State,* 965 So. 2d 842, 843 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2334c]).

"The temporary detention of an individual during the stop of an automobile by a law enforcement officer, even if for a brief period and limited purpose, constitutes a seizure under" the protections provided through the Fourth Amendment to the United States Constitution and Article I, Section 12, of the Florida Constitution. *Crew v. State,* 738 So. 2d 352, 354 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D1170c]. "In determining whether a traffic stop is constitutional, an objective test is used, asking only whether probable cause for the stop existed and ignoring the officer's subjective motivation or intention[—t]he test is whether a police officer could have stopped the vehicle for a traffic violation." *State v. Wilson,* 268 So. 3d 927, 928 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D1007a] (quoting *Hurd v. State,* 958 So. 2d 600, 602 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1594a]). Probable cause exists when "the facts and circumstances, as analyzed from the officer's knowledge, special training and practical experience, and of which he has reasonable trustworthy information, are sufficient in themselves for a reasonable man to reach the conclusion that an offense has been committed." *Dep't of Highway Safety & Motor Vehicles v. Whitley,* 846 So. 2d 1163, 1165-66 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1090a] (citing *Dep't of Highway Safety & Motor Vehicles v. Smith,* 687 So. 2d 30, 33 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D161a]; *Dep't of Highway Safety & Motor Vehicles v. Silva,* 806 So. 551, 554 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D139a]; *Dep't of Highway Safety & Motor Vehicles v. Favino,* 667 So. 2d 305, 309 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a]). Probable cause is evaluated under the totality of the circumstances. *State v. Walker,* 991 So. 2d 928, 931 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2014a] (citing *Revels v. State,* 666 So. 2d 213, 215 (Fla. 2d DCA 1995) [21 Fla. L. Weekly D70a]).

Defendant argues his seizure was unlawful as section 316.2396(2) only limits the number of illuminated lights affixed to a vehicle when an individual light exceeds 300 candlepower. Whereas, the State argues that Defendant was in violation because more than four lights were illuminated, regardless of the candlepower. Neither party has presented, nor has the Court been able to locate, previous analysis of 316.2396(2). Alternatively, the State argues probable cause existed for Defendant's seizure under section 316.238(1)(a). Lastly, the State argues that if no probable cause can be found under 316.2396(2) or 316.238, then law enforcement was justified through the mistake of fact and law doctrines.

I. WHETHER DEFENDANT'S DETENTION WAS LAWFUL UNDER 316.2396(2)

"When the language of the statute is clear and unambiguous and conveys a clear and definite meaning. . .the statute must be given its plain and obvious meaning." *Eustache v. State,* 248 So. 3d 1097, 1100 (Fla. 2018) [43 Fla. L. Weekly S291a] (quoting *Holly v. Auld,* 450 So. 2d 217, 219 (Fla. 1984)). "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *Adv. Op. to the Gov. re Implementation of Amendment 4, the Voting Restoration Amendment,* 288 So. 3d 1070, 1078 (Fla. 2020) [45 Fla. L. Weekly S10a] (citing Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2012)). Additionally,

> [a] subsection of a statute cannot be read in isolation; instead, it must be read "within the context of the entire section in order to ascertain legislative intent for the provision" and each 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."

Lamar Outdoor Advertising-Lakeland v. Florida Dept. of Transp., 17 So. 3d 799, 802 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D1669b] (citing *Florida Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC,* 986 So. 2d 1260, 1265 (Fla. 2008) [33 Fla. L. Weekly S493a]). "When necessary, the plain and ordinary meaning 'can be ascertained by reference to a dictionary." *Rollins v. Pizzarelli,* 761 So. 2d 294, 298 (Fla. 2000) [25 Fla. L. Weekly S331a] (quoting *Green v. State,* 604 So. 2d 471, 473 (Fla. 1992)).

Section 316.2396 provides

> (1) At all times specified in s. 316.217, at least two lighted lamps shall be displayed, one on each side at the front of every motor vehicle, except when such vehicle is parked subject to the regulations governing lights on parked vehicles.
>
> (2) Whenever a motor vehicle equipped with headlamps, as herein required, is also equipped with any auxiliary lamps or a spot lamp or any other lamp on the front thereof projecting a beam of intensity greater than 300 candlepower, not more than a total of 4 of any such lamps on the front of a vehicle shall be lighted at any one time when upon a highway.

(3) A violation of this section is a noncriminal traffic infraction, punishable as a nonmoving violation as provided in chapter 318.

Subsection (2) begins with a conditional clause. *See* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2021) ("[a]lthough drafters, like all other writers and speakers, sometimes perpetrate linguistic blunders, they are presumed to be grammatical in their compositions"). The word "whenever" means "at any or every time that" or "at whatever time." Sidney Greenbaum, OXFORD ENGLISH GRAMMAR 191 (Oxford University Press ed. 1996) ("*[wJh*-conditional pronouns and determiners are compounds ending in -ever[, and t]hey introduce *wh*-conditional clauses. . .which denote a range of possible choices); Merriam-Webster Online Dictionary, 2021. https://www.merriam-webster.com/dictionary/whenever (22 May 2021). A conditional clause establishes an understanding that when certain conditions are present then the remainder of the sentence is then applicable which commonly understood as "if this, then that." *See* Sidney Greenbaum, OXFORD ENGLISH GRAMMAR 340 (Oxford University Press ed. 1996) ("[c]onditional clauses generally express a direct condition, indicating that the truth of the host clause. . .is dependent on the fulfilment of the condition in the conditional clause. . ."). Additionally, conditional clauses are set off in a sentence with a comma. *See* Sidney Greenbaum, OXFORD ENGLISH GRAMMAR 512-13 (Oxford University Press ed. 1996) (summarizing the hierarchy of separation marks to include the use of a comma to separate subordinate clause with the phrase); *see also* Jane Straus and Lester Kaufman, THE BLUEBOOK OF GRAMMAR AND PUNCTUATION 28 (Tom Stern ed. 2014) ("[w]hen starting a sentence with a dependent clause, use a comma after it"). Thus, subsection (2) addresses those situations where a motor vehicle is equipped with headlamps (also known as headlights) and any other lamp on the front, regardless of whether it is an auxiliary lamp or a spot lamp, which projects an intensity greater than 300 candlepower. Once this condition is present, subsection (2) limits the illumination of the lamps to a maximum of four at any one time.

A violation of 316.2396(2) imposes a limit on the projection of light which is analogous to that of the limit on window tint under section 316.2953. Probable cause exists to stop a vehicle for a suspected tint violation when law enforcement believes that a window appears very dark; thus, similarly, it reasons that probable cause exists for a violation of 316.2396(2) when law enforcement believes that there are at least four lights too bright. *See Vaughn v. State,* 176 So. 3d 354, 356 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D2135b] (citing § 316.2953, Fla. Stat. (2014); *State v. Moore,* 791 So. 2d 1246, 1249 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D2037d]). In the case at hand, the record is void of any experience or special training that would have allowed law enforcement to estimate the observed brightness exceeded 300 candlepower. *See State v. Coley,* 157 So. 3d 542, 543 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D511a] (the detaining officer "stated that in his experience, the tint is illegal where the driver cannot be seen"). Additionally, the record does not establish how many lights were very bright. Therefore, law enforcement lacked probable cause to detain Defendant based upon a violation of 316.2396(2).

II. WHETHER DEFENDANT'S DETENTION WAS LAWFUL UNDER 316.238(1)(A)

Section 316.238(1)(a) provides that "[w]henever the driver of a vehicle approaches an oncoming vehicle within 500 feet, such driver shall use a distribution of light, or composite beam, so aimed that the glaring rays are not projected into the eyes of the oncoming driver." Section 316.238(1)(a) is not applicable when a driver is on a divided highway. *State v. Shumaker,* 846 So. 2d 1199, 1199 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D1338b] (citing *State v. Clark,* 511 So. 2d 726 (Fla. 1st DCA 1987)).

In the case at hand, no vehicles were approaching Defendant at the time of his detention. Defendant had no duty to adjust the distribution of light to prevent projection into the eyes of an oncoming driver. The State argues that the passenger's admission as to an approaching vehicle flashing lights supports the detention; however, this admission was not until after the detention, so regardless of whether it would support a violation, it was not part of law enforcement's consideration to detain Defendant. Additionally, the admission fails to establish whether Defendant was on a roadway or a divided highway at the time of the referenced oncoming traffic. Thus, law enforcement lacked probable cause to detain Defendant based upon a violation of 316.238(1)(a).

III. WHETHER DEFENDANT'S DETENTION WAS LAWFUL UNDER MISTAKE OF FACT AND LAW DOCTRINES

When law enforcement exercises a detention on what is later determined to be a mistake of facts, the detention can still be valid when "the officer's mistake of fact was reasonable." *State v. Wimberly,* 988 So. 2d 116, 119 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1856a] (citing *Saucier v. Katz,* 533 U.S. 194, 205 (2001) [14 Fla. L. Weekly Fed. S361a]; *United States v. Chanthasouxat,* 342 F. 3d 1271, 1276 (11th Cir. 2003) [16 Fla. L. Weekly Fed. C1015a]). Additionally, when law enforcement exercises a detention based upon a mistake of the law, the detention can still be valid when the mistake is "objectionably reasonable." *State v. Rand,* 209 So. 3d 660, 663 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D352e] (citing *Heien v. North Carolina,* 574 U.S. 54 (2014) [25 Fla. L. Weekly Fed. S20a]). As to the mistake of fact, the Court cannot find a reasonable basis to support the mistake of law doctrine as law enforcement had no training or personal experience to allow this mistake to be considered reasonable. Additionally, no measurement was conducted of the lights to determine whether the lights exceed the precluded 300 candlepower.

In *Heien v. North Carolina* law enforcement executed a traffic stop on a vehicle with only one functioning brake light based on the understanding that two functioning lights were required. 574 U.S. 54, 58-59 (2014) [25 Fla. L. Weekly Fed. S20a]. However, the appellate court later held that under state law, a vehicle was only required to have one functional brake light. *Id.* Under the mistake of law doctrine, the U.S. Supreme Court held that the officer's mistake of law was reasonable given the ambiguity between the statute's subsections. *Heien,* 574 U.S. at 67-68 (the Court compared the conflicting provisions of N.C. Gen. Stat. Ann. § 20-129(g) and N.C. Gen. Stat. Ann. § 20-129(d)). The Court also noted the dissenting opinion's characterization of the statute's interpretation as "surprising." *Id.* In the case at hand, section 316.2396(2) lacks the ambiguity addressed in *Heien* as the meaning is clear from the plain reading of the statute. Therefore, law enforcement's mistake of law was not reasonable.

CONCLUSION

On July 2, 2020, Deputy Binder and Deputy Chessher were walking back to their patrol vehicles when they directed Defendant to stop his vehicle because of the bright lights affixed to the front of the vehicle citing a violation of section 316.2396(2). Section 316.2396(2) limits a driver to no more than four (4) affixed lights projecting a beam greater than 300 candlepower; however, neither Deputy Binder nor Deputy Chessher have no personal experience or training enabling them to distinguish between a light projecting above or below the limited candlepower. Although Deputy Chessher also believed the positioning of the lightbar created a violation of section 316.238, at the time of the detention, no vehicles were approaching, so Defendant had no obligation to adjust or disable the light. Therefore, law enforcement lacked the probable cause necessary to justify a detention under 316.2396(2) and 316.238. Additionally, Defendant's detention

cannot be justified through the mistake of fact or mistake of law doctrines. It was not reasonable for law enforcement's conclusion that the lights were in violation of the statute when they lacked a foundation to make that assessment. Additionally, the statute is not ambiguous as to create a reasonable mistake of law.

IT IS THEREFORE ORDERED AND ADJUDGED that Defendant's Motion to Dismiss the traffic infraction in 2021-TR-012052 is GRANTED.

IT IS THEREFORE FURTHER ORDERED AND ADJUDGED that Defendant's Motion to Suppress is GRANTED.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Officer had reasonable suspicion to stop defendant's vehicle after observing vehicle swerving in and out of right traffic lane, crossing over fog line on right side of lane, and swerving over center line in making right hand turn—Officer had probable cause to request that defendant perform field sobriety exercises after smelling odor of alcohol on defendant's breath and noticing that defendant's eyes were bloodshot and glassy—Motion to suppress is denied

STATE OF FLORIDA, v. DENNIS SHORTER, JR., Defendant. County Court, 7th Judicial Circuit in and for Putnam County. Case No. 2021-385 MM, Division 62. June 8, 2021. Joe Boatwright, Judge.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

This matter came before the Court for hearing on May 10, 2021, upon Defendant's Motion to Suppress Stop and Search. Based on the testimony and evidence presented to the Court, the Court finds as follows:

FACTS

On the evening of March 7, 2021, Trooper Capela of the Florida Highway Patrol initiated a traffic stop on the Defendant's vehicle. Trooper Capela, while traveling on Reid Street in Palatka, FL, observed the Defendant's vehicle swerving in and out of the right lane traffic. In particular, the Defendant's vehicle crossed over the fog line on the right side of the lane. As Trooper Capela got behind the Defendant, the Defendant made a right hand turn onto a side street. In making the turn the right hand turn, the Defendant swerved over the center or median line into the left hand lane as he was making his turn. Trooper Capela then activated his lights and initiated a traffic stop. Trooper Capela stated that the stop was based on the driving pattern and he wanted to make sure the driver was not ill, tired or impaired.

As Trooper Capela made contact with the driver, he smelled alcohol emanating from the Defendant's breath as he spoke. This was consistent with someone who had been consuming alcoholic beverages. In addition, Trooper Capela noticed that the Defendant's eyes were bloodshot and glassy. Based on the driving pattern, the smell of alcohol, and the bloodshot eyes, the trooper asked the Defendant to perform a series of field sobriety tests. The Defendant agreed and performed the tests which showed multiple indicators of impairment. Based on all factors present, The Defendant was arrested for Driving Under the Influence.

APPLICABLE LEGAL AUTHORITY

All that is required for a valid vehicle stop is a founded suspicion by the officer that the driver of the car, or the vehicle itself, is in violation of a traffic ordinance or statute. *Davis v. State,* 788 So. 2d 308, 309 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1215a]. A traffic stop is reasonable under the Fourth Amendment where the law enforcement officer had probable cause to believe a traffic violation had occurred, and the reasonableness of the stop does not depend on the subjective motivations of the officer who stopped the vehicle. *Whren v. United States,* 517 U.S. 806, 810 (1996) *See also, State v. Thomas,* 109 So. 3d 814 (5th DCA 2013) [38 Fla. L. Weekly D372a]. The validity of the traffic stop depends solely on objective criteria. *Id.* The objective test "asks only whether any probable cause for the stop existed," which makes the subjective motivations of the officer irrelevant. *Holland v. State,* 696 So. 2d 757, 759 (Fla. 1997) [22 Fla. L. Weekly S387a]. In addition, courts have held that an officer has reasonable suspicion to justify a traffic stop if they have a belief that the driver is ill, tired, or impaired, and they observe a driving pattern that is sufficient to warrant such a belief even if there is no traffic violation. *See Yanes v. State,* 877 So. 2d 25, 26 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1282a] (finding that an officer had reasonable suspicion to stop a vehicle where he observed a vehicle cross the fog line with one half of the width of his vehicle on three occasions over a one-mile period, coupled with a belief that the driver was possibly impaired).

It is reasonable for an officer to request that a suspect perform field sobriety tests under certain circumstances. *State v. Liefert,* 247 So. 2d 18 (Fla. 2nd DCA 1971). In order to require a person to take field sobriety tests, an officer must have sufficient cause to request the tests. *Id.* Florida courts have determined that weaving in and out of a lane and an odor of alcohol on the defendant are sufficient cause to request field sobriety tests. *Id. See also State v. Taylor,* 648 So. 2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b].

CONCLUSION

The Defendant's Motion to Suppress is denied. Trooper Capela made a valid stop on the Defendant's vehicle, and it was reasonable for the Trooper Capela to request the Defendant to perform field sobriety exercises. In regards to the traffic stop, Trooper Capela observed the Defendant's vehicle swerving in and out of the right lane traffic. In particular, the Defendant's vehicle crossed over the fog line on the right side of the lane. As Trooper Capela got behind the Defendant, the Defendant made a right hand turn onto a side street. In making the turn the right hand turn, the Defendant swerved over the center or median line into the left hand lane as he was making his turn. This driving pattern provided reasonable suspicion to believe the Defendant was ill, tired, or impaired and justified the traffic stop in question.

In addition, Trooper Capela had sufficient cause to request the Defendant perform field sobriety exercises. The Defendant was weaving in and out of his lane. In addition, the officer smelled alcohol emanating from the breath of the Defendant and noticed that his eyes were bloodshot and glassy. These are indicators of impairment and thus, gave Trooper Capela sufficient cause to request the Defendant perform the field sobriety exercises.

THEREFORE IT IS ORDERED AND ADJUDGED that the Defendant's MOTION TO SUPPRESS is hereby **DENIED**.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Defendant's commission of traffic infraction by driving on bicycle path, coupled with weaving within lane and braking for no apparent reason, provided sufficient legal grounds for traffic stop—Motion to suppress is denied

STATE OF FLORIDA, v. JEFFREY M. SIMES, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2020-000542-CT. June 16, 2021. D. Melissa Distler, Judge. Counsel: Adriana Laforest, Office of the State Attorney, for State. G. Kipling Miller, for Defendant.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS BASED ON UNLAWFUL STOP

THIS MATTER came before the Court on June 9, 2021 on the Defendant's Motion to Suppress Based on Unlawful Stop. The Court, having heard testimony from Trooper Ken Montgomery, having reviewed the recordings admitted into evidence, and having heard argument from Counsel for the State and the Defendant, this Court makes the following findings of fact:

Findings of fact:

Trooper Ken Montgomery testified that on July 10, 2020, he was on duty in a marked patrol vehicle driving westbound on SR 100 in Flagler County, Florida when he noticed a white pickup truck weaving within its lane of travel. The dash camera recording captured by Trooper Montgomery's vehicle were admitted into evidence and reviewed by the Court. Trooper Montgomery ultimately arrested the Defendant JEFFREY M. SIMES for Driving under the influence.

Trooper Montgomery testified that as he was traveling westbound, he noticed the Defendant's vehicle weaving within its lane and then cross over the bike lane divider and drive in the bike lane. He testified that the vehicle traveled into the bike lane several times and also drifted left towards and touching the divider between the inside and outside westbound lanes. The vehicle also braked repeatedly for no apparent reason on two separate occasions. Trooper Montgomery also testified, for the first time at the hearing, that the vehicles' speed varied during the time he followed it. The Trooper estimated that he followed the vehicle for approximately two miles. At that time, Trooper Montgomery conducted a traffic stop of the vehicle; he testified that he stopped the vehicle to conduct a welfare check to determine if the driver was ill, fatigued, or impaired.

The dash camera recording reflects the driving pattern as described by the trooper, including the following: drifting to the right touching the bike lane divider line (5 seconds into video recording); slowly weaving back to center and then drifting onto the divided line between the lanes (21 seconds into video recording); driving over the bike lane with passenger tires beyond the line for several seconds (beginning 27 seconds into video recording); weaving back into the center of the lane and then touching the center divided line between the lanes (41 seconds into the video recording); drifting back towards the bike lane and then braking three times in succession for no apparent reason (beginning 52 seconds into the video); drifting into the bike lane again (beginning 1:05 into video recording); braking 4 times in succession for no apparent reason (beginning 1:18 into video recording); weaving within the lane, almost impacting the bike lane and braking again (beginning at 1:37 into video recording); lastly braking 3 times in succession for no apparent reason (beginning 1:43 into video recording). After this driving pattern, and as the vehicle approaches a more populated area just prior to 1-95, Trooper Montgomery initiates the traffic stop of the pickup, driven by the Defendant JEFFERY M. SIMES.

It is this sequence of events on which the Defendant bases his Motion to Suppress. The Defendant argues that there was no legal basis to conduct a traffic stop. The State argued there was reasonable suspicion for a welfare check based on the trucks' weaving, crossing into the bike lane, and braking, as well as the traffic violation of Florida Statute 316.1995, driving upon a sidewalk or bicycle path, each of which would justify the traffic stop for the unusual operation of the vehicle.

Conclusions of Law

The undisputed testimony of Trooper Montgomery and the recordings reflect that the Defendant violated Florida Statute 316.1995, driving upon a sidewalk or bicycle path on more than one occasion. That violation, coupled with the weaving and braking, provided sufficient legal grounds for Trooper Montgomery to conduct a stop. As a result, the Court holds that Trooper Montgomery had a reasonable basis for the traffic stop for the civil traffic violation and a welfare check.

Based upon the foregoing, the Motion to Suppress is hereby **DENIED.**

* * *

Insurance—Automobile—Windshield repair—Appraisal—Failure to comply with mandatory appraisal clause—Dismissal

SHAZAM AUTO GLASS LLC, a/a/o Elmerson Flores, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendants. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2018-SC-003124-O. June 9, 2021. Amy J. Carter, Judge. Counsel: John Z. Lagrow, Malik Law, P.A., Maitland, for Plaintiff. Lisa M. Lewis, Cole, Scott & Kissane, P.A., Tampa, for Defendant.

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

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

ORDERED AND ADJUDGED that said Motion be, and the same is hereby GRANTED. The appraisal clause is a mandatory provision of the policy and is a mandatory condition precedent to filing suit. The Plaintiff's request for an evidentiary hearing on the prohibitive cost doctrine is DENIED based on the ruling in *Progressive American Insurance Company v. Broward Insurance Recovery Center, LLC*, 46 Fla. L. Weekly D1209a (Fla. 4th DCA 2021). This matter is hereby dismissed without prejudice.

* * *

Insurance—Automobile—Windshield repair—Appraisal—Failure to comply with mandatory appraisal clause—Dismissal

APEX AUTO GLASS LLC, a/a/o Crystal Farlane, Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County, Small Claims Division. Case No. 2020-SC-016190-0. March 30, 2021. Amy J. Carter, Judge. Counsel: William J. Terry, III, Malik Law, P.A., for Plaintiff. Soutchay Xayasone, Law Office of Gabriel Fundora, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE having come before the Honorable Court on Defendant's Motion to Dismiss Hearing on March 29, 2021 involving counsel for the respective parties, and the court being otherwise fully advised in the premises, the court makes the following findings: It is further ORDERED AND ADJUDGED:

1. The Court finds that Appraisal Clause is a mandatory provision of the policy which provides that the Defendant cannot be sued unless there is full compliance with all terms of the policy.

2. The Defendant's Motion to Dismiss Plaintiff's Complaint is GRANTED, without prejudice.

3. The Defendant's Motion to Stay the Proceedings is hereby DENIED.

* * *

Landlord-tenant—Because lease obligates tenant/church to pay proportionate share of landlord's real estate taxes as additional rent, church is ordered to pay additional rent in accordance with parties' agreement

MARLIN ROAD PARTNERS, LTD., Plaintiff, v. THE RIVER OF LIFE CHURCH MIAMI, INC., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-003384-CC-26, Section SD05. June 3, 2021. Michaelle Gonzalez-Paulson, Judge. Counsel: Mark A. Goldstein, Miami, for Plaintiff. Brian Kowal, for Defendant.

ORDER REQUIRING DEFENDANT TENANT TO PAY ADDITIONAL RENT

This case came before the Court for hearing on May 4, 2021, on Defendant's Motion to Determine Rent to be Deposited into Court Registry, and the Court having reviewed the Motion, heard argument of counsel, conducted an evidentiary hearing and being fully advised

in the premises, it is Ordered as follows:

1. Plaintiff is the Defendant's landlord and the dispute between the parties concerns whether the Defendant, a church, must pursuant to the parties' lease, pay additional rent, which in part, is to pay the Plaintiff landlord's real estate taxes on the leased premises.

2. Plaintiff argues that the Defendant is contractually bound to pay the additional rent and the exemption from taxation does not apply because the church is not paying real estate or sales tax to a government entity and the Defendant is bound by the lease to pay its proportionate share of the landlord's real estate taxes which is defined as additional rent under the lease. Defendant argues that it is exempt from paying the additional rent.

3. The parties' lease is attached as an exhibit to the Complaint and governs the parties' rights.[1]

4. The only expert witness to testify in the evidentiary hearing was Dana Kauffman, a CPA. Mr. Kaufman opined that under the lease the Defendant was contractually obligated to pay its portion of the Plaintiff landlord's real estate taxes because Paragraph 5 of the parties' lease defines Additional Rent (CAM) as the tenant's proportionate share of all "Taxes, Insurance and Operating Expenses as hereinafter defined (Taxes, Insurance and Operating Expenses, collectively "CAM"). Section 5(a)(ii) of the parties' lease provides that "Taxes are defined as all impositions, taxes, assessments. . .including without limitation, **real estate taxes**, business improvement taxes."

5. The Defendant, through Nathaniel Surrancy, admitted during the hearing that it signed the lease providing for the payment of the additional rent knowing that it entailed the payment of the landlord's real estate taxes. Mr. Surrancy testified that he felt compelled to sign the lease because the Church had invested too much in the location to leave. Mr. Surrancy further testified that nobody forced him to sign the lease.

6. Contract language that is unambiguous on its face must be given its plain meaning. *Green v. Life & Health of America,* 704 So.2d 1386, 1390 (Fla. 1998) [23 Fla. L. Weekly S42a]. The parties' lease clearly provides that the Defendant is required to pay the Plaintiff landlord for the tenant's proportional share of the landlord's real estate taxes and the lease must be enforced as written. See *Prestige Valet, Inc. v. Mendel,* 14 So. 3d 282, 283 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D1563b] ("It is never the role of a trial court to rewrite a contract to make it more reasonable for one of the parties or to relieve a party from what turns out to be a bad bargain." See also *Barakat v. Broward Cty. Hous. Auth.,* 771 So. 2d 1193, 1195 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2474a]; *Med. Ctr. Health Plan v. Brick,* 572 So. 2d 548, 551 (Fla. 1st DCA 1990) ("A party is bound by, and a court is powerless to rewrite, the clear and unambiguous terms of a voluntary contract").

7. In this case, the Court finds that the parties bargained for the Defendant to pay its proportionate share of the Plaintiff landlord's real estate taxes as additional rent. The Court will enforce the parties' lease, as written. Consequently, the Court Orders the Defendant to pay the Plaintiff $7,264.34 in additional rent by June 15, 2021 including June additional rent, or the Court will issue a final judgment for possession of the premises and direct the Clerk to issue a writ of possession.

[1]Defendant's Answer (Par. 3) admits the genuineness of the lease governing the parties' rights.

* * *

Attorney's fees—Insurance—Personal injury protection—Proposal for settlement—Good faith—Nominal proposal for settlement was made in good faith where insurer had reasonable basis to conclude that it had no liability due to insured's failure to attend examination under oath

CENTRAL THERAPY CENTER, INC., a/a/o Luis Gonzalez, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2014-003027-CC-26, Section SD05. June 10, 2021. Michaelle Gonzalez-Paulson, Judge. Counsel: Maria Corredor, for Plaintiff. Megan Pearl and Maury L. Udell, Beighley Myrick Udell + Lynne P.A., Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR ENTITLEMENT TO ATTORNEY' S FEES AND COSTS

THIS CAUSE having come before the Court on the Defendant's Motion to Tax Attorney's Fees and Costs on May 6, 2021, and this Court having reviewed the pleadings filed by the parties, having heard oral argument, and having been provided with subsequent memorandum of law, this Court hereby GRANTS the Defendant's Motion for Attorney's Fees and Costs. The Court finds as follows:

1) This lawsuit was a PIP lawsuit in which the Defendant refused to pay the Plaintiff medical provider because it believed the insured had not properly complied with the condition precedent of attending the Examination Under Oath (EUO).

2) Plaintiff filed suit on June 18, 2014 for PIP benefits.

3) On October 8, 2014, pursuant to § 768.79, Fla. Stat. Defendant timely served a proposal for settlement in the amount of $100. See Def.'s Notice of Filing, dated October 9, 2020.

4) Plaintiff did not accept the proposal for settlement.

5) On October 16, 2014, Defendant served its answer and affirmative defenses raising the defense of EUO no-show based on the policy of insurance and amended PIP statute which made appearing at an EUO a condition precedent to recovery of PIP benefits among other fraud based defenses due to the clinic owner's arrest and shutdown. On October 5, 2020, this Court granted Defendant's Motion for Final Summary Judgment on the issue of failure to appear at EUO.

6) The Defendant asks this Court to award attorneys' fees and costs in this case based on the Plaintiff's rejection of its PFS. Plaintiff argues that the PFS was not made in good faith because it was not only nominal but because the offer was not made in good faith.

7) In order to find a PFS was not made in good faith, the offeror must have had no reasonable basis to believe the exposure was nominal. The offeror must solely have had a reasonable basis to make the offer. *Miccosukee Tribe of Indians of Florida v. Lewis Tein P.L.,* 277 So.3d 299 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2094a]; *Dep't of Highway Safety v. Weinstein,* 747 So.2d 1019 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2799b].

8) At the time the proposal was served, Defendant had a good faith basis to conclude that it had zero liability in this case, dating back to October 2014 based on the unambiguous statute regarding the EUO.

9) An offeror only has to believe the exposure was nominal and not in bad faith. *State Farm Fla. Ins. Co. v. Laughlin,* 118 So.3d 314 (Fla. 3d DCA 2013) [35 Fla. L. Weekly D1934a] (holding that when an insured fails to comply with the condition precedent to filing a lawsuit against an insurance company, a nominal PFS is made in good faith).

10) In the instant case, the Defendant obtained a Final Judgment in its favor holding that the insured had failed to comply with the EUO. This fact supports the argument that it had a reasonable basis to conclude that the Defendant had limited risk in this case. *Downs v. Coastal Systems Intern., Inc.,* 972 So.2d 258 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D107a].

Therefore, the Defendant's Motion for entitlement to attorney's fees is hereby GRANTED. The parties shall mutually coordinate a hearing to determine the reasonable amount pursuant to Fla. R. Civ. P .1.442.

* * *

Insurance—Automobile—Attorney's fees—Assignee of financing company that is owner of damaged vehicle and prevailed in action against insurer of at-fault driver for diminished value of damaged vehicle is not entitled to attorney's fees under section 627.428—Assignee is third-party beneficiary of at-fault driver's policy, not omnibus insured—Assignee's standing to bring suit against at-fault driver's insurer did not confer right to recover attorney's fees

SHIELD GLOBAL PARTNERS G1, LLC, Plaintiff, v. INFINITY AUTO INSURANCE CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-009768-CC-05, Section CC08. May 10, 2021. Maria D. Ortiz, Judge. Counsel: Alexander Pastukh, Alexander Pastukh, P.A.; and James D. Johnson, Jackson Kelly PLLC, for Plaintiff. Cristina Lombillo, Law Offices of Terry M. Torres, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND COSTS

THIS CAUSE, having come before the Court on Plaintiff's Motion for Attorney's Fees and Costs on January 26, 2021, and the Court, after reviewing the motions, the record, the applicable case law, and after hearing argument of counsel for the parties, and being otherwise fully advised in the premises, makes the following finding of fact and conclusions of law:

BACKGROUND

On or about March 18, 2017, Grisel Moran Lopez ("Lopez") was involved in an automobile accident in Miami, Florida, wherein she caused damages to a 2017 Cadillac XT5, driven by Maria Elena Santana and insured by GEICO. At the time of the accident, Lopez was insured by Defendant under a personal automobile policy subject to its terms, limitations, conditions, and exclusions. GEICO subsequently made a claim for property damages for repairs to Maria Elena Santana's vehicle, which Defendant paid.

Thereafter, Plaintiff, as assignee of GM Financial, the owner of Maria Elena Santana's vehicle, filed suit against Lopez for the diminished value of Ms. Santana's vehicle. Plaintiff obtained a default judgment against Lopez on April 18, 2018. Because Plaintiff successfully litigated Lopez's liability in the underlying suit by way of the default judgment, Plaintiff brought suit directly against Defendant and ultimately prevailed. Thereafter, Plaintiff moved to have its attorney's fees and costs paid by Defendant. Defendant contested Plaintiff's entitlement to attorney's fees and costs.

ANALYSIS

I. Plaintiff Is Not an Omnibus Insured as contemplated under florida statute § 627.428

Florida Statute § 627.428 provides for an award of attorneys' fees in certain limited, enumerated circumstances:

> (1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

Fla. Stat. § 627.428(1).

The purpose of the fee shifting statute is to discourage companies from contesting valid claims, which requires courts to enforce the contract with the insurance company and reimburse insureds their attorneys' fees. *See* Fla. Stat. § 627.428; *see also State Farm Fire & Cas. Co. v. Kambara*, 667 So. 2d 831, 832 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D156c]. However, Florida Statute § 627.428 "must be strictly construed because an award of attorneys' fees is in derogation of common law." *Pepper's Steel & Alloys, Inc. v. United States*, 850 So. 2d 462, 465 (Fla. 2003) [28 Fla. L. Weekly S455a]; *Mid-Continent Casualty Company v. Basedo*, 2011 U.S. Dist. LEXIS 57384, 6.

Plaintiff argued that it was entitled to attorneys' fees under Florida Statute § 627.428(1) as an omnibus insured. "An 'omnibus insured' is one who is covered by a provision in the policy but not specifically named or designated." *Cont'l Cas. Co. v. Ryan Inc. Eastern*, 974 So. 2d 368, 374. An important characteristic in defining an omnibus insured is that the rights of the omnibus insured "flow '**directly** from his or her status under a clause of the insurance policy **without regard to the issue of liability**.' " *Id*. (emphasis added). *See also State Farm Fire & Cas. Co. v. Kambara*, 667 So. 2d at 833.

A key distinction between an omnibus insured and third-party beneficiary lies in the way the underlying insurance benefits flow to the party. For a third-party beneficiary, the benefits inure to the tortfeasor who is insured under the policy, i.e., the named insured. The benefits only flow to the injured party (plaintiff) if said party successfully establishes liability against the tortfeasor/insured. *State Farm Fire & Cas. Co. v. Kambara*, 667 So. 2d at 834. When a third-party beneficiary sues the carrier to establish liability coverage, it is suing to establish the rights of the tortfeasor, which then *indirectly* inure to his/her benefit. *Id*. This status as third-party beneficiary does not qualify as an omnibus insured or any other category contemplated in Florida Statute § 627.428(1). *See id*.

Here, Plaintiff is simply a third-party beneficiary. It successfully established liability against the tortfeasor, Defendant's named insured. Defendant then indemnified its insured, and the benefits of the policy *indirectly* flowed to the Plaintiff as a result of the named insured's *liability*. Plaintiff is *not* an omnibus insured under Florida Statute § 627.428 because Plaintiff was not specifically contemplated in Defendant's policy without regard to liability.

II. Plaintiff's Standing to Bring Suit Does Not Grant Entitlement to Attorneys' Fees

Plaintiff argued in the alternative that because it had standing to bring suit against Defendant, it was effectively "standing in the shoes" of the named insured and was therefore entitled to attorneys' fees. Here, Plaintiff does not have an assignment from Lopez, vesting the insured's rights in Plaintiff. Courts in Florida have held that: ". . .a surety who had no written assignment from the insured, was not a named insured, nor a named beneficiary under the policy was not entitled to an award of attorneys' fees under Florida Statute § 627.428." *Cont'l Cas. Co. v. Ryan Inc. Eastern*, 974 So. 2d 368, 372.

One main distinction is that once rights are transferred via assignment; **the assignor no longer has any right to enforce its interest** "because the assignee has obtained all 'rights to the thing assigned.' " *Id*. (emphasis added). In the context of a surety obtaining rights through equitable subrogation, "[a]lthough the surety may stand in the shoes of the principal, **the principal does not lose its status as an insured** under the policy." *Id*. at 377 (emphasis added). Although a surety may have standing to bring suit and stand in the shoes of the insured, "the surety does not acquire the principal's status as one of the designated entities entitled to attorneys' fees" under Florida Statute § 627.428. *Id*.

Here, Plaintiff had standing to bring suit against Defendant. However, Plaintiff's standing did not remove Lopez's status or rights as the named insured under her policy with Defendant. After Plaintiff obtained the default judgement against Lopez, she maintained her right, as an insured, to sue Defendant herself.

The facts here are similar to those in *Aries Insurance Co. v. Espino*. As is the case here, the *Aries* Plaintiff was a third-party beneficiary who brought suit against Defendant's insured, the tortfeasor, and then successfully litigated against Defendant to obtain coverage. The Third District held that those facts do not give rise to entitlement to attorneys' fees. *See Aries Ins. Co. v. Espino*, 736 So. 2d 792 (Fla. 3d DCA

1999) [24 Fla. L. Weekly D1626a].

Ultimately, Plaintiff is not an omnibus insured as contemplated under Florida Statute § 627.428.[1] *See State Farm Fire & Cas. Co. v. Kambara*, 667 So. 2d 831; *Continental Cas. Co. v. Ryan Inc. Eastern*, 974 So. 2d 368; and *Industrial Fire & Cas. Ins. Co. v. Prygrocki*, 422 So. 2d 314. Plaintiff's standing to bring suit against Defendant does not confer upon it the right to attorneys' fees. Florida courts have rejected the argument that a surety or a third-party beneficiary "standing in the shoes" of the insured to bring suit against the insurance company is entitled to attorneys' fees. See *Continental Cas. Co. v. Ryan Inc. Eastern*, 974 So. 2d 368; *Aries Ins. Co. v. Espino*, 736 So. 2d 792; and *Mid-Continent Cas. Co. v. Basedo*, 2011 U.S. Dist. LEXIS 57384.

Therefore, Plaintiff's is not entitled to attorneys' fees and costs, and its motion is hereby DENIED.

[1]Plaintiff is neither a named insured or a named beneficiary under the policy, nor does Plaintiff have a written assignment of benefits from the named insured.

* * *

Insurance—Personal injury protection—PIP insurer waived right to investigate or deny claim for alleged lack of cooperation by insured where insurer breached policy and violated PIP statute by failing to pay or deny claim within thirty days of receipt of bills

GONZALO A. CODINACH, DC, a/a/o Rebecca Garcia, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2013-002858-CC-23, Section ND03. June 16, 2021. Linda Singer Stein, Judge. Counsel: Robert B. Goldman, Florida Advocates, Dania Beach, for Plaintiff. Rashad Haqq el-Amin, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court on June 9, 2021, upon Plaintiff's Motion for Summary Judgment. The Court having considered the motion and the summary judgment evidence, consisting of the Affidavit of Julie Valdez, Esq. and the depositions of Flor Collazo and Angela Burnstine, having heard argument of counsel and being otherwise fully advised, it is

ORDERED that Plaintiff's Motion for Summary Judgment is GRANTED, for the following reasons:

The summary judgment evidence reflects that United Automobile Insurance Company ("United Auto") issued an automobile insurance policy to Rebecca Garcia, who submitted a claim for Personal Injury Protection benefits as a result of a motor vehicle accident for which Codinach Chiropractic provided treatment. United Auto received bills from Codinach Chiropractic on December 19, 2011, February 2, 2012, and February 16, 2012. United Auto denied Codinach Chiropractic's claim for reimbursement on April 3, 2012. The basis upon which United Auto denied the claim was Rebecca Garcia's failure to cooperate with United Auto's investigation of the claim.

Pursuant to Sec. 627.736(4)(b), Fla. Stat., personal injury protection insurance benefits are overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and the amount of same. The Court in *Century-National Insurance Company v. Halifax Chiropractic and Injury Clinic (a/a/o Rantanen Bloodworth)*, 28 Fla. L. Weekly Supp. 30a (9th Judicial Circuit, Appellate, Jan. 22, 2020) stated the requirement that "[a]n insurer is under this statutory time constraint even after raising a coverage issue." (*Citing January v. State Farm Mut. Ins. Co.*, 838 So.2d 604, 607 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D484a]). The *Halifax* Court went on to state:

> "An insurer is not free to assert a coverage issue, ignore the thirty-day deadline to pay a claim, and investigate further with no consequences. *Id.* Simply put, the deadline to verify, and pay, a claim is not tolled. *Superior Ins. Co. v. Libert*, 776 So.2d 360, 363 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D381a] (*citing Fortune Ins. Co. v. Pacheco,* 695 So.2d 394, 395 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D1076a]. . .). Furthermore, the failure of an insurer to adhere to the statutorily mandated timeframe is itself a breach of contract. *Amador v. United Auto Ins. Co*., 748 So.2d 307, 309 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2437a]. . . ."

In this case, United Auto was initially furnished written notice of the fact of a covered loss and the amount of same when it received Codinach Chiropractic's initial bill on December 19, 2011. Accordingly, United Auto had until January 18, 2012 to pay or deny that bill. United Auto received Codinach Chiropractic's second bill on February 2, 2012. United Auto had until March 3, 2012 to pay or deny that bill. United Auto received Codinach Chiropractic's third bill on February 16, 2012. United Auto had until March 17, 2012 to pay or deny that bill. United Auto failed to pay or deny the claim evidenced by the bills received by United Auto on December 19, 2011, February 2, 2012, and February 16, 2012, within 30 days of its receipt of those bills.

United Auto certainly could have denied the claim for lack of cooperation on the part of Rebecca Garcia, but was required to do so within 30 days of its having been provided written notice of the fact of a covered loss. Having failed to deny the claim until April 3, 2012—more than 30 days from the date on which United Auto received each of Codinach Chiropractic's first three bills, United Auto violated the PIP statute and as such, was in breach of contract and waived the ability to investigate or deny the claim for failure to cooperate. Contrary to United's argument that it was not required to deny or pay Plaintiff's claim within the 30 days, an insurer may not use its investigative right to toll the thirty day time limit provided for in Sec. 627.736(4)(b).

It is further ORDERED that within seven (7) days from the date of this Order, counsel for Defendant shall advise counsel for Plaintiff as to whether United Auto contests the reasonableness, relatedness and medical necessity of the services provided by Codinach Chiropractic to Rebecca Garcia. In the event that United Auto contests the reasonableness, relatedness and medical necessity of those services, Plaintiff shall have thirty (30) days from Defendant's having provided such notice, within which to file its motion for summary judgment as to reasonableness, relatedness and medical necessity.

* * *

Criminal law—Driving under influence—Evidence—Breath test—Where motion to suppress breath test is based on failure to comply with twenty-minute observation period required by administrative rule, burden of proof is on defendant—Merely asserting non-compliance with rule is insufficient to shift burden to state to show substantial compliance—Defendant, who was wearing a mask, failed to show lack of substantial compliance with observation period where evidence demonstrated that officer reasonably ensured that defendant did not take anything by mouth or regurgitate

STATE OF FLORIDA, Plaintiff, v. BRETT MORRIS, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 20 CT 4842. June 2, 2021. Erika Nikla Quartermaine, Judge. Counsel: Ashley Gaillard, for Plaintiff. AnneMarie Rizzo, for Defendant.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS/LIMINE AND STATE'S AMENDED MOTION TO STRIKE

This matter came for hearing on April 22, 2021 on the Defendant's Motion to Suppress/Limine and filed on March 9, 2021 (the "Defense Motion") and the State's Motion to Strike filed on April 21. 2021 and amended the same day (the "Motion to Strike"). The Court has considered the argument of counsel including the Defense's Memo-

randum of Law and the supplemental authority from the State, the testimony of Deputy Brenckle and the video entered into evidence as State's Exhibit 1.

I.

On June 22, 2020, the State charged the Defendant by Information with Driving Under the Influence with a Breath Alcohol Greater than .15, Driving Under the Influence With Property Damage, and two counts of Leaving the Scene of a Crash for an incident that occurred on April 25, 2020.

On March 9, 2021, the Defendant filed a Motion to Suppress claiming that "Deputy Brenckle did not comply with the administrative rules when administering the breach test." A day prior to the hearing, the State filed a Motion to Strike claiming that the Defense Motion is actually a motion in limine requiring the Defense to carry the burden of proof and that it is facially insufficient because it fails to state the alleged deficiencies with any specificity. On the day of the hearing, the Defense provided case law relating to the twenty-minute observation period and FDLE Rule 11D8-007(3).

At the hearing, the Court first heard argument on the Motion to Strike and, given the fact that the Defense had clarified that the Defense Motion relates to the twenty-minute observation period, determined that the State had the burden of proof. As explained below, this ruling was incorrect. In its presentation of evidence, the State presented a video of a portion of the twenty-minute observation period (admitted as Exhibit A) and called Deputy Brenckle as a witness. At the conclusion of the presentation of evidence, the Defense cited to the video wherein the Defendant was wearing a mask during the twenty-minute observation period and argued that it was the presence of the mask that rendered the breath test in violation of FDLE Rule 11D8-007(3).

II.

The Defense Motion alleges noncompliance with the FDLE Rule governing the twenty-minute observation period. Given the holding in *Birchfield v. North Dakota,* 136 S. Ct. 2160 (2016) [26 Fla. L. Weekly Fed. S300a], the Court finds that the Defense Motion should be treated as a motion in limine pursuant to Rule 3.190(a) of the Florida Rules of Criminal Procedure. *State v. Potts,* 27 Fla. L. Weekly Supp. 398a (Polk Cty. Ct. June 4, 2019); *State v. Bencaz,* 28 Fla. L. Weekly Supp. 342a (Sarasota Cty Ct. Mar. 22, 2019); *State v. Alain,* 27 Fla. L. Weekly Supp. 388a (Volusia Cty. Ct. May 15, 2019); *State v. DeMauney,* 25 Fla. L. Weekly Supp. 362a (Pinellas Cty, Ct. Oct. 7, 2016).

The moving party bears the burden of proof in a motion in limine. *Id*. In order to meet this burden of proof with respect to a violation of an FDLE Rule, the Defense must allege specific facts that show the State did not substantially comply with this rule. *State v. Hasetey,* 10 Fla. L. Weekly Supp. 942a (Fla. 17th Cir. Ct. Sept. 1, 2003). As Judge Ross explained, "[t]o challenge the test results, the defendant must show that the State failed to substantially comply with the FDLE rules, or by competent scientific evidence, and not speculation, that there was a procedure followed by the state that calls the scientific accuracy and reliability of the blood [or breath] test results into question. If such a showing is made, the burden would shift to the State to "show substantial compliance or that any noncompliance would be insubstantial before the breath test is admissible." *State v. Griese,* 5 Fla. L. Weekly Supp. 137a (Orange Cty. Ct. Nov. 3, 1997). Asserting noncompliance with an FDLE rule only, as the Defense did in this case, is insufficient to shift the burden. *Id*. Therefore, the Court should have stricken the Defense Motion.

However, even if the Court were to get to the merits of the Defense Motion, the Court finds that the Defense would have not met its burden to show that the twenty minute observation period was not in substantial compliance with Florida Administrative Code 11D-8.007(3), which states:

> [t]he 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.

It is well settled that continuous face to face observation is not required to comply with Rule 11D-8.007. *Kaiser v. State,* 609 So. 2d 768 (Fla. 2d DCA 1992). *See e.g., State v. Fisher,* 6 Fla. L. Weekly Supp. 650a (Broward Cty. Ct. June 7, 1999) (holding that the defense presented no evidence to demonstrate that the defendant's coughing during the 20 minute observation period could lead to an increased mouth alcohol level); *Hamann v. State,* 20 Fla. L. Weekly Supp. 315a (Fla. 9th Cir. Oct. 18, 2012); *Potts,* 27 Fla. L. Weekly Supp. at 850. This authority together with the uncontroverted facts adduced at the hearing do not establish a lack of substantial compliance with Rule 11D-8.007(3). Specifically, Deputy Brenckle's testimony as well as the video evidence (depicting the Defendant and the Deputy face to face within a few feet of each other, the fact the Defendant speaks for a significant part of the video, the manner of the placement of the mask on the Defendant's face, as well as the manner of removal of the mask and the apparent condition of the mask upon removal), demonstrate, by a preponderance of the evidence, that the Deputy reasonably ensured that the Defendant did not take anything by mouth or regurgitated. *Bencaz,* 28 Fla. L. Weekly Supp. at 342a.

III.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that the Defense Motion is **STRICKEN** however, even if the Defense Motion had been considered on the merits, it would have been **DENIED**. The issue here appears to be one of the weight to be given the evidence by the jury, and not whether the evidence should be excluded.

* * *

Criminal law—Driving under influence—Evidence—Statements of defendant—Corpus delicti—Evidence was sufficient to establish corpus delicti independently of defendant's statements where defendant was only person standing next to van damaged in hit-and-run accident, defendant's purse was inside vehicle near driver's seat and she exercised control over vehicle by turning off ignition and pocketing keys, defendant's 10-year-old son was in vehicle, van was registered to defendant's mother, defendant's clothes matched description of driver given by 911 caller, and defendant exhibited indicia of impairment—Motion to suppress is denied

STATE OF FLORIDA, v. BELINDA BETANCOURT, Defendant. County Court, 12th Judicial Circuit in and for Manatee County. Case No. 2021-CT-0042. May 11, 2021. Jacqueline B. Steele, Judge. Counsel: Marissa Price, Office of the State Attorney, for State. Peter Lombardo, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE came on to be heard initially on April 16, 2021 and upon Defendant's Motion to Suppress, and the Court having heard testimony of witnesses, and having heard argument of counsel and being otherwise fully advised in the premises, the Court makes the following findings of Facts and Conclusion of Law:

FACTS

1. On January 1, 2021, Deputy Hurley Smith, of the Manatee County Sheriff's Office, while on routine patrol between 12:00 a.m. (midnight) and 1:00 a.m., was dispatched to the scene of a traffic crash in Manatee County, Florida. Upon arrival, he found one vehicle on the

side of the road, a grayish color mini-van. He saw several people, between 7-10 individuals, including the Defendant and her father. A number of those individuals whom he testified to be passers-by reported not to have been involved. Deputy Smith then made contact on the scene with an individual who identified himself as the father of the Defendant who was clearing debris off the road.

2. Deputy Smith further testified that the father of the Defendant advised he was not in the mini-van at the time of the crash. Deputy Smith indicated that the Defendant was standing behind the mini-van at the time of his arrival and that the vehicle was still running with the keys in the ignition. He noted the Defendant to be wearing a black shirt and blue jeans.

3. Deputy Smith testified that he observed damage to the front passenger quarter-panel of the gray mini-van.

4. As he approached the Defendant, who was standing behind the mini-van, Deputy Smith testified that he noted she was visibly upset and appeared irritated, worried and scared. He further observed her to have glassy eyes and he smelled an odor of alcoholic beverage coming from the Defendant. As a result, he called for a traffic unit because he believed the Defendant to be under the influence.

5. Deputy Smith also testified that the Defendant's son, a minor child, was in the mini-van. He testified that the Defendant went over to the passenger side of the vehicle and reached into the vehicle to retrieve a sweater and she also went over to the driver's side of the vehicle. He testified that he also observed the Defendant turn off the vehicle and retrieve the keys. Deputy Smith also testified that the Defendant retrieved her license from inside the vehicle, but he was unsure from where she retrieved the license in the vehicle.

6. On January 1, 2021, Deputy Charles Bigby, of the Manatee County Sheriff's Office, while on DUI saturation patrol, received a call from Deputy Smith to report to the scene of a hit and run crash with a possible impaired driver. Deputy Bigby testified that the original crash call was received by dispatch at 12:52 a.m. with Deputy Smith arriving on scene at 12:56 a.m. and his arrival thereafter at 1:09 a.m.

7. Upon arrival at or between 1:05 a.m. and 1:09 a.m., Deputy Bigby testified that he observed a vehicle with front end damage. Debris from this vehicle and another vehicle that had already left the scene was also noted to be in a ditch on the side of the roadway. He testified that there were three people on the scene at the time of his arrival in addition to Deputy Smith and himself.

8. His first contact was with the Defendant's father's son in law who advised he was not involved in the accident and had brought the Defendant's father to the scene.

9. Officer Bigby testified that upon his approach to the vehicle, he observed the Defendant to be standing on the vehicle with her feet on the passenger side door frame, leaning inside the vehicle. He testified that the Defendant was wearing flip flops, ripped jeans and a hoodie type sweatshirt.

10. Officer Bigby testified that the vehicle keys were later determined in the Defendant's front left pocket and that he observed the Defendant reach into the vehicle from the open door on the passenger side to retrieve her purse and obtain her driver's license which she handed to Deputy Smith. The Defendant's purse was noted to be located toward the center of the vehicle in close proximity to the driver's seat of the vehicle.

11. While speaking with the Defendant, Officer Bigby testified that he could smell the odor of an alcoholic beverage and that he observed her to have blood shot, glassy eyes and her speech seemed slightly slurred or thick-tongued. He further testified that the Defendant's 10 year old son was in the vehicle.

12. As a result of his subsequent investigation, Officer Bigby arrested the Defendant for Driving Under the Influence with 0.15 or Higher in violation of Section 316.193(4), F.S.

OPINION

CONCLUSIONS OF LAW

In her Motion to Suppress, the Defendant challenges the State's ability to establish Corpus Delicti in order to permit the introduction of any of the Defendant's statements related to operating the motor vehicle, consuming alcohol, owning the motor vehicle, driving the motor vehicle or other statements which could tend to prove the Defendant had committed the offense charged.

In Florida, Corpus Delicti requires proof that a crime was committed and that someone is criminally responsible. *Nelson v. State,* 372 So.2d 949 (Fla. 2nd DCA 1979), cert. denied, 396 So.2d 1130 (Fla.1981). The burden lies with the State to provide substantial evidence that a crime has been committed. *State v. Allen,* 335 So.2d 823, 825 (Fla. 1976). The State may meet this burden with circumstantial evidence. *Id.*

Pursuant to Section 316.193, F.S.:

> (1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if the person is driving or in actual physical control of a vehicle within this state and:
>
> (a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. *877.111,* or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired;

In this case, the deputies testified that the gray mini-van was the only vehicle on the scene with front end damage and debris from this vehicle and another was in the roadway/ditch near the vehicle. The Defendant was the only person standing next to the vehicle (i.e. she was standing right behind the vehicle upon their arrival). *See State v. Kester,* 612 So.2d 584 (Fla. 3rd DCA 1992).

Further, the evidence shows that the Defendant's purse was in the vehicle in close proximity to the driver's seat, the Defendant exercised control over the vehicle by turning it off, removing the keys and placing them in her pocket, and the Defendant's 10 year old minor child was inside the vehicle. *Id. See also, State v. Rivera,* 7 Fla. L. Weekly Supp. 415b (Fla. Broward Cty. Ct. March 7, 2000).

In addition, the deputies testified that the gray mini-van was registered to the Defendant's mother. In *Bribiesca-Tafolla v. State,* 93 So.3d 364 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D1405a], the Fourth District Court of Appeal held that a vehicle registered to a family member was considered to be a piece of circumstantial evidence sufficient, when coupled with other factors, to establish corpus delicti. *Id.*

Deputies Smith and Bigby further testified that the Defendant's eyes were glassy, they detected an odor of alcohol emanating from the Defendant, her eyes appeared bloodshot and she had slurred or thick-tongued speech.

The State also introduced evidence including a 911 call from an individual who identified himself as Jose reporting the crash. In the call, upon questioning from the 911 operator, Jose indicated that the driver of the mini-van was wearing a black shirt and ripped jeans. Defense objected to the admission of this evidence as being hearsay without proper predicate and that admission of same would violate the Defendant's right to confront and cross examine the witness. This Court finds the 911 call to be admissible as hearsay is admissible in a Motion to Suppress. *See, Lara v. State,* 464 S.2d 1163, 1177 (Fla. 1985).

Based upon the totality of the circumstances, this Court finds that even without the admission of the 911 call, there is substantial evidence in this case sufficient to establish Corpus Delicti. In *Walton v. State,* 42 So.3d 902, 905 (Fla. 2nd DCA 2010) [35 Fla. L. Weekly D856d], the Second District Court of Appeal held that the State is not necessarily required to prove the identity of a specific driver in order to establish corpus delicti, depending upon the specific facts of the case. *Id.* at 902.

It is therefore,

ORDERED AND ADJUDGED that Defendant's Motion to

Suppress is hereby **DENIED**.

* * *

Insurance—Discovery—Depositions—Vague and untimely motion for protective order to preclude deposition of insurer's corporate representative is denied—Medical provider is entitled to depose person whose affidavit was filed in support of insurer's motion for summary judgment—Sanctions are awarded against insurer for failing to appear for deposition and failing to schedule motion for protective order for hearing prior to nonappearance

TORRI FITZPATRICK, Plaintiff, v. CENTURY NATIONAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-087391. June 11, 2021. Lisa A. Allen, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS AND DENYING DEFENDANT'S MOTIONS FOR PROTECTIVE ORDER

THIS MATTER having come before the court on June 10, 2021 on Defendant's Motion for Protective Order to Preclude Deposition of Defendant's Corporate Representative and Defendant's Objection to Plaintiff's Notice of Taking Telephonic/ Video Deposition Duces Tecum and Motion for Protective Order to Preclude Deposition of Maribel Lopez and Plaintiff's Motion for Sanctions. Timothy A. Patrick appeared for Plaintiff. Philip Colesanti appeared for Defendant. The court having reviewed the file, considered the Motions, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds,

1. Defendant's Motion for Protective Order to Preclude Deposition of Defendant's Corporate Representative is vague, was filed untimely and, as such is **HEREBY DENIED**. Plaintiff is entitled to conduct the deposition of Defendant's Corporate Representative.

2. Defendant filed an affidavit from Maribel Lopez in support of its Motion for Summary Judgment. As such, Defendant's Motion for Protective Order to Preclude Deposition of Maribel Lopez is **HEREBY DENIED**. Plaintiff is entitled to conduct the deposition of Maribel Lopez.

3. Plaintiff's Motion for Sanctions alleges that Defendant's Corporate Representative and Defendant's counsel failed to appear for a duly noticed deposition and that Defendant failed to schedule its Motion for Protective Order for hearing prior to failing to appear for said deposition.

4. Plaintiff's Motion for Sanctions is **HEREBY GRANTED.** The Court awards the court reporting costs of $80.00 to be paid by Defendant immediately. Plaintiff's counsel shall file an affidavit of attorney's fees for the time spent drafting the Motion for Sanctions and for all time associated with today's hearing.

5. Plaintiff has agreed to only conduct the deposition of Maribel Lopez and forego the deposition of Defendant's Corporate Representative at this time.

6. The continued deposition of Maribel Lopez shall be scheduled within 45 days for a deposition date that shall occur within 90 days of the date of this hearing.

* * *

Insurance—Discovery—Depositions—Where medical provider was first party to request deposition, it is entitled to conduct that deposition first—Insurer's motion to require deposition of provider before deposition of insurer's corporate representative is denied

BAYSIDE REHAB CLINIC, INC., a/a/o Hector Fuentes, Plaintiff, v. THE STANDARD FIRE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-023208. June 17, 2021. Lisa A. Allen, 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 June 16, 2021 on Defendant's Motion for Protective Order. The court having reviewed the file, considered the motions, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds,

1. Defendant's Motion requests that the deposition of the Plaintiff occur prior to the deposition of Defendant's Corporate Representative.

2. Plaintiff served a request for deposition dates of Defendant's Corporate Representative along with the summons & complaint. Inasmuch as Plaintiff was the first party to request a deposition of Defendant, Plaintiff is entitled to conduct that deposition first.

3. Plaintiff agreed to reschedule the currently scheduled deposition for June 17, 2021 at 10:00 am to an alternative date that falls within 45 days of today's date.

4. Defendant's Motion For Protective Order is **HEREBY DENIED**.

* * *

Insurance—Personal injury protection—Conditions precedent—Examination under oath—Plaintiff's motion for final summary judgment is granted where it is undisputed that insurer's request for an EUO was not made within the 30-day window for investigation and payment of the claim and that insurer did not pay plaintiff's claim within 30 days—Insurer waived its right to rescind the policy when it first breached the contract by violating PIP statute's 30-day investigative time requirement and did not invoke the additional time limitation under section 627.736(4)(i)—Even if insurer properly invoked section 627.736(4)(i), defendant breached express requirements of that section when it failed to pay or deny claim within 90 days

HILLSBOROUGH THERAPY CENTER, INC., a/a/o Ainadi Bermudez, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-036257. June 21, 2021. Monique Scott, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

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

THIS MATTER having come before the court on April 14, 2021 on Plaintiff's Motion for Final Summary Judgment. The court having considered the Motion, the arguments presented by the parties, applicable law, and being otherwise fully advised, finds,

1. This action is a Declaratory action under *Florida Statutes* Chapter 86 seeking a coverage declaration based upon Defendant's denial of PIP coverage based on the Defendant's claim that the patient/insured failed to submit to an examination under oath ("EUO").

2. Plaintiff has moved for summary judgment arguing that Defendant violated the PIP statute by failing to notice an EUO within 30 days and then failing to pay or deny the claim within 90 days under Section 627.736(4)(i), Fla. Stat. and thereby is in breach of contract.

3. The undisputed facts reflect that Defendant received Plaintiff's medical bills on 10/3/18, but that Defendant did not make a written request for an EUO of the patient/insured, Ainadi Bermudez, until 11/23/18, well after the 30-day window provided in Section 627.736(4)(b), Fla. Stat. On 10/17/18, Defendant submitted a suspicion of fraud letter to the patient's personal injury attorney, but not to the claimant/medical provider. Defendant did not deny PIP coverage until 1/29/19, which is well beyond 90 days from 10/3/18.

4. Defendant cites to *Palmetto Physical Therapy, etc. v. Progressive Select Ins. Co.,* 46 Fla. L. Weekly D332, Case No. 3D19-2334

(Fla. 3d DCA 2021) [46 Fla. L. Weekly D332a] claiming that *Palmetto* stands for the proposition that an insured's submission to an EUO is a condition precedent and that an EUO may be requested at any time by the insurer even if the insurer first breaches the insurance policy. In response, Plaintiff points out that *Palmetto* merely reiterates the general proposition that summary judgment is appropriate where there is no genuine issue of material fact and that any precedential value found in *Palmetto* is limited to that proposition. In support of its position, Plaintiff cites to *Shaw v. Jain,* 914 So. 2d 458 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D2453d] which holds that:

> A prior opinion has precedential value <u>only</u> to the extent that it is possible to determine from the opinion that the material facts are sufficiently similar. Moreover, it is elementary that the holding in an appellate decision is limited to the actual facts cited in the opinion. We may not look beyond the opinion, itself, in our search for the material facts.

Id. at 461. The court agrees with Plaintiff and finds that because *Palmetto* does not contain any recitation of any material facts, any precedential value to be gleaned therefrom is limited to its recitation of the general summary judgment standard and *Palmetto* does not stand for the proposition set forth by the Defendant.

5. "Without a doubt, the purpose of the no-fault statutory scheme is to 'provide swift and virtually automatic payment . . . .' " *Ivey v. Allstate Ins. Co.,* 774 So. 2d 679, 683-84 (Fla. 2000) [25 Fla. L. Weekly S1103a] (*quoting Gov't Employees Ins. Co. v. Gonzalez,* 512 So. 2d 269, 271 (Fla. 3d DCA 1987)). This Court is bound to follow the law as written as set forth in the PIP statute, especially when that law is clear and unambiguous. Section 627.736(4)(b), Fla. Stat. states:

> Personal injury protection insurance benefits paid pursuant to this section **are overdue** if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same.

Id. (emph. added.) Further, Section 627.736(4)(i), Fla. Stat. states:

> If an insurer has a reasonable belief that a fraudulent insurance act, for the purposes of s. *626.989* or s. *817.234* has been committed, the insurer shall notify the claimant, in writing, within 30 days after submission of the claim that the claim is being investigated for suspected fraud. Beginning at the end of the initial 30-day period, the insurer has an additional 60 days to conduct its fraud investigation. Notwithstanding subsection (10), **no later than 90 days after the submission of the claim,** the insurer must deny the claim or pay the claim with simple interest as provided in paragraph (d). Interest shall be assessed from the day the claim was submitted until the day the claim is paid. All claims denied for suspected fraudulent insurance acts shall be reported to the Division of Investigative and Forensic Services.

Id. (emph. added).

6. In this case, it is undisputed that Defendant's request for an EUO was not made within the 30-day window for investigation and payment of the claim and that Defendant did not pay the Plaintiff's claim within 30 days. *See Hillsborough Therapy Center, Inc. (a/a/o Rolando Perez) v. Progressive American Ins. Co.* 27 Fla. L. Weekly Supp. 980a (Fla. Hillsborough Cty., January 6, 2020) (*citing Bain Complete Wellness, LLC (a/a/o Manuel Ortiz) v. Windhaven Ins. Co.,* 26 Fla. L. Weekly Supp. 413b (Fla. Hillsborough Cty., July 9, 2018) and *Tropical Healing Power, LLC (a/a/o Brendan Venable) v. Mendota Ins. Co.* 19 Fla. L. Weekly Supp. 142a (Fla. Hillsborough Cty., May 6, 2011)) (holding that an insurer has a thirty (30) day investigation window from the date of receipt of the medical bills during which the claim must be paid or denied.)

7. This Court agrees with Judge Stoddard's holding in *Direct General Ins. Co. v. James Harris,* 28 Fla. L. Weekly Supp. 403a (Fla. 13th Jud. Cir., July 14, 2020), and Judge Cook's similar holding in *Direct General Ins. Co. v. Dwayne Mungin,* (Fla. 13th Jud. Cir., August 2, 2020) that Direct General violated the PIP statute by failing to pay or deny this claim within 30 days and did not invoke the additional time limitation under Section 627.736(4)(i), Fla. Stat. *See also AJ Therapy Center, Inc. (a/a/o Victor Hernandez Lopez) v. Century-National Ins. Co.* (Fla. Hillsborough Cty., November 13, 2020) [28 Fla. L. Weekly Supp. 863a]; *Orlando Therapy Center, Inc. (a/a/o Suchitra Chi Mum) v. Progressive American Ins. Co.,* 28 Fla. L. Weekly Supp. 736b (Fla. Hillsborough Cty., September 29, 2020) (granting summary judgment against insurer where insurer violated the statutory 30-day investigative time requirement and did not invoke the additional time limitation under Section 627.736(4)(i), Fla. Stat.); *Regions All Care Health Center, Inc. (a/a/o Remy Jean) v. Century-National Ins. Co.,* 28 Fla. L. Weekly Supp. 161a (Fla. Hillsborough Cty., April 14, 2020) (granting summary judgment against insurer and finding that rescission of policy was improper where insurer violated the PIP statute by failing to pay or deny the claim within 30 days and did not invoke the additional time limitation under Section 627.736(4)(i), Fla. Stat.); *Irma Beaufils v. Allstate Prop. & Cas. Ins. Co.,* 28 Fla. L. Weekly Supp. 421a (Fla. Hillsborough Cty., July 28, 2020) (granting summary judgment against insurer where insurer violated the PIP statute by failing to pay or deny the claim within 30 days and did not invoke the additional time limitation under Section 627.736(4)(i), Fla. Stat.).

9. This Court also agrees with the Ninth Circuit's reasoning in *Century National Ins. Co. v. Halifax Chiropractic & Injury Clinic (a/a/o Rantanen Bloodworth)* 28 Fla. L. Weekly Supp. 30a (Fla. 9th Jud. Cir. App., January 22, 2020) wherein the Ninth Circuit, sitting in its appellate capacity, held that the insurer waived its right to rescind the policy when it first breached the contract by violating the PIP statute's 30-day investigative time requirement and did not invoke the additional time limitation under section 627.736(4)(i), Fla. Stat. *Id.* (*citing Amador v. United Automobile Ins. Co.,* 748 So.2d 307 (Fla. 3rd DCA 1999) [24 Fla. L. Weekly D2437a] and *January v. State Farm Mutual Auto. Ins. Co.,* 838 So.2d 607 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D484a]). The Fifth District Court of Appeal found that the Ninth Circuit's ruling was not a departure from the essential requirements of law and denied Century National's petition for writ of certiorari. *Century National Ins. Co. v. Halifax Chiropractic & Injury Clinic (a/a/o Rantanen Bloodworth),* No. 5D20-0509 (Fla. 5th DCA June 18, 2020).

10. Moreover, it is undisputed that the Defendant failed to pay or deny the claim within 90 days. *See Hillsborough Therapy Center, Inc. (a/a/o Eliel Marzo) v. GEICO Ind. Co.,* 27 Fla. L. Weekly Supp. 408a (Fla. Hillsborough Cty. May 30, 2019) (granting summary judgment for plaintiff as insurer admitted that it did not deny coverage until well past 90 days from the receipt of the initial medical bills); *Hillsborough Therapy Center, Inc. (a/a/o Edileidys Marzo) v. GEICO Ind. Co.,* 27 Fla. L. Weekly Supp. 406a (Fla. Hillsborough Cty. Ct., May 13, 2019) (granting summary judgment for plaintiff as insurer admitted that it did not deny coverage until well past 90 days from the receipt of the initial medical bills); *Hillsborough Therapy Center, Inc. (a/a/o Jaiden Marzo) v. GEICO Ind. Co.,* 27 Fla. L. Weekly Supp. 313b (Fla. Hillsborough Cty., May 13, 2019) (granting summary judgment for plaintiff as insurer admitted that it did not deny coverage until well past 90 days from the receipt of the initial medical bills).

12. Even if the Defendant properly invoked Section 627.736(4)(i), Fla. Stat., it is undisputed that the Defendant breached the express requirements of that section when it failed to pay or deny the claim within 90 days. *See Colonial Medical Center (a/a/o Daunte Draper) v. Century-National Ins. Co.,* 27 Fla. L. Weekly Supp. 71a (Fla. Orange Cty., March 1, 2019) *(citing GEICO Indemnity Co. v. Central Florida Chiropractic Care (a/a/o David Cherry) v. GEICO Ind. Co.,* 26 Fla. L. Weekly Supp. 613a (Fla. 9th Cir. App., May 11, 2017). The

Ninth Circuit's appellate decision in *Cherry* tracks *Amador v. United Automobile Ins. Co.,* 748 So. 2d 307 (Fla. 3rd DCA 1999) [24 Fla. L. Weekly D2437a] and *January v. State Farm Mutual Insurance Co.,* 838 So.2d 604 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D484a], which stresses that the "burden is clearly upon the insurer to authenticate the claim within the statutory time period." *Id.* Nothing within the statute allows for the statutory time period to be arbitrarily increased by the insurer for an indefinite amount of time.

13. Based on the forgoing, the court finds that there is no genuine issue of material fact that the Defendant violated the PIP statute and therefore cannot compel the patient/insured to submit to an untimely EUO and that a denial based on that premise is improper as a matter of law. As such, Plaintiff's Motion for Final Summary Judgment is **HEREBY GRANTED**.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Drugs—Insurer was correct to use Medicare Part B Drug Average Sales Price Fee Schedule to reimburse for Medicare Part B covered drug

MEDLINK NOW, LLC, a/a/o Catherine Bultron, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE19029759, Division 50. June 7, 2021. Mardi Levey Cohen, Judge. Counsel: Christie Storelli, GEICO Staff Counsel, West Palm Beach, for Defendant.

SUMMARY JUDGMENT

THIS CAUSE having come upon Defendant's Motion for Summary Disposition regarding Defendant's use of the Medicare Part B Drug Average Sales Price Fee Schedule (ASP) to reimburse CPT code J1885, the Court having heard the Motion, and otherwise being fully advised in the premises, it is hereby ordered:

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

2. This Court finds that the Defendant was correct to use the ASP to reimburse CPT code J1885. Pursuant to Florida Statute 627.736 (5)(a)(1)-(3) and the policy of insurance issued by Defendant, this Court finds that the ASP was the proper Medicare Part B payment methodology to utilize in reimbursing CPT code J1885; thus, the Plaintiff's argument that the Defendant should have defaulted to the Workers' Compensation fee schedule is incorrect and without merit. This Court also finds that the Plaintiff's argument that CPT code J1885 shall be reimbursed under the National Physician Fee Schedule is also without merit, as the National Physician Fee Schedule addresses SERVICES and CPT code J1885 is a Medicare Part B covered DRUG under the ASP.

It is hereby ORDERED AND ADJUDGED THAT Defendant's Motion for Final Summary Disposition is hereby GRANTED. Plaintiff's claim is hereby DISMISSED. The Plaintiff shall take nothing by this action and the Defendant shall go hence without delay. Defendant is the prevailing party in this action.

* * *

Insurance—Personal injury protection—Complaint—Amendment—Motion to amend complaint to add count for declaratory judgment seeking declaration regarding whether insurer improperly exhausted benefits and engaged in bad faith claims handling is denied—Any bad faith claims would not accrue before conclusion of litigation over contractual benefits and determination of liability against insurer—Further, where medical provider has expressly alleged improper exhaustion of benefits in its reply, relief sought in proposed declaratory action is subsumed within breach of contract claim

WELLNESS REHAB OF SOUTH FLORIDA, INC., a/a/o Reinaldo Gomes, Plaintiff, v. INFINITY INDEMNITY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO20010196 (61). April 15, 2021. Corey Amanda Cawthon, Judge. Counsel: Crystal Eiffert, Eiffert & Associates, P.A., Orlando, for Plaintiff. Leslie M. Goodman, Law Offices of Leslie M. Goodman, Miami, for Defendant.

ORDER ON PLAINTIFF'S MOTION TO AMEND COMPLAINT

THIS CAUSE having come before the Court on January 27, 2021 for hearing on Plaintiff's Motion to Amend Complaint, and the Court having reviewed the Motion and the relevant portions of the Court file; heard argument of counsel; reviewed relevant legal authorities; and being otherwise sufficiently advised in the premises, finds as follows:

BACKGROUND

1. This case arises out of a claim for Personal Injury Protection ("PIP") benefits where Plaintiff filed its initial Complaint against Defendant on September 30, 2020 alleging breach of contract for Defendant's alleged failure to pay personal injury protection benefits for treatment rendered to Reinaldo Gomes for dates of service March 31, 2020 through April 15, 2020.

2. Defendant served its Answer and Affirmative Defenses on or about November 20, 2020. Plaintiff filed its Reply to Defendant's Answer and Affirmative Defenses on or about December 9, 2020.

3. After suit was filed, Defendant was served with a second pre-suit demand letter for additional dates of service—specifically, for dates of service April 17, 2020 through June 19, 2020.

4. Thereafter, Plaintiff filed its Motion to Amend Complaint on December 9, 2020. Plaintiff seeks to amend its Complaint to include the additional dates of service identified in the second pre-suit demand letter as well as a second count for declaratory judgment.

5. Plaintiff now contends that, after suit was filed, Defendant provided copies of Explanations of Benefits to the Plaintiff which demonstrate that Defendant paid valid claims out of order, refused to pay for claims despite being provided with notice of a covered loss and having no reasonable proof that the claims were not due and owing, and that Defendant issued gratuitous payments. As stated in Plaintiff's Motion to Amend its Complaint, Defendant claims benefits are exhausted, but Plaintiff disagrees.

6. Count II of Plaintiff's proposed amended complaint, states in part: "Specifically, Plaintiff seeks a declaration regarding whether Defendant properly adjusted the claim, whether Defendant issued a gratuitous payment, and whether the Defendant engaged in bad faith claims handling when Defendant failed to pay otherwise valid and compensable claims pursuant to Fla. Stat. §626.9541, §627.736 and Florida law."

7. Defendant does not object to Plaintiff's request to add additional dates of service to the Complaint; however, Defendant does object to Plaintiff's request to add the second count for declaratory judgment to the Complaint.

8. Defendant contends that the proposed Count II is futile and unripe because it seeks to add a bad faith claim, which is precluded under Florida law. Specifically, Defendant argues that liability and damages have not yet been determined in this action—a final determination of these matters being a condition precedent to alleging a bad faith cause of action. Defendant further argues that it would be irreparably harmed if Plaintiff is permitted to amend its Complaint and pursue its bad faith claim alongside its claim for PIP benefits.

ANALYSIS & OPINION

9. "Leave to amend shall be given freely when justice so requires and it should not be denied unless the privilege has been abused or the complaint is clearly not amendable." *Dingess v. Florida Aircraft Sales and Leasing, Inc.,* 442 So.2d 431, 432 (5th DCA 1983).

10. However, leave to amend a complaint should not be given if the amendment would be futile. *Collado v. Baroukh,* 226 So.3d 924, 928 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1916a] (citing *Life Gen.*

Sec. Ins. Co. v. Horal, 667 So.2d 967, 969 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D434a]).

11. In this case, as this is Plaintiff's first request for leave to amend and the case has not yet been set for trial, it is clear that the privilege has not been abused. As such, the Court must determine whether the amendment sought would be futile.

12. In determining the sufficiency of a complaint for declaratory judgment, the question is whether the plaintiff is entitled to a declaration of rights, not whether the plaintiff will prevail in obtaining the decree he or she seeks. *Smith v. City of Ft. Myers,* 898 So.2d 1177, 1178 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D902a].

13. In order to bring an action for declaratory relief, the party must show that there is a bona fide, actual, present practical need for the declaration and that the declaration deals with a present controversy as to a state of facts. *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles,* 680 So.2d 400, 404 (Fla. 1996) [21 Fla. L. Weekly S271a] (quoting *Martinez v. Scanlan,* 582 So.2d 1167, 1170 (Fla. 1991). The test to activate jurisdiction under the Declaratory Judgment Act is "whether or not the moving party shows that he is in doubt as to the existence or nonexistence of some right, status, immunity, power or privilege and that he is entitled to have such doubt removed and if shown to be existent, seek such relief as the circumstances warrant." *Flagship Real Estate Corp. v. Flagship Banks, Inc.,* 374 So.2d 1020, 1021 (Fla. 2d DCA 1979) (citing to *Caldwell v. North,* 24 So.2d 806, 806 (Fla. 1946); *Olive v. Maas,* 811 So.2d 644 (Fla. 2002) [27 Fla. L. Weekly S139a].

14. In support of its position, Plaintiff has cited to a number of cases in its Memorandum in Support of its Motion to Amend as well as its Notice of Filing Case Law in Support of Memorandum, including *Higgins v. State Farm Fire and Casualty Company,* 894 So.2d 5 (Fla. 2005) [27 Fla. L. Weekly S139a]. However, this Court believes that Plaintiff's question of fact and its application to the policy as set forth in Count II of the proposed Amended Complaint fall outside the meaning of *Higgins.* Though the *Higgins* decision stands for the ruling that actions for declaratory relief as to be liberally allowed, the relief sought in Count II of Plaintiff's proposed Amended Complaint fails to establish the requirements necessary to bring an action for declaratory relief.

15. Once again, Count II of Plaintiff's Amended Complaint states: "Specifically, Plaintiff seeks a declaration regarding whether Defendant properly adjusted the claim, whether Defendant issued a gratuitous payment, and whether the Defendant engaged in bad faith claims handling when Defendant failed to pay otherwise valid and compensable claims. . ." Based on the language referenced, it appears Plaintiff is simply seeking a declaration as to whether Defendant improperly exhausted benefits or otherwise engaged in bad faith claims handling with respect to the claim at issue in this case. Plaintiff has not established that there is a bona fide, actual, present practical need for the declaration, nor has Plaintiff established that it is in doubt as to the existence or nonexistence of some right, status, immunity, power or privilege. Certainly, there can be no doubt, if Plaintiff establishes that Defendant improperly exhausted benefits in the underlying claims handling, then Defendant would liable for payment of other valid, pending claims submitted by Plaintiff.

16. Furthermore, Defendant has cited to a number of cases in its Notice of Filing Case Law in Support of its Opposition to Plaintiff's Motion to Amend, including *Fridman v. Safeco Ins. Co.,* 185 So.3d 1214 (Fla. 2016) [41 Fla. L. Weekly S62a]. In *Fridman,* the Court referenced a long line of cases holding that "a determination of liability and the full extent of damages is a prerequisite to a bad faith cause of action". (citing to *Vest v. Travelers Ins. Co.,* 753 So.2d 1270, 1275 (Fla. 2000) [25 Fla. L. Weekly S177a], *Imhof v. Nationwide Mut. Ins. Co.,* 643 So.2d 617, 619 (Fla. 1994)). The Court further referenced its ruling in *Blanchard v. State Farm Mut. Auto. Ins. Co.,* 575 So.2d 1289 (Fla. 1991), which stated "absent a determination of the existence of liability on the part of the uninsured tortfeasor and the extent of the plaintiff's damages, a cause of action cannot exist for a bad faith failure to settle." *Id.* Applying the Court's logic in *Fridman* and the cases cited therein to the present case, any bad faith claims such as those contained within Count II of Plaintiff's proposed Amended Complaint would not accrue before conclusion of litigation over contractual benefits and a determination of liability in the present action against the insurer.

17. Additionally, this Court notes that Plaintiff has cited to *Northwoods Sports Medicine & Physical Rehabilitation, Inc. v. State Farm Mutual Auto. Ins. Co.,* 137 So.3d 1039 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a] in support of its argument that Plaintiff must allege bad faith on the part of the Defendant regarding exhaustion of benefits, apparently as justification for the proposed count for declaratory judgment. In *Northwoods,* the Court stated, "Once PIP benefits are exhausted through the payment of valid claims, an insurer has no further liability on unresolved, pending claims, absent bad faith in the handling of the claim by the insurance company."

18. In its Reply to Defendant's Answer and Affirmative Defenses filed December 9, 2020, Plaintiff specifically cited to the *Northwoods* case and expressly alleged that Defendant failed to pay valid claims, failed to pay certain CPT codes without justification, paid bills out of order, and issued gratuitous payments. Plaintiff further alleged that Defendant's bad faith handling of the subject claim resulted in an underpayment to the Plaintiff. As such, in accordance with the *Northwoods* case, as cited by the Plaintiff, Plaintiff has expressly alleged and pled its position that benefits were improperly exhausted.

19. Accordingly, this Court finds that the relief sought in Count II of Plaintiff's Amended Complaint does not fall within the scope of relief permitted in *Higgins* and further fails to establish the requirements necessary to bring forth an action for declaratory relief. Further, the Court finds that Plaintiff has expressly alleged improper exhaustion in its Reply and that the relief sought in Plaintiff's proposed declaratory judgment is subsumed within the remaining breach of contract claim.

20. Based on the above referenced case law and the circumstances outlined in this specific case, the Court finds the proposed declaratory action in Count II of Plaintiff's Amended Complaint to be futile.

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

1. Plaintiff's Motion to Amend is hereby **GRANTED IN PART** and **DENIED IN PART**.

2. Plaintiff Motion is Granted to the extent Plaintiff may file an Amended Complaint to include the additional dates of service referenced within its Motion to Amend within twenty (20) days of the date of this Order.

3. Plaintiff's Motion is Denied to the extent that Plaintiff's request to amend to include a second count for declaratory judgment as addressed herein is denied.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Plain text of policy required insurer to pay full amount of charges submitted by provider where submitted charges were less than the amount allowed under the schedule of maximum charges enumerated in section 627.736(5)(a)(1)—20% co-insurance requirement did not apply to charges that were less than 200% of the allowable amount under participating physicians' fee schedule of Medicare Part B

KAM HABIBI, D.C., P.A., a/a/o Emely Polanco, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE-17-007236, Division 54. December 6, 2018. Florence T. Barner, Judge.

[Affirmed: *Geico General Insurance Company v. Kam Habibi, D.C.*, P.A., Case No. CACE19-000044(AP), November 19, 2020.]

FINAL JUDGMENT IN FAVOR OF THE PLAINITFF

THIS CAUSE came before the Court for hearing on October 22, 2018 on the parties' respective motions for final summary judgment, and the Court having reviewed the motions, having reviewed the entire court file and the legal authorities presented by the parties, having heard argument of counsel and being otherwise sufficiently advised in the premises, makes the following findings:

1. Pursuant to the Joint Pretrial Stipulation entered by the parties on July 30, 2018, the only disputed issue of law is whether GEICO General Insurance Company properly reimbursed the Plaintiff for the treatment and services provided to Emely Polanco between September 6, 2016 and October 31, 2016.

2. More specifically, Plaintiff argued the Defendant improperly reduced the billed amount to 80% of the amount charged for CPT Codes 97110 and 97112, which were billed at less than 200% of the Medicare Fee Schedule. Thus, the issue determined by this Court is the proper amount of reimbursement for assigned personal injury protection (PIP) benefits when a medical provider's submitted charge is less than the amount allowed under the schedule of maximum charges enumerated in Section 627.736(5)(a)(1) Florida Statute (2013).

3. GEICO's Endorsement states, in relevant part, as follows:

PAYMENTS WE WILL MAKE

The Company will pay in accordance with the Florida Motor Vehicle No Fault Law (as enacted, amended, or newly enacted), and where applicable in accordance with all fee schedules contained in the Florida Motor Vehicle No Fault Law, to or for the benefit of the injured person:

(A) Eight percent (80%) of ***medical benefits*** which are ***medically necessary***, pursuant to the following schedule of maximum charges contained in the Florida Statutes § 627.736(5) (a)l., (a)2. and (a)3.:

***

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

(1.) The participating physicians fee schedule of Medicare Part B.

***

However, if such services, supplies, or care is not reimbursable under Medicare Part B (as provided in section (A) 6. above), we will limit reimbursement to eighty percent (80%) of the maximum reimbursable allowance under workers' compensation, as determined under Florida Statutes § 440.13 and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided. Services, supplies, or care that is not reimbursable under Medicare or workers' compensation is not required to be reimbursed by us.

***

A charge submitted by a provider, for an amount less than the amount allowed, shall be paid in the amount of the charge submitted[1].

4. It is undisputed that the Plaintiff charged the following amounts for the CPT Codes at issue in this case:

CPT Code	Amt. Charged	Dates of Service
97110	$60.00	09/07/16; 09/08/16; 09/20/16; 09/21/16; 09/26/16; 09/29/16; 10/04/16; 10/10/16; 10/13/16; 10/19/16; 10/20/16, and 10/31/16.
97112	$60.00	09/07/16; 09/08/16; 09/20/16; 09/21/16; 09/26/16; 09/29/16; 10/04/16; 10/10/16; 10/13/16; 10/19/16; 10/20/16; and 10/31/16.

5. It is undisputed that 200 percent of the allowable amount under the participating physicians fee schedule of Medicare Part B for these CPT codes for the locality where the services were performed when the services were performed are:

CPT Code	Medicare Fee Schedule	200%
97110	$33.57	$67.14
97112	$35.04	$70.08

6. It is undisputed that Geico allowed the full amount charged for these CPT Codes, however reduced the reimbursement amount to $80% each time these services were performed. In which case, Geico paid 80% of the amount charged rather than "the amount of the charge submitted" as stated in its policy.

7. Plaintiff argues that the disputed policy text means exactly what it says—that is when a medical provider submits a charge for less than 200% of the allowable amount under the participating physicians' fee schedule of Medicare Part B, then Geico shall pay "the amount of the charge submitted." Plaintiff therefore contends that the 20% coinsurance requirement does not apply to charges that are less than that threshold.

8. Geico, on the other hand, argues that the 20% coinsurance applies to all charges because the insured's copayment responsibility is mandated by the PIP statute and the policy. Geico's interpretation, however, defies the promise it made in its policy to pay the entire charge when the amount billed is less than 200% of the Medicare Part B fee schedule. The PIP Statute only provides for the minimal benefits required under Florida's financial responsibility law and should not be read to limit the benefits the policy provides to the minimum required by statute. *See Sturgis v. Fortune Ins. Co.,* 475 So.2d 1272-73 (Fla. 1985). See also *Windsor Imaging a/a/o Roneil Morris v. State Farm Insurance,* 19 Fla. L. Weekly Supp. 215b (Broward County, Judge Lee, 2011)(200% of the Medicare fee schedule is the floor for the least reimbursement under the No Fault Statute's limited reimbursement alternative). In other words, an insurance policy can always afford more benefits than the PIP statute, but it could not afford less.

9. Geico further argues the Plaintiff's interpretation leads to an "absurd" result because a provider who charges less than the amount allowed under the fee schedules would be paid more than a provider who charged an amount that exceeds the fee schedule. This argument also fails because the provider will be paid 100% of the charge either way, i.e. either 80% of the fee schedule from the insure and the remaining 20% from the claimant, or 100% from the insurer. In the instant case, the policy provides 100% to be paid from the insurer, thereby providing a greater benefit to its insured when the provider bills less than 200% of the Medicare fee schedule.

10. Geico also argues that the disputed policy text "essentially" mirrors the last sentence in Section 627.736(5)(a)(5), which contemplates the scenario where insurers who elect the fee schedules receive charges from the providers that are less than the amount allowed thereunder:

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

11. This argument also fails because the statute clearly states the insurer "may" pay the amount of the charge submitted while Geico's policy clearly states "shall" pay the amount of the charge submitted.

12. The law in Florida is well settled with respect to the interpretation of an insurance contact. Where the language is clear and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give the effect to the policy as written. *Washington Nat'l Ins. Corp. v. Ruderman,* 117 So.3d 943, 948 (Fla. 2013) [38 Fla. L. Weekly S511a], *citing State Farm Mut. Auto. Ins. Co., v. Menendez,* 70 So.3d 566, 569-70 (Fla. 2011) [36 Fla. L. Weekly S469a]. If the language is susceptible to more than one reasonable interpretation, then the language is ambiguous and is to be construed in favor of the insured and against the insurer. *Id.*

13. The Court finds Plaintiff's construction of the disputed policy text to be a reasonable interpretation as a matter of law. The Court finds Geico's interpretation unreasonable as it defines a plain reading of the plain language.

14. Even if the Court were to determine Geico's interpretation to also be reasonable, then we are left with policy language that is susceptible to two reasonable interpretations in which case, the Plaintiff's interpretation would therefore prevail. *Ruderman*, 117 So.3d at 948.

15. Geico is bound by the language of its own choosing. *Berkshire Life Ins. Co. v. Adelberg,* 698 So.2d 828, 830 (Fla. 1997) [22 Fla. L. Weekly S513a] (Insurers are bound by the language of their own choosing regardless of whether under the policy language results in a good or bad bargain for the insurer.) If Geico meant something different from the plain text of the policy, then it was required to unambiguously draft the contract accordingly. *Id.* Courts are not permitted to revise an otherwise valid insurance policy to make it more reasonable or advantageous for an insurance company that used imprecise language providing coverage that is greater than coverage the insurance company may have originally contemplated. *Stack v. State Farm Mut. Auto. Ins. Co.,* 507 So.2d 617, 619 (Fla. 3d DCA 1987). In short, the insurer—not the insured—bears the risk of poorly drafted or imprecise language.

16. Based upon the aforementioned, this Court finds that Geico breached the insurance contract when it failed to pay the full amount of the charges submitted under CPT Codes 97110 and 97112 even though those amounts were less than 200% of the allowable amount under the participating fee schedule of Medicare Part B. The Defendant's payment calculation resulted in principal damages in the amount of $288.00.

It is therefore ORDERED AND ADJUDGED that Plaintiff's Motion for Final Summary Judgment is GRANTED and Defendant's Motion for Final Summary Judgment is DENIED.

It is further, ORDERED that Plaintiff, KAM HABIBI, D.C., P.A. a/a/o Emely Polanco, shall have and recover from Defendant, GEICO GENERAL INSURANCE COMPANY, the principle sum of $100.00 in benefits, plus prejudgment interest of $10.28 for a total sum of $110.28, that shall bear interest at the legal rate of 6.09% for all of which let execution issue.

It is, Further ADJUDGED, that Plaintiff, KAM HABIBI, D.C., P.A., a/a/o Emely Polanco, as the prevailing party in this action, is entitled to reasonable attorney's fees and costs and this Court retains jurisdiction to determine the amount of same.

---

[1]See page 3 of 11 of the Florida Policy Amendment, form, FLPIP (07-15) (emphasis added)

* * *

Volume 29, Number 4
July 30, 2021
Cite as 29 Fla. L. Weekly Supp. ____

MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Memberships, organizations and avocational activities—Lobbying, activist and advocacy groups—A judge may appear in a video to be shown by clerk of circuit court at an upcoming conference where clerk will assume chairmanship of statewide clerks' association

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2021-04. Date of Issue: June 1, 2021.

ISSUE

May a judge appear in a video to be shown by the Clerk of the Circuit Court that is to be shown at an upcoming conference where the Clerk will assume the chairmanship of the statewide clerks' association?

ANSWER: Yes.

FACTS

The Clerk of the Circuit Court in one of the counties where the inquiring judge is eligible to sit will soon be installed as president of the Florida Clerks and Comptrollers, a statewide organization. The Clerk has asked the judge to appear in a brief video that will be shown when the Clerk is formally sworn into this position.

The inquiring judge has been advised that the theme of the video will be "the incoming president's message of collaboration with community partners, including law enforcement, the judiciary, [and] the county commission." It is anticipated that the judge will be seen only briefly, enrobed and seated at the bench, perhaps accepting or forwarding paperwork. The judge does not anticipate speaking on the video.

DISCUSSION

The web site of the Florida Clerks and Comptrollers may be accessed at **www.flclerks.com**. A perusal of the site clearly indicates that the association is dedicated to improvement of the services these officials provide in their home counties. Among the primary functions of the office are maintenance of the records of the state's courts and assistance to judges during court proceedings. Courtroom clerks are familiar figures with whom lawyers and litigants will see and often interact with as the state's courts conduct their business.

In most if not all of Florida's counties the Clerk is an elected official. Accordingly, it would not be permissible for a judge to give a public endorsement of a candidate for the office or to appear in campaign advertising materials. *See generally* Canon 7A(1)(b), Florida Code of Judicial Conduct. Clearly, however, the video contemplated in this instance is not intended to advance the personal interests of the Clerk—not even the Clerk's bid for the association's top position (already a *fait accompli*). Further, while we do note that the Clerks' association may engage in such activities as lobbying the legislature, the video will not be utilized for that purpose either. We view it as more akin to newsreel or "day in the life" footage, and thus nothing that would raise ethical concerns if the judge agrees to appear.

REFERENCES

Canon 7A(1)(b), Florida Code of Judicial Conduct.

* * *

Judges—Judicial Ethics Advisory Committee—Retired/senior judges—Lobbying, activist and advocacy groups—A senior judge is not permitted to act as a compensated expert witness in a matter pending in a county other than the one in which the judge is currently eligible to preside

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2021-5. Date of Issue: June 9, 2021.

ISSUE

Whether it is permissible for a senior judge to act as a compensated expert witness in a matter pending in a county other than the one the judge is currently eligible to preside?

Answer: No

FACTS

The inquiring judge served as a circuit court judge for several decades and is currently certified by the Supreme Court as both a senior circuit court judge and mediator. Further, the judge remains on the list of available senior judges and is subject to recall. Recently, the judge has been asked to serve as a compensated expert witness in a civil matter pending in a county other than the one where the judge has presided for so many years.

DISCUSSION

Senior judges subject to recall must comply with all provisions of the Code of Judicial Conduct, except Sections 5C(2), 5E, 5F, and 6A. See "Application of the Code of Judicial Conduct," found at the end of the Code of Judicial Conduct ("Code"), and Fla. JEAC Op. **06-02**, [13 Fla. L. Weekly Supp. 408a] **01-04** [8 Fla. L. Weekly Supp. 410a] and **95-33** [3 Fla. L. Weekly Supp. 462b] (senior judge subject to recall bound by Code of Judicial Conduct, except for sections identified above).

Canon 2A of the Code of Judicial Conduct provides that: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2B states

> "A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness."

It is well settled and supported by numerous Judicial Ethics Advisory Committee (JEAC) opinions that the testimony of a sitting judge in any forum requires that the judge be under subpoena. Canon 2 and commentary to Canon 2B, Fla. Code Jud. Conduct; see also Fla. JEAC Ops. **90-2** [3 Fla. L. Weekly Supp. 80a]; **93-31**; **95-32** [3 Fla. L. Weekly Supp. 462a]. However, these and other opinions largely dealt with witness testimony of judges related to character references, and not as financially compensated expert witnesses.

In Fla. JEAC Op. **04-37** [12 Fla. L. Weekly Supp. 268a], this committee determined that a judge-elect could not serve as an expert witness in a legal malpractice matter to be tried *after* the judge had taken office, despite the fact the judge had been retained and was to be deposed before that date. The opinion noted that even though the judge in that matter had been subpoenaed and must comply with the subpoena,

> ". . .the judge should take all legal steps to notify a presiding judge that giving expert testimony in a legal proceeding is precluded under the Code of Judicial Conduct. Notification to the presiding judge may require filing a motion for a protective order."

That committee also went so far as to specifically recede from prior JEAC Op. **95-35** [3 Fla. L. Weekly Supp. 559a] that implied a judge could serve as an expert witness as long as the judge was properly subpoenaed. This committee does take note of JEAC Op. **12-27** [19 Fla. L. Weekly Supp. 1109a] where a judge-elect was permitted to testify as an attorney's fee expert in a trial taking place after the judge took office. However, that case is distinguished by the fact that the

retention and testimony of the judge took place before the judge was even a candidate for office. The opinion reasoned that the risk of calling into question the prestige of the office was outweighed by the need for the judge to conclude the service to the client that was largely already completed by the time the judge was in office. To do otherwise caused undue hardship to the parties in the case. That opinion also took pains to recede from JEAC Op. **95-35** [3 Fla. L. Weekly Supp. 559a].

Although a survey of past opinions both before and after JEAC Ops. **04-37** [12 Fla. L. Weekly Supp. 268a] and **12-27** [19 Fla. L. Weekly Supp. 1109a] do not specifically address a senior judge serving as an expert witness in another county, the committee is not persuaded that these nuances would remove it from the prohibitions in Canon 2 and the prior opinions cited. Despite the exemption from Canon 6A addressing compensation and reimbursement in certain circumstances, nothing in the Code indicates that being compensated as an expert witness, albeit in a county separate from where the judge presides, would be allowed under the present facts described. As a result, the inquiring judge should not accept the retention as an expert witness while he is in his current status as a senior judge.

REFERENCES

Fla. Code Jud. Conduct, Canons 2A, 2B, 5C, 5E, 5F, and 6A.
Fla. JEAC Ops. **90-02, 93-31, 95-32, 95-33, 95-35, 01-04, 04-37, 06-02, 12-27**.

* * *

Judges—Judicial Ethics Advisory Committee—Memberships, organizations and avocational activities—Task forces and public policy commissions—An active senior judge may also serve on a city's ethics commission

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2021-6. Date of Issue: June 21, 2021.

ISSUE

May an active senior judge also serve on a city's ethics commission?

ANSWER: Yes.

FACTS

An active senior judge has been asked to serve as a member of a city's ethics commission. The judge seeks guidance as to whether the service is permissible.

DISCUSSION

Sitting judges and justices are prohibited from serving as a member of governmental committees unrelated to the improvement of the law. *See* Canon 5C(2) Fla. Code of Jud. Conduct ("A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, the judicial branch, or the administration of justice.") *See also,* JEAC Op. 2009-6 [19 Fla. L. Weekly Supp. 1109a] (opining that a sitting judge may not serve on a local ethics commission). However, senior judges are specifically exempt from the limitations of Canon 5C(2). The Florida Code of Judicial Conduct Application B(1) states, in relevant part, "A retired judge eligible to serve on assignment to temporary judicial duty, hereinafter referred to as "senior judge," shall comply with all the provisions of this Code except *Sections 5C(2)*, 5E, 5F(1), and 6A" (emphasis added). We see no impediment to a senior judge serving on a local ethics committee.

REFERENCES

Florida Code of Judicial Conduct Canon 5C(2)
Florida Code of Judicial Conduct Application B(1)
Florida Judicial Ethics Advisory Opinion 2009-6

* * *